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San Francisco County Superior Court
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SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN FRANCISCO

DEPARTMENT 304

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| UFCW & EMPLOYERS BENEFIT TRUST, *et al.*,<br><br>Plaintiffs,<br><br>v.<br><br>SUTTER HEALTH, ET AL.,<br><br>Defendants. | Case No. CGC-14-538451<br><br>Consolidated with<br><br>Case No. CGC-18-565398<br><br>ORDER RE PLAINTIFFS' COUNSEL'S JOINT MOTION FOR ATTORNEYS' FEES, COSTS, AND SERVICE AWARD |
| PEOPLE OF THE STATE OF CALIFORNIA, ex rel. XAVIER BECERRA,<br><br>Plaintiff,<br><br>v.<br><br>SUTTER HEALTH,<br><br>Defendant. | |

The Court held the final approval hearing in this action on July 22, 2021. At the final approval hearing, the Court heard argument on the above-captioned motion.[1] UEBT, the lone class representative, objected, in part. No other objections or opposition to the above-captioned motion were submitted. The papers filed in connection with the above-captioned motion were counsel's moving papers, UEBT's objection, counsel's reply, UEBT's sur-reply, counsel's response thereto, and the Attorney General's August 2, 2021[2] response to a post-hearing order requesting clarification. (See July 22, 2021 Order, 2-3 [discussing consideration of sur-reply and response thereto]; Aug. 2, 2021 Order, 2.) Having considered the papers and argument submitted, and the file in this action, the Court orders as follows.

**I. Litigation Expenses**

Class Counsel seeks $13,146,557 in costs. (Motion, 39-40 [Class Counsel seeks reimbursement for $11,683,808 paid out of the Litigation Cost Fund and $1,462,749 paid out by individual firms].) The Attorney General seeks $8,161,954.74 in costs. (Compare Varanini Decl. ¶ 104; with Motion, 40.) No objection to either request was submitted. The Court provided a tentative ruling raising concerns with certain litigation expenses, constituting a relatively small proportion of the total costs. No oral argument on any of the litigation expenses was provided. Following oral argument, Plaintiffs' Counsel submitted a Second Amended Proposed Order representing that Class Counsel and the Attorney General would waive the costs implicated by the tentative ruling, which they calculated to constitute $66,020 for Class Counsel and $4,674.95 for the Attorney General, "[t]o obviate the need for further filings and to expedite final approval[.]" This submission notwithstanding, the Court enters the following ruling on the costs award based on the record that was presented.[3]

The Court awards Class Counsel $13,091,381.98 in litigation expenses[4] and the Attorney General $8,161,954.74 in litigation expenses, to be paid from the common fund. As to the amounts awarded, the

[1] The Court provided the parties a written tentative ruling prior to oral argument.
[2] Plaintiffs' Counsel also refiled three previously-filed declarations, with appropriate attestations, on August 2, 2021.
[3] It is unclear how Class Counsel calculated the amount of costs that was implicated by the tentative ruling. In any event, the Court notes that the reductions below are less significant than those to which Class Counsel assented. The Court enters an award of litigation costs that is reasonable and fair based on the record before it, without the need for further filings or argument.
[4] This reflects a reduction of $55,175.02.

Court finds the request well-supported by the evidence and argument submitted.[5] As to the amounts that are denied, the Court finds the request inadequately supported for the reasons that follow.[6]

**A. Meals**

Class Counsel and the Attorney General seek reimbursement for various meals. These include meals while traveling, "business" meals, catered meals at the temporary trial office, and groceries for the temporary trial office. (See Bird Decl., Exs. 19-21; Grossman Decl., Exs. 19, 22; Grossman-Swenson Decl., Ex. 7 at Tables 4-5; Ruan Decl., Exs. 1, 10; Taylor Decl., Exs. 7, 9; Varanini Decl. ¶ 114(c), Ex. 6.)[7] Implicitly acknowledging that there must be some limits on the amount of money that may be reimbursed for meals from the common fund, the firms have capped the amount they seek to have reimbursed on a per-person per-meal basis at various levels.

Counsel argues that the meal expenses sought are properly reimbursed from the common fund because fee-paying clients would normally pay for such costs. (Motion, 38-39.)[8] Three of the declarations address whether a fee-paying client would reimburse the expenses sought. (See Grossman-Swenson Decl. ¶ 41; Grossman Decl. ¶ 85; Taylor Decl. ¶ 8.) Each of the declarations shares a common organization. The declarations listing several broad categories of costs, including, as relevant to the meal expenses, "travel" and "business meals." (See Grossman-Swenson Decl. ¶ 41; Grossman Decl. ¶¶ 84-85; Taylor Decl. ¶¶ 7-8.) The list is followed by a paragraph to the general effect that fee-paying clients pay the same categories of costs. (See Grossman-Swenson Decl. ¶¶ 40-41; Grossman Decl. ¶ 85; Taylor

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[5] As counsel argues, reimbursement of the litigation costs from the common fund is rooted in equity. (See Motion, 38; *Serrano v. Priest* (1977) 20 Cal.3d 25, 35 [explaining the "common fund" exception to the "American rule" regarding attorneys' fees]; *Earley v. Superior Court* (2000) 79 Cal.App.4th 1420, 1436 [articulating "equitable theory" that "it is only fair that the plaintiff require the passive beneficiaries to bear a fair share of the litigation expenses" "when a winning plaintiff bears the costs of attorney's fees in creating a fund that benefits others"]; see also *In re High-Tech Employee Antitrust Litigation* (N.D. Cal. Sept. 2, 2015) 2015 WL 5158739, at *16 ["In common fund cases, the Ninth Circuit has stated that the reasonable expenses of acquiring the fund can be reimbursed to counsel who has incurred the expense"].)

