

1 **MATERN LAW GROUP, PC**
MATTHEW J. MATERN (SBN 159798)
2 mmatern@maternlawgroup.com
DALIA R. KHALILI (SBN 253840)
3 dkhalili@maternlawgroup.com
MATTHEW W. GORDON (SBN 267971)
4 mgordon@maternlawgroup.com
1230 Rosecrans Avenue, Suite 200
5 Manhattan Beach, CA 90266
Telephone: (310) 531-1900
6 Facsimile: (310) 531-1901

7 **ALTSHULER BERZON LLP**
JAMES M. FINBERG (SBN 114850)
8 jfinberg@altshulerberzon.com
EILEEN B. GOLDSMITH (SBN 218029)
9 egoldsmith@altshulerberzon.com
ERIC P. BROWN (SBN 284245)
10 ebrown@altshulerberzon.com
177 Post Street, Suite 300
11 San Francisco, CA 94108
Telephone: (415) 421-7151
12 Facsimile: (415) 362-8064

13 Attorneys for Plaintiffs REYNALDO LOPEZ,
EUNICE DELGADILLO, UMBERTO MENDOZA,
14 AVEIA TAUTOLO, LADONA NARR and KARL
ARMSTRONG, individually, and on behalf of others
15 similarly situated

16
17 IN THE UNITED STATES DISTRICT COURT
18 CENTRAL DISTRICT OF CALIFORNIA

19 REYNALDO LOPEZ et al.) No. 2:15-cv-07302-SVW-SS
20 Plaintiffs,) [Assigned to Hon. Stephen V. Wilson,
21 v.) Courtroom 10A; Magistrate Judge: Hon.
22 DELTA AIRLINES, INC. et al.) Suzanne H. Segal]
23 Defendants.) **PLAINTIFFS’ NOTICE OF MOTION**
24) **AND MOTION FOR ATTORNEYS’**
25) **FEEES, COSTS AND CLASS**
26) **REPRESENTATIVE SERVICE**
27) **PAYMENTS**
28)
Date: October 30, 2017
Time: 1:30 p.m.
Ctrm: 10A
Judge: Hon. Stephen V. Wilson

1 TO THE COURT, ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE that on October 30, 2017 at 1:30 p.m. or as soon
3 thereafter as the matter may be heard in Courtroom 10A of the United States District
4 Court for the Central District of California, located at 350 West 1st Street, Los Angeles,
5 California, Plaintiffs LaDona Narr, Karl Armstrong, Eunice Delgadillo, Reynaldo Lopez,
6 Umberto Mendoza and Aveia Tautolo (“Plaintiffs”) will, and hereby do, move this Court,
7 this Court, pursuant to Rules 23(h) and 54(d) of the Federal Rules of Civil Procedure, for
8 an order awarding (1) attorney’s fees in the amount of \$1,416,667.00 (2) Class Counsel’s
9 litigation costs in the amount of \$171,942.48 and (3) Class Representative Service
10 Payments of \$10,000.00 each to Plaintiffs LaDona Narr and Karl Armstrong.

11 This motion will be made on the grounds that pursuant to the express terms of the
12 Stipulation of Settlement (“Settlement” or “Stipulation”), California Labor Code §§ 1194
13 and 2802 and California Code of Civil Procedure § 1021.5, Plaintiffs are entitled to
14 recover their reasonable attorney’s fees, not to exceed \$1,416,667.00, and their reasonable
15 litigation costs which were estimated to be no more than \$190,000.00 and are in fact
16 \$171,942.48, incurred in the prosecution of this action which resulted in a substantial
17 monetary settlement of \$4.25 million for the benefit of a Class of 3,740. Plaintiffs LaDona
18 Narr and Karl Armstrong are also entitled to receive Class Representatives’ Service
19 Payments not to exceed \$10,000.00 each.

20 This motion will be based on this Notice, the attached Memorandum of Points and
21 Authorities, the accompanying Declarations of Matthew J. Matern, James M. Finberg,
22 LaDona Narr and Karl Armstrong, the documents and records on file in this matter, and
23 such additional arguments, authorities, evidence, and other matters as may be presented
24 by the parties hereafter.

25 Pursuant to the Parties’ Stipulation, Delta Airlines, Inc. (“Delta”) does not oppose
26 this motion. Dkt. 138-3, ¶ 6.3.2; Declaration of Matthew J. Matern (“Matern Decl.”)
27 ¶ 65.

1 DATED: September 28, 2017

Respectfully submitted,

2 **MATERN LAW GROUP, PC**

3 Matthew J. Matern

Dalia R. Khalili

4 Matthew W. Gordon

5 **ALTSHULER BERZON LLP**

6 James M. Finberg

Eileen B. Goldsmith

7 Eric P. Brown

8 By: /s/ Matthew J. Matern

9 Matthew J. Matern

10 Attorneys for Plaintiffs

11 REYNALDO LOPEZ et al.

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Pursuant to Rules 23(h) and 54(d) of the Federal Rules of Civil Procedure,
4 Plaintiffs request an order awarding attorney’s fees to Class Counsel, Matern Law Group,
5 PC (“MLG”) and Altshuler Berzon LLP (“AB”) in the amount of \$1,416,667.00, litigation
6 costs in the amount of \$171,942.48 and Class Representative Service Payments in the
7 amount of \$10,000.00 each to Plaintiffs LaDona Narr and Karl Armstrong.

8 Plaintiffs are entitled to recover reasonable attorney’s fees under California
9 Labor Code §§1194 and 2802, Code of Civil Procedure § 1021.5, and the common fund
10 doctrine. The requested fees are reasonable as a percentage of the common fund,
11 representing 33 1/3% of the non-reversionary settlement fund. The amount of attorney’s
12 fees requested is also reasonable based upon a cross-check of MLG and AB’s respective
13 lodestars of \$1,133,003.75 and \$435,471.00, which include 2036.55 and 688 attorney
14 hours respectively, billed at customary hourly rates which, taken together the requested
15 fee award of \$1,416,667.00. Class Counsel’s costs of 171,942.48 are also reasonable and
16 were necessarily incurred. The requested Class Representative Service Payments are
17 reasonable based on the risks assumed by Plaintiffs and their significant time and effort
18 expended on behalf of the Class Members to recover unpaid wages.

19 Accordingly, Plaintiffs respectfully request that the Court grant this motion.

20 **II. STATEMENT OF FACTS**

21 **A. Procedural History**

22 This action was filed on July 1, 2015 in the Los Angeles Superior Court and was
23 removed to this Court on September 17, 2015, pursuant to the Class Action Fairness Act.
24 Dkt. 1. The original complaint alleged claims on behalf of a statewide class of non-exempt
25 Delta employees for failure to provide meal and rest breaks; failure to pay overtime based
26 on Delta’s “pay to schedule” policy, by which it paid class members for their scheduled
27 hours rather than based on their time punches; failure to adequately reimburse class
28

1 members for business expenses; and related derivative claims under the California Labor
2 Code and Unfair Competition Law. Dkt. 1-1, ¶ 7.

3 On January 21, 2016, after an attempt to mediate the case was not successful,
4 Plaintiff filed a First Amended Complaint. Dkt. 19. In the First Amended Complaint,
5 Plaintiffs sought to certify a class of all non-exempt employees in California and added
6 Plaintiff LaDona Narr as a proposed class representative. Dkt. 19, ¶ 9. (Plaintiffs and
7 Delta are collectively referred to as “the Parties”.)

8 Because Delta opposed Plaintiffs’ amendment of the complaint to add a new class
9 representative and make other clarifications, Plaintiffs filed a motion for leave to file a
10 Second Amended Complaint on September 22, 2016. Dkt. 104. After receiving full
11 briefing on Plaintiffs’ motion (Dkt. 107 (Opp.), 108 (Reply)), the Court granted Plaintiffs’
12 motion on October 26. Dkt. 109. The operative Second Amended Complaint identifies
13 Narr and Armstrong as class representatives and clarifies the basis for, among other
14 things, Plaintiffs’ claim that Delta failed to include required components of compensation
15 in its calculation of class members’ regular rates of pay for overtime purposes. Dkt. 110.

16 **B. Discovery and Investigation**

17 Plaintiffs engaged in substantial discovery and investigation of their claims and
18 Delta’s defenses. Declaration of Matthew J. Matern (“Matern Decl.”) ¶¶ 9-11. Class
19 counsel conducted dozens of interviews of Delta employees employed at LAX and other
20 airports in California. Plaintiffs took the depositions of two 30(b)(6) designees of Delta.
21 Each of the six named Plaintiffs was deposed, five of them twice. Plaintiffs also took or
22 defended the depositions of an additional fifteen rank-and-file employees and Delta
23 managers. Plaintiffs obtained thousands of pages of documents from Delta, and served
24 and received responses to interrogatories and requests for admission. Plaintiffs also
25 retained an expert, Dr. Richard Drogin, to analyze a sample of class member payroll
26 records and provide an expert report regarding the observed rates of various Labor Code
27 violations. Dr. Drogin provided two expert declarations (Dkt. 60-48, 95), and also
28 provided a damages analysis that Plaintiffs used in mediation. Delta submitted a report of

1 its own expert, Dr. Valentin Estevez. Dkt. 68-11. Both experts were deposed. Third party
2 subpoenas were issued by both Parties. Delta subpoenaed the personal records of
3 numerous putative class members to which Plaintiffs served objections.

4 **C. Law and Motion Proceedings**

5 The case was heavily litigated, with Delta's positions requiring Plaintiffs to engage
6 in substantial motion work on discovery, class certification, pleading, and summary
7 judgment issues. Matern Decl. ¶¶ 12-28. As a result of a series of discovery motions and
8 conferences with Magistrate Judge Suzanne H. Segal, the scope of discovery was limited
9 at the class certification phase to non-exempt employees of Delta in Departments 120 and
10 125 at LAX. Matern Decl. ¶ 20.

11 On May 16, 2016, Plaintiffs moved to certify a class consisting of those LAX
12 employees which was supported by approximately 30 exhibits, including documents,
13 deposition testimony and Class Member declarations as well as a declaration from
14 Plaintiffs' expert statistician consultant who analyzed the time and payroll records
15 regarding Plaintiffs' meal break violation, minimum wage and overtime claims. Dkt. 60-
16 1 at 1.

17 In its July 5, 2016 opposition to class certification, Delta submitted twenty-six (26)
18 declarations, most of which were from putative class members, ten (10) of whom
19 Plaintiffs deposed. Dkt. 68-69. Delta also filed a Motion to Strike Plaintiffs' Expert's
20 Declaration (Attachment 37) which Plaintiffs had to oppose. Dkt. 95. Delta challenged
21 the adequacy of each of the proposed class representatives on various grounds. Dkt. 68.
22 In their reply brief, Plaintiffs defended Narr's adequacy to serve as a class representative.
23 Dkt. 98 at 4. Plaintiffs also identified a new proposed class representative, Karl
24 Armstrong, and submitted his declaration in support of class certification. *Id.* at 3 n.1.
25 Plaintiffs explained they would seek to amend the complaint to add Armstrong as a class
26 representative. *Id.* Defendants filed a sur-reply brief (Dkt. 101) and Plaintiffs filed a sur-
27 sur-reply brief. Dkt. 102.

28 ///

1 On September 14, the Court issued an order on Plaintiffs' motion for class
2 certification, finding that while certain proposed class representatives did not satisfy the
3 adequacy standard of Fed. R. Civ. P. 23(a)(4), Narr was an adequate class representative.
4 The Court gave Delta additional time to depose any additional named Plaintiffs, and
5 allowed the Parties to file supplemental briefs regarding the adequacy of any such
6 Plaintiffs. Dkt. 103 at 5.

7 After Delta took Armstrong's deposition, the Parties submitted supplemental
8 briefing on class certification, focusing principally on Armstrong's adequacy as a class
9 representative. Dkt. 115, 116. On December 16, 2016, the Court issued its order granting
10 in part and denying in part Plaintiffs' class certification motion. Dkt. 118. The Court
11 granted the motion as to the regular rate overtime claim, on an issue-only basis under Rule
12 23(c)(4). Dkt. 118 at 10. The Court denied class certification as to Plaintiffs' other claims.
13 *Id.* at 4-7, 8-9.

14 Following the Court's class certification order, Plaintiffs moved for summary
15 judgment as to Delta's liability on the regular rate overtime claim on March 2, 2017. Dkt.
16 131. The briefing on Plaintiffs' motion proceeded while the Parties returned to mediation
17 on March 10, again with Mr. Rudy's assistance. *See* Dkt. 132 (Opp., filed March 9), 133
18 (Reply, filed March 16)).

19 On March 30, 2017, just as the Parties were notifying the Court that they had
20 reached a settlement in principle, the Court granted Plaintiffs' motion for summary
21 adjudication as to Delta's liability on the regular rate claim and related derivative claims
22 for relief. Dkt. 134. The Court's order focused primarily on issues of first impression
23 regarding the scope and interpretation of the § 3(N) exemption to Wage Order No. 9,
24 which excepts certain hours worked by airline employees from overtime requirements,
25 and on the scope of an offset claimed by Delta. Dkt. 134 at 2-8.

26 Agreeing with Plaintiffs on these two legal issues, the Court found that Delta's
27 regular rate calculations were legally flawed because Delta failed to include two forms of
28 employee compensation, shift differentials and "Shared Rewards" bonuses, in those

1 calculations. *Id.* at 6. The Court allowed Delta to file a summary judgment motion in
2 which it could argue that payments from its Profit Sharing Plan are not a form of
3 compensation that must be included in the regular rate of pay. Dkt. 134 at 9. The Court
4 subsequently vacated the summary judgment order in light of the Parties' Settlement. *See*
5 Dkt. 136 (Notice of Def's Unopposed Mot. for Vacatur); 137 (Order Granting Def's
6 Unopposed Mot. for Vacatur).

7 **D. Settlement Negotiations**

8 The Settlement is the product of two mediation sessions with the assistance of a
9 Mark Rudy, a mediator who is highly experienced in complex wage and hour class, and
10 several additional weeks of negotiations. The Parties first attempted to mediate this case
11 on January 4, 2016. That mediation was not successful. The Parties returned to mediation
12 on March 10, 2017 with Mr. Rudy.

13 Although the case did not resolve at the second mediation, the Parties continued to
14 participate in settlement negotiations over the ensuing weeks, and finally signed a term
15 sheet on March 30, 2017. The Parties then spent substantial time over the following two
16 months negotiating and finalizing the terms of a detailed settlement agreement. Matern
17 Decl. ¶ 30.

18 **E. Preliminary Approval and Notice to the Class**

19 On July 13, 2017, the Court granted preliminary approval of the Settlement and
20 directed that notice be sent to the Class Members. Dkt. 141. The deadline for Class
21 members to submit objections or to opt out of the Settlement is October 12, 2017.
22 Declaration of Zachary Cooley ("Cooley Decl.") ¶¶ 3-4; Dkt. 141, ¶¶ 11, 13.