[6] The Court raised concerns regarding each of the items as to which recovery of costs is denied in its written tentative ruling. Counsel did not address the issues at oral argument.

[7] The moving declarations filed by Daniel A. Small, Daniel G. Bird, and Matthew Ruan were refiled with attestations that comply with Code of Civil Procedure § 2015.5 on August 2, 2021.

[8] The Court generally agrees with counsel's premise that the litigation costs a fee-paying client would reimburse are analogous to the costs that are properly awarded from the common fund to reimburse counsel for the reasonable expenses incurred in generating the common fund. (See *Carlin v. DairyAmerica, Inc.* (E.D. Cal. 2019) 380 F.Supp.3d 998, 1023-24 [cost award should be limited to typical out-of-pocket expenses that are charged to a fee-paying client and should be reasonable and necessary].)

Decl. ¶ 8.)

Of the three, the Grossman-Swenson Declaration provides the strongest support for the proposition that the firms ordinarily seek reimbursement for meal expenses from fee-paying clients in the same way that they are seeking reimbursement here. Ms. Grossman-Swenson declares that it "is MSH's standard practice to charge the firm's paying clients for these types of costs in the same way that they were billed to the Class" with respect to the categories of costs claimed. (Grossman-Swenson Decl. ¶ 41.)[9] The Grossman Declaration is vague. There Mr. Grossman declares that it "is Pillsbury's standard practice to charge regularly paying clients for these types of costs" with respect to a set of broadly defined categories of costs. (Grossman Decl. ¶ 85.) The Taylor Declaration is the weakest of the three. After using language functionally equivalent to the language in the Grossman Declaration, Mr. Taylor provides an excerpt from his firm's retainer template that lists, without limitation, certain costs that it invoices to fee-paying clients. (Taylor Decl. ¶ 8.) The list does not include meal expenses. (*Ibid.*)

On this record, counsel have not shown that the meal expenses identified here would be reimbursed by fee-paying clients or, relatedly, that the meal expenses claimed here are among the litigation expenses that should in equity be reimbursed from the common fund.[10]

Accordingly, the Court does not award reimbursement of the expenses for "business meals." This results in a reduction of $22,371.82 to Class Counsel's requested cost award. It does not impact the Attorney General's requested cost award, because the Attorney General did not request reimbursement for "business meals."

In light of the cases awarding reasonable meal expenses while traveling, the Court will award meal expenses as a component of travel expenses subject to a reduction, which takes into account: (1) The

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[9] Notably, Ms. Grossman-Swenson's definition of a "business meal" is much narrower than that of Mr. Grossman and Mr. Taylor. (Compare Grossman Swenson Decl. ¶ 41(d); with Grossman Decl. ¶ 92; Taylor Decl. ¶ 19.) The Court finds the record with respect to business meals particularly unsatisfactory. For example, Mr. Grossman's invoices for "business meals" include a $544.24 dinner with an unspecified number of members of the "co-counsel team" with no stated business purpose. (See Grossman Decl., Ex. 22.)

[10] Trial courts have, to be sure, awarded reimbursement of meal expenses from common funds. (See, e.g., *Carlin*, 380 F.Supp.3d at 1023-24 [noting that costs reimbursed from the common fund can include meals, hotels, and transportation]; *Bellinghausen v. Tractor Supply Co.* (N.D. Cal. 2015) 306 F.R.D. 245, 265 [same]; *Ridgeway v. Wal-Mart Stores Inc.* (N.D. Cal. 2017) 269 F.Supp.3d 975, 1002 [granting reimbursement of meal expenses, in reduced amount].)

Court's conclusion that the common fund should not pay the cost of providing all meals, including catered meals and groceries, to the members of the out-of-town trial team that worked out of a temporary trial office;[11] (2) The lack of evidence to support the inference that the caps on per-person per-meal expenses are reasonable, including the difference in practice between the Attorney General's Office and other Class Counsel;[12] (3) The frequency with which the reimbursements requested are at the self-imposed caps; and (4) Instances of inadequate explanation.[13] Accordingly, the Court reduces the claimed travel and trial expenses by $20,843.27 to account for the Court's determinations regarding meal expenses, a reduction that effectively awards Class Counsel approximately $10,000 in meal expenses to provide reasonable reimbursement for meals while traveling.[14] The Court awards the Attorney General $4,674.94, the full amount sought, in meal expenses. (Varanini Decl. ¶ 114(c).) This reflects the much lower caps set on meal reimbursements by the Attorney General's Office as well as the absence of the particular issues identified above with respect to Class Counsel's request. (See *ibid.*)

**B. Commute Costs**

Some of the firms have requested reimbursement of commuting costs. (Bird Decl., Ex. 20; Ruan Del., Ex. 9; Taylor Decl. ¶ 20.) This is composed of (1) regular local commutes on days when overtime

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[11] Due to the inclusion of out-of-state counsel on the trial team, Class Counsel undertook substantial expenses in leasing and furnishing temporary office space and housing staff in anticipation of, and in the time running up to, the anticipated trial in this action. (See, e.g., Bird Decl. ¶¶ 176-179, Ex. 20.) Pursuant to this order, the Court finds it equitable and reasonable for much of this cost to be borne by the common fund. However, the Court does not find it equitable and reasonable for the common fund to bear the cost of feeding all out-of-state members of the trial team, plus some witnesses and clients, for the duration of the time period out-of-state members of the trial team had relocated their offices – including all meals, in-office catering, and groceries. (See *id.* at ¶ 179, p. 62 n.14, Ex. 20.) The meals, catering, and groceries for the trial team over a two-week period accounts for $13,287.99 by itself, more than one-third of the total request for reimbursement of travel meal expenses by all firms combined. (*Id.* at Ex. 20.)