23 **II. ARGUMENT**

24 **A. Class Counsel's Fee Application Is Governed By California Law**

25 Rule 23(h) of the Federal Rules of Civil Procedure provides that, in a certified class
26 action, "the court may award reasonable attorney's fees and nontaxable costs that are
27 authorized by law or by the Parties' agreement." Fed. R. Civ. P. 23(h). Where, as here,
28 state law claims predominate, state law governs the right to an award of attorney's fees

1 and the method of calculating the fees. *Mangold v. Cal. Pub. Utils. Comm'n*, 67 F.3d
2 1470, 1478 (9th Cir. 1995). Under both Ninth Circuit and California precedent, a district
3 court has the discretion to award attorney's fees in common fund cases under either the
4 percentage of recovery method or the lodestar method. *Espinoza v. Domino's Pizza, LLC*,
5 No. EDCV-07-1601-VAP(OPx), 2012 WL 5462550, at *2 (C.D. Cal. Nov. 7, 2012);
6 *Powers v. Eichen*, 229 F.3d 1249, 1256 (9th Cir. 2000); *Laffitte v. Robert Half Int'l Inc.*,
7 1 Cal. 5th 480, 506 (2016); *Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 254
8 (2001).

9 “The percentage method calculates the fee as a percentage share of a recovered
10 common fund or the monetary value of the plaintiffs' recovery.” *Laffitte*, 1 Cal. 5th at
11 489. The lodestar method calculates the fee “by multiplying the number of hours
12 reasonably expended by counsel by a reasonable hourly rate.” *Id.*, citing *Lealao v.*
13 *Beneficial Cal., Inc.*, 82 Cal. App. 4th 19, 26 (2000). Once the court has fixed the lodestar,
14 “ ‘it may increase or decrease that amount by applying a positive or negative ‘multiplier’
15 to take into account a variety of other factors, including the quality of the representation,
16 the novelty and complexity of the issues, the results obtained, and the contingent risk
17 presented.’ ” *Id.*

18 The recognized advantages of the percentage of the fund method include “relative
19 ease of calculation, alignment of incentives between class counsel and the class, a better
20 approximation of market conditions in a contingency case, and the encouragement it
21 provides counsel to seek an early settlement and avoid unnecessarily prolonging the
22 litigation.” *Laffitte*, 1 Cal. 5th at 503. The Ninth Circuit has encouraged district courts
23 to conduct a lodestar cross-check on a percentage fee award. *See Vizcaino v. Microsoft*
24 *Corp.*, 290 F.3d 1043, 1050 (2002). As noted by the California Supreme Court, “[t]he
25 lodestar method better accounts for the amount of work done, while the percentage of the
26 fund method more accurately reflects the results achieved.” *Laffitte*, 1 Cal. 5th at 504
27 (citing *Rawlings v. Prudential-Bache Properties, Inc.*, 9 F.3d 513, 516 (6th Cir. 1993)).
28

1 **B. Class Counsel Is Entitled To Reasonable Attorney’s Fees And Costs**
2 **Under the California Labor Code And The Private Attorney General**
3 **Statute**

4 Class Counsel is entitled to recover fees and costs pursuant to California
5 Labor Code §§ 1194 and 2802 and California Code of Civil Procedure § 1021.5.

6 **1. Class Counsel is Entitled to Attorneys’ Fees under the California**
7 **Labor Code**

8 Class Counsel is entitled to recover attorney’s fees and costs under Labor Code
9 § 1194(a), which provides that:

10 [A]ny employee receiving less than the legal minimum wage
11 or the legal overtime compensation applicable to the
12 employee is entitled to recover in a civil action the unpaid
13 balance of the full amount of this minimum wage or overtime
14 compensation, including interest thereon, reasonable
15 attorney’s fees, and costs of suit.

16 Similarly, Labor Code § 2802 provides that an employer shall indemnify an
17 employee for “all necessary expenditures or losses incurred by the employee in direct
18 consequence of the discharge of his or her duties,” including “attorney’s fees incurred by
19 the employee enforcing the rights granted by this section.” Cal. Lab. Code § 2802(a) and
20 (c). Because this litigation culminated in a settlement that provides for a recovery of
21 unpaid wages, including unpaid overtime compensation and unpaid expense
22 reimbursements, Plaintiffs are entitled to recover reasonable attorney’s fees under
23 California Labor Code §§ 1194(a) and 2802.

24 **2. Class Counsel is Entitled to Attorneys’ Fees under California’s**
25 **Private Attorney General Statute**

26 Plaintiffs are also entitled to a fee award under California’s private attorney general
27 statute, Code of Civil Procedure § 1021.5. An award of attorney fees is proper under
28 Section 1021.5 if “(1) plaintiffs’ action ‘has resulted in the enforcement of an important
 right affecting the public interest,’ (2) ‘a significant benefit, whether pecuniary or
 nonpecuniary, has been conferred on the general public or a large class of persons’ and
 (3) ‘the necessity and financial burden of private enforcement are such as to make the

1 award appropriate.’ ” *Press v. Lucky Stores*, 34 Cal. 3d 311, 317-18 (1983). The
2 fundamental objective of the statute is “to encourage suits enforcing public policies by
3 providing substantial attorneys’ fees to successful litigants in such cases.” *Graham v.*
4 *DaimlerChrysler Corp.*, 34 Cal. 4th 553, 565 (2004).

5 This action resulted in the enforcement of important rights affecting the public
6 interest, as Plaintiffs sought to enforce Class Members’ rights to recover statutory wages
7 arising out of Delta’s failure to pay overtime compensation, among other things. *Moore*
8 *v. Indian Spring Channel Gold Mining Co.*, 37 Cal. App. 370, 379-380 (1918)
9 (recognizing that the “[d]elay of payment or loss of wages results in deprivation of the
10 necessities of life, suffering inability to meet just obligations to others, and, in many cases
11 may make the wage earner a charge upon the public”); *Murphy v. Kenneth Cole*
12 *Productions, Inc.*, 40 Cal. 4th 1094, 1113 (2007) (noting that “health and safety
13 considerations (rather than purely economic injuries) are what motivated the IWC to
14 adopt mandatory meal and rest periods in the first place”).

15 This action also conferred a significant benefit on a large class of persons. *Colgan*
16 *v. Leatherman Tool Group, Inc.*, 135 Cal. App. 4th 663, 703 (2006) (holding that
17 “[a]ttorney fees may be awarded under Code of Civil Procedure section 1021.5 for
18 consumer class action suits benefiting a large number of people”). Here, the class size is
19 comprised of 3,740 Class Members. Cooley Decl. ¶ 2. The Settlement provides a
20 significant monetary benefit, in that it permits all persons who worked for Delta in non-
21 exempt positions in California (except flight attendants and pilots) during the Class Period
22 to obtain compensation for unpaid wages. Dkt. No. 141.

23 Finally, the necessity and financial burden of private enforcement render an award
24 appropriate. Without the incentive of an attorney’s fee award, Plaintiffs could not have
25 afforded to hire counsel to pursue this case, as the cost of litigating this matter far
26 outweighed Plaintiff’s potential recovery. *Ryan v. California Interscholastic Fed’n*, 94
27 Cal. App. 4th 1033, 1044 (2001) (“As to the necessity and financial burden of private
28 enforcement, an award is appropriate where the cost of the legal victory transcends the

1 claimant’s personal interest; in other words, where the burden of pursuing the litigation
2 is out of proportion to the plaintiff’s individual stake in the matter”).

3 Thus, an award of reasonable attorney’s fees under Cal. Code of Civil Procedure
4 § 1021.5 is appropriate in this case.

5 **C. Class Counsel’s Requested Fee Award Is Reasonable Under the**
6 **Percentage Of the Fund Method**

7 In this case, the Settlement resulted in the creation of a common fund from which
8 all Class Members are to be paid. As a result, Plaintiffs are entitled to recover attorney’s
9 fees based upon a percentage of that fund. *Laffitte*, 1 Cal. 5th at 506 (approving fee equal
10 to 33 1/3% of the common fund). Plaintiffs’ request for attorney’s fees in the amount of
11 \$1,416,667.00, which represents 33 1/3% of the total settlement fund of \$4.25 million, is
12 reasonable and justified.