[12] Several, but not all, of the firms that served as Class Counsel refer to voluntarily capping the amount for which they seek reimbursement with respect to travel meals. (See Grossman-Swenson Decl. ¶ 41(c) [referring to a $30 cap on travel meals]; Taylor Decl. ¶ 16(c) [caps of $30 per meal on dinner, $20 per meal on breakfast and lunch]; Bird Decl. ¶ 180 [same caps as Taylor Declaration]; Ruan Decl. ¶ 15 [same caps as Taylor Declaration]; but see Grossman Decl. ¶ 89, Ex. 19 [not referring to such a cap, seeking reimbursement for, inter alia, a $97 dinner for one attorney].) The caps imposed by the Attorney General's Office, which are a matter of office practice as opposed to unilaterally adopted without explanation for the purpose of this fee motion, are $18 per dinner, $10 per lunch, and $6 per breakfast. (Varanini Decl. ¶ 114(c).)

[13] See, e.g., Grossman Decl., Ex. 19 [seeking $385.63 as "Business Travel" expenses for $385.63 to cover unspecified number of "meals" with unspecified number of "UEBT attys."; seeking $484.37 to cover unspecified meals during mediation].)

[14] Class Counsel have not in all instances aggregated the expenses attributed to travel meals. The Court has quantified this reduction based on a review of the records provided by Class Counsel.

was worked; and (2) commutes between a temporary residence – a hotel – and a temporary office – an office leased on a short-term basis – while the office was temporarily relocated due to trial. (Bird Decl., Ex. 20; Ruan Decl., Ex. 9; Taylor Decl. ¶ 20.) Counsel have not provided persuasive evidence supporting the reimbursement of these commuting expenses from the common fund. Accordingly, the Court views these commuting expenses as overhead properly absorbed by counsel, not reimbursed from the common fund. (Compare *Ridgeway v. Wal-Mart Stores Inc.* (N.D. Cal. 2017) 269 F.Supp.3d 975, 989 [in the context of assessing whether time was properly included in the lodestar, stating that commute should be absorbed into counsel's overhead].) As a result, the Court denies $7,857.93 of the "local travel" costs claimed by Class Counsel.[15]

**C. Tips**

The travel expenses claimed by one firm include tips, both in connection with hotel stays and transportation services. (Ruan Decl., Ex. 10.) While the Court does not discourage tipping, the Court is not persuaded that counsel should be reimbursed for the tips they voluntarily paid from the common fund. Accordingly, the Court denies $270 of the travel costs to account for this practice.[16]

**D. Long-Distance Calling**

To the extent long-distance calling expenses were incurred in case-related calls, the Court intends to award reimbursement. With respect to one firm, long-distance calling expenses appear on hotel invoices. (Bird Decl., Ex. 22.) The record does not support the inference that these calls are case-related. Accordingly, the Court will not reimburse this expense. This reduces the requested cost award by $112.34.

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[15] First, with respect to the Ruan Declaration, the Court has distinguished between local transportation to attend a deposition, which is awarded, and local transportation to attend an ABA conference and overtime transportation home, which is not awarded. (See Ruan Decl., Ex. 9.) Second, with respect to the Taylor Declaration and the Bird Declaration, lumped cost requests have precluded the Court from distinguishing between local travel costs that the Court would otherwise award and local commute costs, such that the Court finds denying the entire lumped request reasonable. (See Taylor Decl. ¶ 20; Bird Decl., Ex. 20 [$3,051.98 for daily transportation to and from the trial office, court, and hotel].)

[16] Pursuant to the Court's review of the time cost request, $251.62 are described as tips. However, there are several other entries that appear consistent with the firm's tipping practices (i.e., $1 payments for private transportation), the purpose of which is not clearly identified. The Court infers that there are several other tips that were not adequately described. Accordingly, the Court finds a reduction of $270 reasonable.

### E. Laundry/Dry Cleaning

Two firms request reimbursement for laundry and/or dry-cleaning expenses. (Bird Decl., Ex. 22; Ruan Decl., Exs. 10-11.) Counsel did not adequately explain why these expenses should be reimbursed from the common fund. Accordingly, the Court denies reimbursement of $2,638.25.

### F. Office Supplies

One firm seeks reimbursement for unspecified office supplies. (Bird Decl., Ex. 20.) Counsel have not explained why the cost of unspecified office supplies should be borne by the common fund. Accordingly, the Court denies reimbursement of $435.37 from the common fund.

### G. Wi-Fi and Hotspots

Class Counsel seek reimbursement for (1) in-flight Wi-Fi; and (2) a data plan that provided hotspots during the anticipated trial. (See Grossman Decl., Ex. 19; Ruan Decl., Exs. 10-11.) In both instances, it is unclear what the purchased services were used for – i.e., whether it was used to perform work on this case, work on other cases, and/or for some other purpose.[17] Accordingly, the Court is not persuaded that the items should be reimbursed from the common fund. The Court denies reimbursement of $646.04 from the common fund.

## II. Attorneys' Fees

The Court awards Class Counsel $152.375 million in fees and the Attorney General $11.5 million in fees.[18]

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[17] There is free public Wi-Fi at the courthouse, so it is not facially obvious that the data plan was intended to provide internet access to counsel while in court at trial.

[18] Through the Proposed Order, Plaintiffs' Counsel asked the Court to include a provision granting them interest on the fee award pursuant to Section III(A)(6) of the Settlement Agreement. (See Proposed Order, 2; Amended Proposed Order, 2-3, 3 n.1; Second Amended Proposed Order, 3, 3 n.4.) Section III(A)(6) of the Settlement Agreement provides: "Half of the interest earned by the Settlement Fund in the Account during the period between the deposit of the Settlement Fund into the Account and the Effective Date shall be for the benefit of Defendants, and shall be paid to Sutter Health, and half of such interest shall be for the benefit of the Class and shall become part of the Settlement Fund. Interest earned by the Settlement Fund in the Account after the Effective Date shall be for the benefit of the Class. Defendants shall have no liability, obligation or responsibility for any taxes on interest earned by the Settlement Fund that is for the benefit of the Class or for any reporting requirements relating to such interest. ..." First, the Settlement Agreement clearly provides that interest earned by the Settlement Fund in the Account during the period between the deposit of the Settlement Fund into the Account and the Effective Date shall be half for Defendants and half for the Class and interest earned by the Settlement Fund in the Account after the Effective Date shall be for the benefit of the Class – none of the interest goes to Class Counsel. On that basis alone, the request for interest is denied. Second, the implicit thrust of Plaintiffs' Counsel's argument seems to be that because counsel is seeking a percentage of the common

### A. Framework

Counsel seek fees pursuant to a percentage of the recovery analysis, cross-checked by a lodestar multiplier analysis. This is a permissible approach in California. (*Laffitte v. Robert Half Intern. Inc.* (2016) 1 Cal.5th 480, 503-06; *Karton v. Ari Design & Construction, Inc.* (2021) 61 Cal.App.5th 734, 745.)

Pursuant to the percentage method, courts calculate the fee as a percentage share of a recovered common fund or the monetary value of the plaintiffs' recovery. (*Laffitte*, 1 Cal.5th at 489.) Broadly, the benefits of the percentage method include the alignment of incentives between class and counsel and ease of application. (*Id.* at 490, 503.) However, as relevant here, courts have expressed concern that the application of the percentage method to a very large class settlement can result in a windfall for class counsel. (*Id.* at 490, 495-96.)

Pursuant to the lodestar-multiplier method, courts calculate the fee by multiplying the number of hours reasonably expended by counsel by a reasonable hourly rate, increased or decreased by applying an upward or downward multiplier to account for a variety of other facts, such as the quality of the representation, the novelty and complexity of the issues, the results obtained, and the contingent risk presented. (*Id.* at 489; see also *Karton*, 61 Cal.App.5th at 745 [no established criteria calibrate the precise size and direction of the multiplier, thus implying considerable deference to trial court decisionmaking about attorney fee awards].) This method focuses on the amount of work done, rather than the results achieved. (*Laffitte*, 1 Cal.5th at 489.) It has been praised for providing accountability and encouraging attorneys to secure marginal increases in recovery, but criticized for discouraging early settlement and consuming too large an amount of judicial resources in its application. (*Id.* at 489-90.)

In *Laffitte*, the California Supreme Court upheld the application of the percentage method cross-checked by a lodestar multiplier analysis. (See *Laffitte*, 1 Cal.5th at 503-06; see also *Karton*, 61

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fund and because interest will be added to the common fund, Plaintiffs' Counsel should take a proportional percentage share of the interest accrued by the common fund. But the fee request is, and was noticed as, a request for a sum certain, justified pursuant to the percentage method cross-checked by a lodestar-multiplier analysis. (Taylor Decl., Ex. 11 at 1, 8, 14; Motion, 34-35 n.31, 35 [Attorney General is seeking $11.2 million; Class Counsel is seeking $172.5 million]; Varanini Decl. ¶ 16; Response to Order for Clarification, 1 [clarifying that Attorney General is seeking $11.5 million].) The Court finds no basis to alter the Settlement Agreement. Interest will be apportioned as provided for in Section III(A)(6).

Cal.App.5th at 745.) The *Laffitte* Court stated that "empirical studies show that the percentage method with a lodestar cross-check 'is the most prevalent form of fee method' in practice." (*Laffitte*, 1 Cal.5th at 496-97 [citation omitted].) Applying a lodestar cross-check to a percentage of the recovery fee provides a mechanism for bringing an objective measure of the work performed into the calculation of a reasonable attorney fee. (*Id.* at 504.)

"[T]rial courts conducting lodestar cross-checks have generally not been required to closely scrutinize each claimed attorney-hour, but have instead used information on attorney time spent to 'focus on the general question of whether the fee award appropriately reflects the degree of time and effort expended by the attorneys.' [Citations.] The trial court in [*Laffitte*] exercised its discretion in this manner, performing the cross-check using counsel declarations summarizing overall time spent, rather than demanding and scrutinizing daily time sheets in which the work performed was broken down by individual task. Of course, trial courts retain the discretion to consider detailed time sheets as part of a lodestar calculation, even when performed as a cross-check on a percentage calculation." (*Laffitte*, 1 Cal.5th at 505.) "If the multiplier calculated by means of a lodestar cross-check is extraordinarily high or low, the trial court should consider whether the percentage used should be adjusted so as to bring the imputed multiplier within a justifiable range, but the court is not necessarily required to make such an adjustment. Courts using the percentage method have generally weighed the time counsel spent on the case as an important factor in choosing a reasonable percentage to apply." (*Ibid.*)

Pursuant to the Court's discretion under *Laffitte*, the Court will analyze the fee request as a percentage of the recovery fee request, subject to a lodestar-multiplier cross-check.