13 The California Supreme Court has held that “when a number of persons are entitled
14 in common to a specific fund, and an action brought by a plaintiff or plaintiffs for the
15 benefit of all results in the creation or preservation of that fund, such plaintiff or plaintiffs
16 may be awarded attorneys’ fees out of the fund.” *Serrano v. Priest*, 20 Cal. 3d 25, 34
17 (1977) (internal citations omitted).

18 **1. The Percentage Should Be Calculated Based Upon the Total**
19 **Settlement Fund**

20 Courts have concluded that it is proper to calculate the fee award as a percentage
21 of the *total* settlement fund, including attorney’s fees, litigation costs, and administrative
22 costs. *Powers*, 229 F.3d at 1258 (rejecting objector’s argument that a fee award in a
23 securities settlement should be based on “net recovery,” which does not include “expert
24 fees, litigation costs, and other expenses”); *Vizcaino*, 290 F.3d at 1052 (district court did
25 not abuse its discretion in approving class counsel’s fee application based upon a
26 percentage of the total settlement fund, including attorney’s fees, costs, and incentive
27 awards); *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 953 (9th Cir. 2015)
28 (“district court did not abuse its discretion in calculating the fee award as a percentage of
the total settlement fund, including notice and administrative costs, and litigation

1 expenses”); *see also* Manual for Complex Litig., 4th ed., § 21.7 (advocating use of the
2 total settlement fund, including attorney’s fees and expenses, “to measure whether the
3 portion allocated to the class and to attorney fees is reasonable”). The rationale for this
4 method of calculation is that “a fee awarded against the entire judgment will shift the
5 costs of litigation to each absentee in the exact proportion that the value of his claim bears
6 to the total recovery.” *Boeing Co. v. Van Gemert*, 444 U.S. 472, 479-80 (1980).

7 Here, the amount of fees requested, 33 1/3% of the total settlement fund, is well
8 within the range of percentages generally awarded by courts in class actions resulting in
9 the creation of a common fund. *See, e.g. Laffitte*, 1 Cal.5th at 506. While there is no
10 specific benchmark under California law, California superior courts have frequently
11 awarded percentage fees of 33.33% or more in common fund cases litigated by Class
12 Counsel involving wage and hour claims like this case. Matern Decl. ¶ 52.

13 2. An Upward Adjustment of the 25% Benchmark is Justified

14 Even under the Ninth’s 25 percent “benchmark” for attorney fee awards, an upward
15 adjustment is appropriate when justified based on “all of the circumstances of the case.”
16 *Vizcaino*, 290 F.3d at 1047-48 (affirming 28% common fund fee); *see also, Six Mexican*
17 *Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir. 1990); *Paul, Johnson,*
18 *Alston & Hunt v. Graulity*, 886 F.2d 268, 272 (9th Cir. 1989); *In re Pacific Enterprises*
19 *Security Litigation*, 47 F.3d 373, 379 (9th Cir. 1995). However, courts in the Ninth Circuit
20 have regularly awarded attorney’s fees ranging from 30 to 40 percent in common fund
21 cases. *See, e.g., In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 460 (9th Cir. 2000)
22 (affirming award of fees equal to one-third of the total recovery); *Corral v. Lifecare*
23 *Solutions Inc.*, No. CV12-10074-FMO (PJWx), Dkt. No. 55 (C.D. Cal. Nov. 6, 2014)
24 (approving requested fee award of 33 1/3%); *Ruiz v. JCP Logistics, Inc.*, No. SACV-13-
25 1908-JLS, 2016 WL 6156212, *10 (C.D. Cal. Aug. 12, 2016) (awarding attorney’s fees
26 of 30% of the gross settlement fund); *Ingalls v. Hallmark Mktg. Corp.*, No. 08-CV-4342-
27 VBF (E), 2009 U.S. Dist. LEXIS 131078 (C.D. Cal. Oct. 16, 2009) (wage and hour class
28 action awarding fees equal to 33 1/3%); *Fernandez v. Victoria Secret Stores, LLC*, No.

1 CV-06-04149-MMM (SHx), 2008 WL 8150856, at *16 (C.D. Cal. Jul. 21, 2008)
2 (concluding 34% fee award is fair and reasonable in wage and hour class action).

3 In determining whether an upward adjustment of the 25% benchmark is justified,
4 courts in the Ninth Circuit consider the following factors: “(1) the result obtained for the
5 class; (2) the effort expended by counsel; (3) counsel’s experience; (4) counsel’s skill; (5)
6 the complexity of the issues; (6) the risks of non-payment assumed by counsel; (7) the
7 reaction of the class; and (8) comparison with counsel’s lodestar.” *Craft v. County of San*
8 *Bernardino*, 624 F.Supp.2d 1113, 1116-17 (C.D. Cal. 2008); *see also Vizcaino*, 290 F.3d
9 at 1048-50. An analysis of these factors shows that Class Counsel’s request for a fee
10 award of one-third of the gross settlement fund is reasonable.

11 **a. The Result Obtained for the Class**

12 “The result achieved is a significant factor to be considered in making a fee award.”
13 *In re Heritage Bond Litig.*, 2005 WL 1594403, at *19 (C.D. Cal. Jun. 10, 2005); *Hensley*
14 *v. Eckerhart*, 461 U.S. 424, 436, (1983) (“the most critical factor is the degree of success
15 obtained”). In evaluating the results achieved for the class, courts consider the value of
16 the individual awards class members will receive rather than the size of the settlement
17 fund. *See Fernandez*, 2008 WL 8150856 at *11.

18 Here, the results obtained by Class Counsel warrant an upward adjustment of the
19 25% benchmark. The claims in this case concern, among other things, Delta’s failure to
20 pay overtime. “These types of claims would not generally produce substantial individual
21 damage awards.” *Barbosa v. Cargill Meat Sols. Corp.*, 297 F.R.D. 431, 449 (E.D. Cal.
22 2013). Recoveries here would inevitably be modest, as they are largely based on the
23 differential between overtime premiums actually paid and the slightly higher premiums
24 that Class Members should have been paid had Defendant included all required forms of
25 compensation in its regular rate calculations. Nevertheless, assuming none of the 3,740
26 Class Members opt out,¹ each Class Member will receive from the total recovery of \$4.25

27 _____
28 ¹ As of September 28, 2017, no requests for exclusion have been received. Cooley
Decl. ¶ 3.

1 million an average settlement payment of approximately \$667.48 and the average
2 maximum payment is \$1,634.12. Cooley Decl. ¶ 5. A comparison of the average
3 settlement award here to other actions in the Ninth Circuit for wage and hour violations
4 highlights the significant success achieved by Class Counsel. *See, e.g., Barbosa*, 297
5 F.R.D. at 448-51 (court deemed recovery of \$1,290,000 for 1,837 employees a “favorable
6 result” and awarded fees amounting to 33 1/3% of the total settlement). The Court should
7 find that the results achieved are excellent, especially if there is no objection by Class
8 Members to the settlement amount or to the attorney’s fees requested. *Barbosa*, 297
9 F.R.D. at 44. In light of the significant result achieved by Plaintiffs for the Class, this
10 factor favors granting the requested fee award.