**B. The Total Fee Request as a Percentage of the Recovery**

The combined fee request is for 32% of the common fund.[19] This percentage is within the

[19] Objecting to the fee request, UEBT argues that the fee request should be conceptualized as a percentage of the common fund after a deduction of litigation costs. But, of course, counsel would request the same amount of money as fees even if it were viewed as, for example, 33.3% of the common fund after a deduction of litigation costs. Such a request would also be within the reasonable range. The utility of conceptualizing the fee request as a percentage of the common fund is that it permits a comparison across cases. The Court is satisfied that conceptualizing the fee request as a percentage of the common fund better facilitates that approach because it is in line with the approach taken in *Laffitte* and other cases. (See *Laffitte*, 1 Cal.5th at 486, 506; Footnote 16, *infra*.)

reasonable range, albeit toward the higher end of the range.[20] The factors the Court considers in assessing whether the fee request is reasonable in this case are detailed in more length in the Court's discussion of the lodestar cross-check,[21] below.[22]

### C. The Attorney General's Fee Request

The Attorney General seeks an award of $11.5 million, 2% of the common fund. (See Response to Order for Clarification, 1.) The Court finds the hourly rates claimed by the Attorney General's Office reasonable in view of the experience of counsel. (See Varanini Decl. ¶¶ 13-16, Ex. 1.) The Court finds that the reasonable hours worked support the fee request based on the Varanini Declaration and the Court's oversight of this litigation. (See Varanini Decl. ¶¶ 16-103.)[23] The Court finds that it is

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[20] Requests for up to one-third of the common fund are common in this department and in California state court. (See *Laffitte*, 1 Cal.5th at 486-88, 506 [affirming 1/3 fee award]; *Ha v. Google Inc.* (Cal. Super. Ct. Feb. 7, 2018) 2018 WL 1052448, at *2 ["1/3 of the gross settlement . . . is not an uncommon contingency fee allocation"]; see also *Thomas v. Universal Home Care, Inc.* (Cal. Super. Ct. Jan. 11, 2018) 2018 WL 1751693, at *5 ["Empirical studies show that, regardless whether the percentage method or the lodestar method is used, fee awards in class actions average around one-third of the recovery"] [quoting *In re Consumer Privacy Cases* (2009) 175 Cal.App.4th 545, 558 n.13].) In *Laffitte*, the California Supreme Court described an approach taken by certain federal courts, including those sitting in California, whereby 25% of the common fund is presumptively reasonable subject to an upward or downward adjustment to account for the circumstances of the case. (See *Laffitte*, 1 Cal.5th at 495 [collecting cases].) However, California courts have not adopted a similar benchmark approach. The Court calls attention to the Ninth Circuit's benchmark, in particular, because it covers the geographic region that includes this Court. Nevertheless, the Court is satisfied that the percentage award requested is within the reasonable range, subject to a consideration of case-specific circumstances.

[21] There is substantial overlap in the factors courts consider in fixing an appropriate percentage and in adjusting the lodestar cross-check with an appropriate multiplier. (See *Laffitte*, 1 Cal.5th at 489, 504-05 [(1) applying percentage method, (a) court carefully considered the information on contingency, novelty, and difficulty together with the skill shown by counsel, the number of hours worked and the asserted hourly rates, and (b) time spent has generally been treated as an important factor in choosing a reasonable percentage to apply – lodestar cross-check provides an objective measure of time spent; and (2) in lodestar-multiplier analysis, multiplier takes into account a variety of factors, including the quality of the representation, the novelty and complexity of the issues, the results obtained, and the contingent risk presented].) Moreover, the lodestar cross-check itself is a factor courts consider in fixing an appropriate percentage. (See *id.* at 496-97, 503-06.) Accordingly, the Court takes up those factors once, below.

[22] To the extent there is any suggestion that the Court should adopt a sliding-scale approach to fix the proper percentage of the recovery whereby the percentage of the recovery presumptively decreases as the settlement value increases to guard against a windfall, the Court declines the invitation. The *Laffitte* Court observed that some federal courts engage in the practice, but neither objected or rejected the approach. (See *Laffitte*, 1 Cal.5th at 495-96, 496 n.5.) In the Court's view, the best approach to assess the reasonableness of the fee sought pursuant to a percentage-of-the-recovery request is the approach expressly authorized by *Laffitte*, using a lodestar-multiplier cross-check. (See *id.* at 504-06; see also *High-Tech Employee*, 2015 WL 5158730 at *6-*8.) This approach will adequately guard against a windfall.

[23] The Attorney General's Office calculates the base lodestar at $14,639,182.50, more than $3 million in excess of the fee request. Accordingly, the Court need not find that every hour claimed by the Attorney General's Office was reasonably expended. The Court finds, instead, that the reasonable hours worked

reasonable to use the base lodestar without adjustment upward or downward, as requested by the Attorney General's Office.[24] Accordingly, the lodestar cross-check supports the Attorney General's fee request.

**D. Class Counsel's Fee Request**

Class Counsel requests a fee of $172.5 million, 30% of the common fund. (Motion, 35; Reply, 34.) In an unusual turn of events, UEBT, as Class Representative, objects to the fee request. In addition to specific challenges to the fee request, UEBT raised a more general challenge to the credibility of counsel. The primary foundation for this credibility challenge, which became a focal point of the July 22, 2021 hearing, was a comparison of statements Mr. Grossman, lead counsel, made to UEBT and representations Class Counsel made to the Court in support of the present fee request. The Court finds that the record before it does adversely impact Mr. Grossman's credibility and takes that credibility finding into account in considering the present fee request.[25] For all of the reasons that follow, including a consideration of the fee request and UEBT's objection, the Court awards fees in the amount of $152,375,000.

**1. Credibility**

The following facts adversely impact Mr. Grossman's credibility.

In the spring of 2011, Mr. Grossman read an article in the San Francisco Chronicle describing an economic analysis describing an inexplicably large difference between the cost of healthcare between Northern California and Southern California. (RT 56:2-12.) This piqued Mr. Grossman's interest

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are sufficient to support the Attorney General's fee request in the broader framework of the Court's analysis.

[24] As discussed with respect to Class Counsel, this is a case where, at least for Class Counsel, an upward adjustment is appropriate. The Attorney General's Office does not request any multiplier. (Varanini Decl. ¶ 15.) Implicitly, at least, this constitutes a request not to use the multiplier to adjust the fee downward. From the Attorney General's perspective, suit was filed only after a private enforcement action had obtained class certification. The Attorney General targeted consolidation with the private enforcement action, a strategy that reduced the risk and expense borne by the office. While the incentive structure applicable to public enforcement is also somewhat different from the incentive structure applicable to private enforcement, the Attorney General's Office provided a substantial contribution to Class Counsel's efforts on behalf of the class, generating high quality work with no guarantee that the investment of public resources would be reimbursed in securing a strong result on behalf of the class. Accordingly, the Court is satisfied that the multiplier should not be used to adjust the base lodestar downward with respect to the Attorney General.

[25] The Court has also considered credibility issues with respect to other requests, including the request for reimbursement of costs.

because he had been involved in two prior cases involving alleged anticompetitive behavior by Sutter Health in the San Francisco area. (*Ibid.*) Shortly after reading the article, Mr. Grossman attended a public hearing conducted by the San Francisco Board of Supervisors regarding the high costs of healthcare in the Bay Area during which some of the testifying witnesses suggested that the higher cost of healthcare in Northern California may be attributable to rumored anticompetitive conduct by Sutter. (*Id.* at 56:12-24.) During the hearing, Mr. Grossman met with a potential client that asked him to look into the alleged anticompetitive conduct discussed at the hearing. (*Id.* at 56:20-24.)

In 2012, reports began to come out about a California Attorney General antitrust investigation into the business practices of certain California hospitals. (*Id.* at 56:25-57:2.) In particular, a September 13, 2012 Wall Street Journal report disclosed that the California Attorney General's Office had subpoenaed several big hospital operators in California, including Sutter. (*Id.* at 57:3-21.)

On several occasions, the dates of which are broadly described as occurring between the Board of Supervisors hearing and the filing of the complaint in this action, Mr. Grossman met lawyers from the antitrust section of the California Attorney General's Office. (*Id.* at 57:22-58:5.) One of the early in-person meetings was initiated by Mr. Grossman on behalf of the potential client he met at the Board of Supervisors hearing. (*Ibid.*) At the time of that meeting, Mr. Grossman was aware of public reports of an investigation in which multiple subpoenas were issued. (*Id.* at 58:14-16.) Counsel for the Attorney General confirmed those publicly reported facts – that is, a lawyer from the Attorney General's Office told Mr. Grossman that the Attorney General was conducting an investigation pursuant to which subpoenas had been issued to healthcare providers as reflected in public reports – and represented that the Attorney General had taken a personal interest in the problems within the California healthcare market. (*Id.* at 58:14-23.) Based on the balance of the proceedings, Mr. Grossman concluded that his potential client was being interviewed as part of the ongoing investigation. (*Id.* at 58:24-59:3.) In the time that followed, Mr. Grossman asked whether the Attorney General intended to file an enforcement action but was told that the Attorney General's Office could not discuss whether it intended to file an enforcement action. (*Id.* at 59:22-60:3.)[26]

[26] It is unclear what other matters were discussed in Mr. Grossman's ongoing communications with unspecified lawyers from the Attorney General's Office, but it is apparent that Mr. Grossman found the

In the fall of 2013, Mr. Grossman began meeting with UEBT. (*Id.* at 59:4-8.) At the time, Mr. Grossman was attempting to persuade UEBT to retain him to pursue antitrust claims against Sutter. (See Whitehead Sur-Reply Decl. ¶¶ 3-7.) In an October 2013 memorandum Mr. Grossman sent to UEBT, Mr. Grossman wrote:

> *At my urging*, the antitrust division of the California Attorney General commenced as investigation last fall into the California healthcare market – focusing, in particular, on the conduct of Sutter Health. Multiple subpoenas were issued, witnesses have been interviewed and *thousands of documents have been produced. Based upon the evidence already discovered, the [AG] has taken a personal interest in the issue and has committed more resources to this investigation than any other.*

(*Id.* at ¶ 4 [italics added].)