11 ***b. The Effort Expended by Class Counsel***

12 This factor largely duplicates the lodestar calculation, which reflects the hours
13 Class Counsel spent litigating the case. *Fernandez*, 2008 WL 8150856 at *12. There is no
14 doubt that Class Counsel vigorously and thoroughly litigated this action. Among other
15 work, Class Counsel conducted preliminary legal research and drafting of the complaint;
16 interviewed dozens of Class Members concerning their claims, successfully amended the
17 complaint to add new class representative, drafted extensive written discovery, took and
18 defended over 25 lay and expert depositions, reviewed thousands of pages of relevant
19 documents, including Class Members’ timekeeping records, retained an expert statistician
20 who analyzed the wage and hour data, filed a motion for class certification (which was
21 granted in part) supported by approximately 30 exhibits including numerous lay and
22 expert declarations, documents and deposition testimony and supplemental briefing, filed
23 an opposition to Delta’s motion to strike Plaintiffs’ expert’s declaration, filed a motion
24 for summary judgment (which was granted and later vacated due to the Parties’
25 settlement), filed or opposed several discovery and pleading motions and ex parte
26 applications, attended numerous court hearings, participated in two full-days of mediation
27 in San Francisco and ongoing settlement discussions continuing over the following two
28 months, negotiated and drafted the Stipulation, prepared the motions for preliminary and

1 final approval and this motion, and communicated with the Claims Administrator. Matern
2 Decl. ¶ 44; Finberg Decl. ¶ 18.

3 Class Counsel thus expended significant time performing this work and did not
4 sacrifice due diligence in achieving an efficient resolution of this case. Indeed, Class
5 Counsel's combined lodestar of \$1,568,474.75 *exceeds* the requested fee award of
6 \$1,416,667.00, and the lodestar does not even include MLG's paralegal's hours or the
7 estimated 30-50 hours Class Counsel will expend overseeing the administration of the
8 Settlement, answering questions from Class Members about the Settlement, and attending
9 the final fairness hearing. Matern Decl. ¶¶ 45-46; Finberg Decl. ¶ 19-24. Class Counsel's
10 persistence in prosecuting Plaintiffs' claims, even after only one class was certified,
11 merits an upward adjustment of the 25% benchmark. Matern Decl. ¶¶ 50-57. This factor
12 supports a generous award of attorney's fees under the percentage of recovery method.

13 ***c. The Experience and Skill of Class Counsel***

14 The quality of Class Counsel's experience and skill is demonstrated by the
15 exceptional result achieved. As shown in the accompanying Declarations of Matthew J.
16 Matern and James M. Finberg, Class Counsel are highly experienced litigators in the field
17 of wage and hour class actions, and they put the full use of their skill and experience to
18 work in the service of Plaintiffs and the Class Members in this case. Matern Decl. ¶¶ 34-
19 -41; Finberg Decl. ¶¶ 1-16; Ex. A. Importantly, Delta was represented by experienced and
20 skilled attorneys from a law firm (Morgan Lewis & Bockius, LLP) with a strong
21 reputation for vigorous advocacy in the defense of complex employment class action
22 cases. Matern Decl. ¶ 51. Class Counsel's ability to obtain this Settlement in the face of
23 such formidable legal opposition confirms the quality of Class Counsel's representation.
24 *Barbosa*, 297 F.R.D. at 449 (“[t]he quality of opposing counsel is important in evaluating
25 the quality of Class Counsel's work”) (citing *In re Equity Funding Corp. Sec. Litig.*, 438
26 F.Supp. 1303, 1337 (N.D. Cal. 1977)).

27 The Court should find that the experience and specialized skill of Class Counsel in
28 this area of the law was an asset to the Class Members. Class Counsel's “extensive

1 investigation, comprehensive discovery practice, and skillful preparation resulted in a
2 favorable Settlement for the Class.” *Hopkins v. Stryker Sales Corp.*, No. 11-CV-02786-
3 LHK, 2013 WL 496358, at *2 (N.D. Cal. Feb. 6, 2013). Class Counsel advanced the costs
4 associated with the litigation of this matter, including experts and investigators, in order
5 to fully and competently prepare this matter for the benefit of the Class. Matern Decl.
6 ¶ 59; Ex. 11; Finberg Decl. ¶ 32; Ex. S. These factors weigh in favor of approval of the
7 fee award.

8 ***d. The Complexity of the Issues***

9 This case involved complex issues of wage and hour law, as evidenced by the
10 Court’s ruling on the motion for class certification (Dkt. 118), the ruling on the summary
11 judgment motion (Dkt. 134) including novel issues regarding the scope and interpretation
12 of the § 3(N) exemption to Wage Order No. 9 and the offset claimed by Delta. Dkt. 134
13 at 2-8.) Class Counsel was required to analyze a substantial amount of data pertaining to
14 a large putative class and consult with an expert statistician. Matern Decl. ¶ 56. This factor
15 also weighs in favor of granting an upward adjustment of the benchmark.

16 ***e. The Risk of Non-Payment***

17 “Courts consistently recognize that the risk of non-payment or reimbursement of
18 expenses is a factor in determining the appropriateness of class counsel’s fee award.”
19 *Heritage*, 2005 WL 1594403, at *21. Here, Class Counsel proceeded entirely on a
20 contingency basis while paying for all expenses incurred, and invested time, effort, and
21 money with no guarantee of any recovery. Matern Decl. ¶ 51. Class Counsel faced
22 substantial risk of non-payment for hundreds of hours of work because of the uncertainty
23 of obtaining class certification and of establishing liability. Plaintiffs brought this action
24 against a major national corporation with extensive resources. As the rulings on the class
25 certification and summary judgment motions evidence, the case did not lend itself to easy
26 proof of liability or damages. Dkt. 118, 134. Class Counsel prosecuted this case knowing
27 there was a chance that Delta could prevail and that, even if Plaintiffs prevailed, the case
28 would likely take years to bring to trial and would not be resolved without an appeal. This

1 risk of no recovery on a classwide basis in complex wage and hour class actions is very
2 real. From the outset, Delta vehemently contested liability and it continues to do so today.
3 In light of these substantial risks and obstacles, Class Counsel thus undertook Plaintiffs’
4 representation with the hope that they would receive a risk enhancement if they prevailed.
5 Matern Decl. ¶ 52. Having nevertheless obtained an excellent result for the Class, Class
6 Counsel should be fully compensated for their work and the risk involved.

7 In cases where the recovery is far from certain, as here, an award of attorney’s fees
8 constituting more than 25% of the common fund is appropriate. *See In re Wash. Pub.*
9 *Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1302 (9th Cir. 1994) (finding district court’s
10 failure to apply multiplier to lodestar calculation was abuse of discretion where the case
11 was “fraught with risk and recovery was far from certain”); *Vizcaino*, 290 F.3d at 1048.
12 In sum, Class Counsel’s requested fee award is justified by the significant risk assumed
13 in litigating this case on a contingency basis without any guarantee of compensation.
14 *Graham*, 34 Cal. 4th at 580 (“A contingent fee must be higher than a fee for the same
15 legal services paid as they are performed. The contingent fee compensates the lawyer not
16 only for the legal services he renders but for the loan of those services.”) (internal
17 quotations omitted); *Barbosa*, 297 F.R.D. at 449 (“Like this case, where recovery is
18 uncertain, an award of one-third of the common fund as attorneys’ fees has been found to
19 be appropriate”) (citing *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 463 (9th Cir.
20 2000); *Heritage*, 2005 WL 1594403, at *19, n. 14.

21 ***f. The Reaction of the Class***

22 Thus far, the reaction of the class to the Settlement has been overwhelmingly
23 positive in that no requests for exclusion and no objections have been received. Zachary
24 Decl. ¶¶ 3-4; Matern Decl. ¶ 65. If the final tally reflects no objections to the fee request,
25 such a reaction will strongly support an increase in the benchmark percentage. “Numerous
26 courts have noted that the lack of objection from members of the class is one of the most
27 important” factors in determining the reasonableness of a requested fee. *In re Prudential*
28 *Sec. Inc. Ltd. P’ships. Litig.*, 985 F.Supp. 410, 416 (S.D. N.Y. 1997) (internal citations

1 omitted); *Thieriot v. Celtic Ins. Co.*, No. C-10-04462-LB, 2011 WL 1522385, at *6 (N.D.
2 Cal. Apr. 21, 2011) (“The fact that no members of the 390-person class objected to the
3 proposed 33% fee award—which was also communicated in the notice—supports an
4 increase in the benchmark rate”) (citing *In re Omnivision Tech., Inc.*, 559 F.Supp.2d 1036,
5 1048 (N.D. Cal. 2008)).