Mr. Grossman has not denied that he made the representations reflected in the memorandum to UEBT in October 2013. Rather, Mr. Grossman said in Court that all representations in the memorandum are true. (RT 68:14-15.) But the representations that Mr. Grossman made to UEBT and the representations Mr. Grossman made to the Court cannot both be true.

In the excerpt from the memorandum quoted above, Mr. Grossman said that the California Attorney General initiated its investigation at his urging. In Court, Mr. Grossman said that he learned about the Attorney General's investigation from news reports, had the fact of the investigation confirmed to him point blank by a lawyer from the Attorney General's Office, and personally understood that his potential client had been interviewed by the Attorney General's Office in the course of an ongoing investigation in his presence before he told UEBT that the Attorney General commenced its investigation at his urging.

In the excerpt from the memorandum quoted above, Mr. Grossman provided specific details about the progress of the Attorney General's investigation. In Court, Mr. Grossman denied having knowledge of the specific details about the progress of the Attorney General's investigation. (See *id.* at 62:22-63:8.) However, when pressed Mr. Grossman conceded that at least one of the representations he made in the memorandum was based on unidentified meetings with an unidentified representative of the Attorney General's Office because he had no other basis for knowing that information. (See *id.* at 68:16-23.)

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communications sufficiently beneficial that he continued to communicate with lawyers from the office.

The Court is not troubled merely by Mr. Grossman's misrepresentation to UEBT or his apparent access to the Attorney General's Office, but by representations made to the Court in connection with the present motion. Before UEBT filed the Whitehead Declaration, Class Counsel represented to the Court that Class Counsel "had no reason to believe" that the Attorney General would ever file suit against Sutter for antitrust violations when Class Counsel initiated this action. (Reply, 9; see also Grossman Reply Decl. ¶ 11 [declaring, before the Whitehead Declaration was filed, that UEBT's argument that the present action was founded on the Attorney General's pre-existing investigation "lacks any basis in fact"].) Class Counsel made these representations in an effort to persuade the Court to find a disputed fact material to the present motion in their favor – i.e., to find that the case presented a high degree of risk from the perspective of Class Counsel when it was filed. In so doing, Class Counsel obfuscated the fact that Class Counsel had inside access to the Attorney General's decision-making, inside information about the scope of the ongoing investigation, and legal advice from lawyers at the Attorney General's office regarding the legal validity of their claims. (See Whitehead Sur-Reply Decl. ¶¶ 3-7; RT 62:11-21.)

The Court considers these credibility concerns in evaluating the evidence and the factors that it must evaluate to fix a reasonable fee.

**2. Percentage of the Recovery**

As noted above, the combined fee request is within the reasonable range of a percentage of the recovery. Necessarily, Class Counsel's share of the fee request is also within the reasonable range of a percentage of the recovery. The Court takes up the question of whether the precise percentage sought is appropriate in this case below. (See *Laffitte*, 1 Cal.5th at 504 [trial court properly determined that fee request was for a reasonable percentage of the settlement fund in the specific case by carefully considering the information on contingency, novelty, and difficulty, together with the skill shown by counsel, the number of hours worked, and the asserted hourly rates].)

**3. Lodestar-Multiplier Cross-Check**

**a. Reasonable Hourly Rates**

A large number of attorneys employed and/or contracted by Class Counsel worked on this case. (See Wheeler Decl. ¶¶ 296-329; Grossman Decl. ¶¶ 37-48, 51; Grossman-Swenson Decl. ¶¶ 10-35; Small

Decl. ¶¶ 8-37; Bird Decl. ¶¶ 9-49.) In this order, the Court does not identify each attorney or list each attorneys' hourly rate or experience. Based on the record presented, the Court is satisfied that the hourly rates claimed here are within the reasonable range, taking into consideration the skill and experience of counsel.

First, UEBT contends that some of the attorneys have unreasonably high billing rates. (UEBT Objection, 32-34.) The Court agrees that some attorneys have high billing rates, but finds those billing rates to be within the reasonable range pursuant to the skill and experience of counsel, including the skill demonstrated in the prosecution of this action. However, the Court is mindful of the extent to which the billing rates already include a premium for the skill and experience of counsel in fixing the multiplier, as any further upward multiplier for skill and experience should be justified based on work that demonstrates greater skill and/or experience than other attorneys billing at the same, or roughly the same, rates, else counsel will be doubly compensated for their skill and experience. (See *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1142 ["We are also concerned that the substantial enhancement herein purportedly based on exceptional quality of representation may have included improper double counting. ... By using counsel's qualifications and the submitted declarations to justify both the hourly rate and the multiplier, the court appears to have counted the same factor twice"].)

Second, UEBT contends that Class Counsel should only be permitted to seek recovery of services rendered by contract attorneys at cost, rather than at rates of up to $200 per hour. (*Id.* at 33-34.) The Court, however, is satisfied by the evidence supporting the proposition that firms in the relevant market bill fee-paying clients for contract attorney work at rates higher than firms pay the contract attorneys, including evidence supporting the proposition that $200 per hour for contract attorney work is reasonable. (See Wheeler Decl. ¶ 322 n.6; Grossman Del. ¶ 51; Small Decl. ¶¶ 44, 46 n.5.) Accordingly, the Court finds UEBT's argument, which is not supported by evidence,[27] unpersuasive.