6 **g. Comparison with the Lodestar**

7 A lodestar cross-check also weighs in favor of an award above the 25% benchmark.
8 As explained below, Class Counsel’s current combined lodestar of \$1,568,474.75
9 (MLG’s lodestar of \$1,133,003.75 plus AB’s lodestar of \$435,471.00) which does not
10 include paralegal hours or 30-50 hours estimated to be expended through final approval
11 and the end of the litigation, *exceeds* the requested fee award of \$1,416,667.00. This factor
12 supports the fairness and reasonableness of a fee award of 33 1/3% of the total settlement
13 fund. *Barbosa*, 297 F.R.D. at 454 (concluding that a 33 1/3% fee award, necessitating a
14 1.06 multiplier of the lodestar, is reasonable and commensurate with other wage and hour
15 class actions); *Fernandez*, 2008 WL 8150856 at *16 (finding a 34% award, representing
16 application of a risk multiplier of approximately 1.82 to the lodestar amount, is fair and
17 reasonable). Indeed, given that the requested fee award is less than the lodestar actually
18 incurred by Class Counsel, resulting in a “negative multiplier” of approximately 0.90,
19 there is a strong presumption that the requested fee award is reasonable. *See Jefferson v.*
20 *Chase Home Fin.*, No. C-06-6510-THE, 2009 WL 2051424, *4 (N.D. Cal. July 10, 2009)
21 (granting the fee award because “the figure sought is well under the Plaintiffs’ counsel’s
22 lodestar”); *Chun-Hoon v. McKee Foods Corp.*, 716 F.Supp.2d 848, 854 (N.D. Cal. 2010)
23 (“This resulting multiplier of less than one, (sometimes called a negative multiplier)
24 suggests that the negotiated fee award is a reasonable and fair valuation of the services
25 rendered to the class by class counsel”).

26 Taking all of the relevant factors into consideration, the Court should conclude that
27 Plaintiffs have shown circumstances warranting an award of fees above the 25%
28

1 benchmark and approve the requested fees in the amount of \$1,416,667.00, which
2 represents 33 1/3% of the total settlement fund.²

3
4 **D. Class Counsel’s Requested Fee Award Is Reasonable Based Upon A**
5 **Lodestar Cross-Check**

6 Courts utilize the lodestar as a cross-check on the reasonableness of the percentage
7 of the fund approach. *See Laffitte*, 1 Cal. 5th at 496; *Barbosa*, 297 F.R.D. at 448;
8 *Fernandez*, 2008 WL 8150856 at *14. Under the lodestar method, the court considers the
9 number of hours reasonably spent on the litigation multiplied by a reasonable hourly rate
10 for each attorney. *Ketchum v. Moses*, 24 Cal. 4th 1122, 1131–32 (2001); *PLCM Group,*
11 *Inc. v. Drexler*, 22 Cal. 4th 1084, 1095 (2000); *see also McGrath v. County of Nevada*,
12 67 F.3d 248, 252 (9th Cir.1995). The moving party meets its burden in this regard by
13 submitting “declarations evidencing the reasonable hourly rate for their services and
14 establishing the number of hours spent working on the case,” as “California case law
15 permits fee awards in the absence of detailed time sheets.” *Wershba*, 91 Cal. App. 4th at
16 254-255; *Mardirossian & Assocs., Inc. v. Ersoff*, 153 Cal. App. 4th 257, 269 (2007)
17 (same) (citing *Steiny & Co. v. California Electric Supply Co.*, 79 Cal. App. 4th 285, 293
18 (2000); *Laffitte*, 1 Cal. 5th at 505 (trial court properly exercised its discretion to perform
19 the lodestar cross-check “using counsel declarations summarizing overall time spent
20 rather than demanding and scrutinizing daily time sheets in which the work performed
21 was broken down by individual task”).

22 Similarly, under federal law, “[w]here the lodestar method is used as a cross-check
23 to the percentage method, it can be performed with a less exhaustive cataloguing and
24 review of counsel’s hours.” *Barbosa*, 297 F.R.D. at 451; *In re Rite Aid. Corp. Sec. Litig.*,
25 396 F.3d 294, 306 (3d Cir. 2005) (“The lodestar cross-check calculation need entail

26 ² Indeed, an award of the 25% “benchmark” fee here -- \$1,062,500 -- would result in a
27 negative multiplier of 0.90, notwithstanding the excellent results achieved by Class
28 Counsel on behalf of the Class. The requested 33 1/3% fee award is already significantly
below Class Counsel’s lodestar. In light of the results achieved, there is no justification
for reducing Class Counsel’s fee award even further below the lodestar.

1 neither mathematical precision nor bean-counting”); *In re Immune Response Sec. Litig.*,
2 497 F.Supp.2d 1166, 1176 (S.D. Cal. 2007) (“Although counsel have not provided a
3 detailed cataloging of hours spent, the Court finds the information provided to be
4 sufficient for purposes of lodestar cross-check”).

5 The “lodestar” figure may be augmented or diminished by the court taking into
6 account various “multiplier” factors, including the time and labor required, the novelty
7 and difficulty of the questions involved, the skill requisite to perform the legal service
8 properly, the preclusion of other employment by the attorney due to acceptance of the
9 case, and whether the fee is fixed or contingent. *Ramos v. Countrywide Home Loans, Inc.*,
10 82 Cal. App. 4th 615, 622 (2000), citing *Serrano v. Priest*, 20 Cal. 3d 25, 48-49 (1977).
11 “It is an established practice in the private legal market to reward attorneys for taking the
12 risk of non-payment by paying them a premium over their normal hourly rates for winning
13 contingency cases.” *Fischel v. Equitable Life Assur. Society of U.S.*, 307 F.3d 997, 1008
14 (9th Cir. 2002) (citing *In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d at 1299).
15 Here, Class Counsel’s total lodestar is approximately \$1,568,474.75 (which is based on
16 2036.55 and 688 attorney hours billed by MLG and AB respectively, at customary hourly
17 rates). Matern Decl. ¶ 43; Exs. 1-10; Finberg Decl. ¶¶ 19-24, 30-31: Ex. B.

18 **1. Class Counsel’s Hourly Rates Are Reasonable**

19 Class Counsel’s hours are to be multiplied by a “reasonable hourly rate” to generate
20 the lodestar figure. *In re Consumer Privacy Cases*, 175 Cal. App. 4th 545, 556 (2009).
21 To determine the reasonable hourly rate, the court must look to the “rate prevailing in the
22 community for similar work performed by attorneys of comparable skill, experience, and
23 reputation.” *Camacho v. Bridgeport Fin., Inc.*, 523 F.3d 973, 979 (9th Cir. 2008); accord
24 *MBNA American Bank, N.A. v. Gorman*, 147 Cal. App. 4th 1, 13 (2006) (“[I]n assessing
25 a reasonable hourly rate, the trial court is allowed to consider the attorney’s skill as
26 reflected in the quality of work, as well as the attorney’s reputation and status.”). Courts
27 may “find hourly rates reasonable based on evidence of other courts approving similar
28 rates.” *Parkinson v. Hyundai Motor Am.*, 796 F. Supp. 2d 1160, 1172 (C.D. Cal. 2010).

1 “Affidavits of the plaintiff’s attorney and other attorneys regarding prevailing fees in the
2 community, and rate determinations in other cases, particularly those setting a rate for the
3 plaintiff’s attorney, are satisfactory evidence of the prevailing market rate.” *United*
4 *Steelworkers of Am. v. Phelps Dodge Corp.*, 896 F.2d 403, 407 (9th Cir. 1990); *Bouman*
5 *v. Block*, 940 F.2d 1211, 1235 (9th Cir. 1991) (the submission of “declarations stating that
6 the rate was the prevailing market rate in the relevant community [was]... sufficient to
7 establish the appropriate rate for lodestar purposes”). As a general rule, the forum district
8 represents the relevant legal community. *See Gates v. Deukmejian*, 987 F.2d 1392, 1405
9 (9th Cir. 1992).

10 Class Counsel’s rates are in line with the current prevailing billing rates in the Los
11 Angeles and San Francisco areas, which range from \$285 to \$1,000 per hour. Matern
12 Decl. ¶¶ 48-49; Finberg Decl. ¶¶ 25-28. *See also Rodriguez v. County of Los Angeles*, 96
13 F.Supp.3d 1012, 1023 (C.D. Cal. 2014) (approving attorney rates in 2014 from \$500 per
14 hour for attorney with 6 years of experience to \$975 per hour for attorney practicing 45
15 years). The requested rates are also within the range previously approved by various
16 courts in the cases Class Counsel has litigated. Matern Decl. ¶ 47; Finberg Decl. ¶ 29;
17 Exs. C-R. Class Counsel are experienced litigators who specialize in employment law,
18 with a substantial wage and hour class action practice. Matern Decl. ¶¶ 34-41; Finberg
19 Decl. ¶¶ 3, 4, 7-11:Ex. A. Given the skill and experience of Class Counsel and the
20 excellent result achieved for the Class Members, Class Counsel’s hourly rates are
21 reasonable.

22 **2. Class Counsel’s Hours Are Reasonable**

23 In determining whether the number of hours expended on the litigation was
24 reasonable, the court must determine that the “time spent was reasonably necessary and
25 that [] counsel made ‘a good faith effort to exclude from the fee request hours that are
26 excessive, redundant, or otherwise unnecessary.’ ” *Jordan v. Multnomah County*, 815
27 F.2d 1258, 1263, n.8 (9th Cir. 1987) (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 433,
28 434 (1983)). “[T]he standard is whether a reasonable attorney would have believed the

1 work to be reasonably expended in pursuit of success at the point in time when the work
2 was performed.” *Moore v. Jas. H. Matthews & Co.*, 682 F.2d 830, 839 (9th Cir. 1982).
3 In determining the reasonableness of the hours expended on the litigation, “the district
4 court should take into account the reality that some amount of duplicative work is
5 ‘inherent in the process of litigating over time.’” *Stetson v. Grissom*, 821 F.3d 1157, 1166
6 (9th Cir. 2016) (quoting *Moreno v. City of Sacramento*, 534 F.3d 1106, 1112 (9th Cir.
7 2008)). The district court “should defer to the winning lawyer’s professional judgment
8 as to how much time he was required to spend on the case.” *Moreno*, 534 F.3d at 1112
9 (noting that “[l]awyers are not likely to spend unnecessary time on contingency fee cases
10 in the hope of inflating their fees. The payoff is too uncertain, as to both the result and
11 the amount of the fee.”); *see also Guam v. Soc’y of Obstetricians & Gynecologists v. Ada*,
12 100 F.3d 691, 700 (9th Cir.1996) (“[A]lthough it may be easy, in hindsight, to tout this as
13 an easy victory, plaintiffs cannot be faulted for their thoroughness under the
14 circumstances.”). “An attorney’s sworn testimony that, in fact, it took the time claimed
15 ‘...is evidence of considerable weight on the issue of the time required...’” *Blackwell v.*
16 *Foley*, 724 F. Supp. 2d 1068, 1081 (N.D. Cal. 2010) (quoting *Perkins v. Mobile Housing*
17 *Bd.*, 847 F.2d 735, 738 (11th Cir. 1988)).

18 As § 2.b. above amply demonstrates, Class Counsel expended a significant amount
19 of time litigating the case for nearly two years to achieve the excellent result on behalf of
20 the Class. The summary of their work ranges from investigation (from legal research of
21 Plaintiffs’ claims and interviews of Plaintiffs and dozens of Delta employees), to
22 discovery (extensive written discovery and over 25 lay and expert depositions), review of
23 hundreds of pages of Delta’s documents, substantial motion work (researching and
24 drafting pleading, discovery, class certification and summary judgment motions),
25 attending court hearings, participating in numerous conferences and correspondence with
26 Delta’s counsel; retaining and consulting an expert statistician to analyze the time and
27 payroll records and other employment records and performing damages calculations
28 based on those records, research and preparation of a mediation brief and damages

1 analyses; participation in two private mediation sessions, in addition to ongoing
2 settlement discussions; drafting, negotiating, and revising the Settlement; researching and
3 drafting the Motions for Preliminary and Final Approval and accompanying declarations;
4 and communicating with Delta’s counsel and the Settlement Administrator to effectuate
5 the terms of the Settlement and to monitor the claims process. Matern Decl. ¶ 44; Finberg
6 Decl. ¶¶ 18, 23.

7 To date, Class Counsel has spent approximately a total of 2724.55 attorney hours
8 litigating this case, and will spend approximately 30-50 additional hours through final
9 approval.³ Matern Decl. ¶¶ 43, 46; Finberg Decl. ¶ 23. These hours were necessary and
10 reasonable to achieve the excellent result on behalf of the Class. Matern Decl. ¶ 44. The
11 attorney hours do not include the dozens of hours expended by Class Counsel’s staff
12 members. Matern Decl. ¶ 45. Thus, Class Counsel’s hours are reasonable.

13 3. Application of a Negative Multiplier Is Inappropriate.

14 After the court determines the lodestar value, the court may enhance the lodestar
15 by applying a multiplier to take into account the contingent nature and risk associated
16 with the action. *Ketchum*, 24 Cal. 4th at 1130, 1137 (2001); *Graham*, 34 Cal. 4th at 582.
17 California courts have a more “permissive attitude on the use multipliers” than their
18 federal counterparts. *Lealao*, 82 Cal. App. 4th at 43; *see Weeks v. Baker & McKenzie*, 63
19 Cal. App. 4th 1128, 1173 (1998) (finding that “adjustment from the lodestar figure will
20 be far more common under California law than under federal law.”); *Flannery v.*
21 *California Highway Patrol*, 61 Cal. App. 4th 629, 646 (1998). Under California law,
22 “[m]ultipliers can range from 2 to 4 or even higher” and are routinely granted. *Wershba*,
23 91 Cal. App. 4th at 254-255; *Chavez v. Netflix, Inc.*, 162 Cal. App. 4th 43, 66 (2008)
24 (upholding 2.5 multiplier). Some of the factors courts consider when determining whether
25 to apply a multiplier are: “(1) the novelty and difficulty of the questions involved, (2) the
26

27 ³ The Ninth Circuit has repeatedly held that time spent by counsel establishing the right
28 to a fee award is compensable. *See, e.g. D’Emanuele v. Montgomery Ward & Co.*, 904
F.2d 1379, 1387-88 (9th Cir. 1990).

1 skill displayed in presenting them, (3) the extent to which the nature of the litigation
2 precluded other employment by the attorneys, (4) the contingent nature of the fee award.”
3 *Ketchum*, 24 Cal.4th 1122 at 1132 (citations omitted).

4 In *Ketchum*, the California Supreme Court held that fee enhancement in
5 contingency cases is necessary to (1) fully compensate counsel for the “loan” of legal
6 services in light of the inherent high risk of “default” posed by losing the case, and (2)
7 encourage competent counsel to take on fee award cases. *Ketchum*, 24 Cal.4th at 1132-
8 1133. As the Court noted, “A lawyer who both bears the risk of not being paid and
9 provides legal services is not receiving the fair market value of his work if he is paid only
10 for the second of these functions. If he is paid no more, competent counsel will be
11 reluctant to accept fee award cases.” *Id.* at 1133 (citations omitted); *see Greene v.*
12 *Dillingham Construction N.A., Inc.*, 101 Cal. App. 4th 418, 426 (2002) (holding that trial
13 court erred by refusing to consider contingent risk as a factor in the decision to apply a
14 multiplier). Similarly, the Ninth Circuit recently held that “[t]he district *must* apply a risk
15 multiplier to the lodestar ‘when (1) attorneys take a case with the expectation they will
16 receive a risk enhancement if they prevail, (2) their hourly rate does not reflect that risk,
17 and (3) there is evidence the case was risky.’ ” *Stetson*, 821 F.3d at 1166 (emphasis in
18 original) (quoting *Stanger v. China Elec. Motor, Inc.*, 812 F.3d 734, 740 (9th Cir. 2016)).

19 In the event that the Court reduces Class Counsel’s lodestar for purposes of
20 comparison with the percentage award, application of a positive multiplier is appropriate
21 for the reasons discussed above in connection with the necessity of an upward adjustment
22 of the 25% benchmark. Class Counsel has been litigating this case for over two years with
23 no payment, expending significant time and resources which could have been directed
24 towards other cases and assumed considerable risk given the uncertain proposition these
25 types of cases entail. Matern Decl. ¶¶ 50-57. Accordingly, Plaintiffs request that the Court
26 award Class Counsel the requested fees of \$1,416,667.00 based on their lodestar.

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1 **E. Class Counsel’s Request For Reimbursement Of Costs Is Reasonable**

2 Because Plaintiffs’ claim for attorney’s fees arises under California substantive
3 law, the Court applies California law on costs rather than Local Rule 54. *Clausen v. M/V*
4 *New Carissa*, 339 F.3d 1049, 1064 (9th Cir. 2003). Cal. Labor Code §§ 1194 and 2802
5 provide that an employee is entitled to recover costs of suit in a civil action to recover
6 unpaid wages and unreimbursed expenses.

7 Here, Class Counsel estimated their costs would not exceed \$190,000.00. Matern
8 Dec. ¶ 58; Dkt. 138-2, ¶ 39. Class Counsel has incurred a total of approximately
9 \$171,942.48 (MLG costs of \$167,592.86 plus AB’s costs of \$4,349.62) in unreimbursed
10 costs and will continue to incur costs through final approval. Matern Decl. ¶¶ 59-60; Ex.
11 11; Finberg Decl. ¶ 32; Ex. S. Because these costs were reasonably incurred, the Court
12 should award Class Counsel \$171,942.48 in costs to be paid out of the common fund.

13 **F. The Requested Class Representative Service Payments Are Reasonable**

14 “[N]amed plaintiffs... are eligible for reasonable incentive payments.” *Staton*, 327
15 F.3d at 977. The district court must evaluate a plaintiff’s incentive award using “relevant
16 factors includ[ing] the actions the plaintiff has taken to protect the interests of the class,
17 the degree to which the class has benefitted from those actions, ... [and] the amount of
18 time and effort the plaintiff expended in pursuing the litigation.” *Id.* (internal quotation
19 marks omitted). Courts also consider the “proportion of the payment[] relative to the
20 settlement amount.” *Id.* Courts routinely grant enhancements for class representatives,
21 which are necessary to provide an incentive to represent the class and are appropriate
22 given the benefit the class representatives produce for the class. *See Rodriguez v. W.*
23 *Publ’g Corp.*, 563 F.3d 948, 958-59 (9th Cir. 2009).

24 The requested enhancements of \$10,000.00 each to Plaintiffs LaDona Narr and
25 Karl Armstrong are reasonable given that they exposed themselves to public notoriety
26 and significant risk by filing this action against an employer. *See Narr Decl.* ¶¶ 6-7;
27 *Armstrong Decl.* ¶¶ 6-7; *Matern Decl.* ¶ 62; *compare Covillo v. Specialtys Cafe*, 2014
28 WL 954516, *8 (N.D. Cal. Mar. 6, 2014) (awarding \$8,000 each to two named plaintiffs,

1 noting that “the incentive awards are particularly appropriate in this wage and hour class
2 action, where Plaintiffs undertook a significant ‘reputational risk’ in bringing this action
3 against their former employer.”). Additionally, they both are required to sign a broader
4 release than other class members. Dkt. 138-3, ¶ 5.8.3.

5 In addition, Ms. Narr and Mr. Armstrong dedicated significant time and effort to
6 this case on various tasks, including (1) assisting Class Counsel in their preliminary
7 investigation of the case, (2) responding to written discovery, (3) reviewing documents,
8 (4) preparing for and submitting to deposition (twice and over 10 (ten) hours for Ms.
9 Narr’s deposition; traveling from New York to Los Angeles by Mr. Armstrong and over
10 eight (8) hours of deposition), (5) providing the names of witnesses, and (6) consulting
11 with Class Counsel regarding the status of the case, including the Settlement. Narr Decl.
12 ¶ 4; Armstrong Decl. ¶ 4; Matern Decl. ¶ 61. In total, Ms. Narr and Mr. Armstrong spent
13 approximately 80 and 70 hours respectively performing these and other functions on
14 behalf of the Class. Narr Decl. ¶¶ 4-5; Armstrong Decl. ¶¶ 4-5.

15 Furthermore, the requested enhancements are minimal -- 0.235% which is far less
16 than even one percent of the Gross Settlement Amount. The requested service payment is
17 within the range of awards recently approved by district courts within the Ninth Circuit.
18 *See, e.g., McCabe v. Six Continents Hotels, Inc.*, 2016 WL 491332, *2 (N.D. Cal. Feb. 8,
19 2016) (granting enhancement awards of \$10,000 each to two named plaintiffs and \$7,500
20 to a third named plaintiff); *Rinky Dink, Inc. v. World Bus. Lenders, LLC*, 2016 WL
21 3087073, *4 (W.D. Wash. May 31, 2016) (granting service awards of \$10,000 each to
22 two named plaintiffs and \$5,000 to a third plaintiff who was not deposed); *Richardson v.*
23 *THD At-Home Servs., Inc.*, 2016 WL 1366952, *13 (E.D. Cal. Apr. 6, 2016) (awarding
24 named plaintiff an enhancement award of \$15,000).

25 In sum, the Court should approve the Service Payments to Ms. Narr and Mr.
26 Armstrong because they represent a fair award given the time and effort they expended
27 on behalf of the Class, the risk entailed in pursuing a class action, putting the interests of
28 their co-workers and other non-exempt Delta employees ahead of their own interests and

1 giving Delta a broader release than other Class Members. Narr Decl. ¶¶ 4-12; Armstrong
2 Decl. ¶¶ 4-12; Matern Decl. ¶¶ 61-64.

3 **G. Delta Does Not Oppose This Motion**

4 Delta does not oppose this motion. Dkt. 138-3, ¶ 6.3.2; Matern Decl. ¶ 66.

5 **IV. CONCLUSION**

6 Based on the foregoing, Plaintiffs respectfully request that the Court enter an order
7 awarding (1) Class Counsel attorney's fees in the amount of \$1,416,667.00; (2) Class
8 Counsel reimbursement of litigation costs in the amount of \$171,942.48 and (3) Class
9 Representative Service Payments to Plaintiffs LaDona Narr and Karl Armstrong in the
10 amount of \$10,000.00 each.

11 DATED: September 28, 2017

Respectfully submitted,

12 **MATERN LAW GROUP, PC**
13 Matthew J. Matern
14 Dalia R. Khalili
Matthew W. Gordon

15 **ALTSCHULER BERZON LLP**
16 James M. Finberg
17 Eileen B. Goldsmith
Eric P. Brown

18 By: /s/ Matthew J. Matern
19 Matthew J. Matern

20 Attorneys for Plaintiffs
REYNALDO LOPEZ et al.