Third, UEBT flags that Class Counsel's hourly rates are increased because Class Counsel used

[27] UEBT relies on *In re Wells Fargo & Co. Shareholder Derivative Litigation* (N.D. Cal. 2020) 445 F.Supp.3d 508, 531. But that District Court ruling was expressly premised on the "simpl[e]" conclusion that counsel failed to produce satisfactory evidence that the requested rates for contract attorneys were in line with those prevailing in the community. (*Wells Fargo*, 445 F.Supp.3d at 531.) The Court finds the evidence before it sufficient.

2020 billing rates. (UEBT Objection, 24.) UEBT acknowledges that the rationale provided by Class Counsel is that the use of increased 2020 hourly rates for litigation that was filed in 2014 compensates Class Counsel for having to wait for payment. (*Ibid.*; Motion, 31-32 n.22 [collecting cases for the proposition that "California Supreme Court precedent supports calculating the lodestar at current rates to compensate for delay in receipt of payment"].) UEBT describes the approach as generous but supportable, and does not object to the manner of computing the base lodestar outright. (UEBT Objection, 24.) The Court takes the impact of this practice into consideration in fixing the appropriate multiplier, below. (See, generally, *Ketchum*, 24 Cal.4th at 1142 [raising double-counting concerns regarding using the same factor to justify both the reasonableness of the hourly rates and an upward multiplier].)[28]

**b. Reasonable Hours Worked**

Class Counsel claims 194,642.6 hours in the lodestar. (Grossman Decl. ¶ 51 [21,846.60 hours]; Wheeler Decl. ¶ 330 [63,280.8 hours]; Bird Decl. ¶ 50 [44,357.25 hours]; Small Decl. ¶ 38 [48,840.75 hours]; Grossman-Swenson Decl. ¶ 35 [16,317.2 hours].) To demonstrate the reasonableness of these hours, Class Counsel prepared five declarations, one for each firm, providing task-based summaries of the work performed across seven discrete phases of this litigation. See Wheeler Decl. ¶¶ 13-291, 330-349, Exs. 16-23; Grossman Decl. ¶¶ 49-50, 58-72, Ex. 14; Grossman-Swenson Decl. ¶¶ 35, 42-56, Exs. 8-14; Small Decl. ¶¶ 38, 47-136; Bird Decl. ¶¶ 50, 56-165, Exs. 5, 7-11; see also Varanini Decl. ¶ 16-103.) As explained in more detail below, UEBT contends that the claimed lodestar is substantially inflated, such that the number of hours reasonably worked in this action is lower. (See, generally, UEBT Objection, 24.) For the reasons that follow, the Court concludes that the claimed hours are unreasonably high, and imposes a reasonable reduction.

First, the declarations provided by Class Counsel are an appropriate means of substantiating the number of hours reasonably worked for the purposes of a cross-check on the percentage of the recovery, although a court may request complete billing records. (*Laffitte*, 1 Cal.5th at 505 ["With regard to

[28] In the briefing, Class Counsel represent that the imputed multiplier sought is 1.67. (Motion, 35.) However, the imputed multiplier sought would be increased by .25, to 1.92, if historic billing rates were used. (*Id.* at 35 n.32.)

expenditure of judicial resources, we note that trial courts conducting lodestar cross-checks have generally not been required to closely scrutinize each claimed attorney-hour, but have instead used information on attorney time spent to 'focus on the general question of whether the fee award appropriately reflects the degree of time and effort expended by the attorneys.' [Citations.] The trial court in the present case exercised its discretion in this manner, performing the cross-check using counsel declarations summarizing overall time spent, rather than demanding and scrutinizing daily time sheets in which the work performed was broken down by individual task. Of course, trial courts retain the discretion to consider detailed time sheets as part of a lodestar calculation, even when performed as a cross-check on a percentage calculation."].)

Second, the particularized lines of attack UEBT drew in its objection do not, in themselves, substantially alter the analysis. The focal points of UEBT's objection to the reasonableness of the hours worked are (1) a challenge to block billing; and (2) a challenge to the extent of fees claimed for travel time, particularly non-productive travel time. (UEBT Objection, 24-32.) Block billing is not objectionable per se, though it creates a risk that the trial court, in a reasonable exercise of its discretion, will discount a fee request, particularly where there is a need to separate out work that qualifies for compensation from work that does not. (*Jaramillo v. County of Orange* (2011) 200 Cal.App.4th 811, 830; *Christian Research Institute v. Alnor* (2008) 165 Cal.App.4th 1315, 1325-26 [block billing is not objectionable per se, but may exacerbate vagueness of a fee request; block-billed time entries inflated with non-compensable hours destroy an attorney's credibility with the trial court]; see also *Bell v. Vista Unified School Dist.* (2000) 82 Cal.App.4th 672, 689 [apportionment of hours worked between certain causes of action was required, but block billed time entries made it impossible to make that apportionment]; *Sweetwater Union High School Dist. v. Julian Union Elementary School Dist.* (2019) 36 Cal.App.5th 970, 995-96 [rejecting challenge to fee award based on block billing].) Thus, while there was extensive block billing in this matter,[29] it is only material to the fee request to the extent there are

[29] The Court agrees that there was extensive block billing that makes it difficult to ascertain, from the billing records, how much time was spent on discrete tasks in the billing entries. For example, on 8/8/16, Alex J. Reese and Roderick M. Thompson of Farella billed 3.1 and 5.1 hours respectively. (Seib Decl., Ex. 4 at 01171.) These entries included participation on a call with the Court regarding subpoenas to Cigna. Reese's entry lists conferring with Thompson regarding the hearing as one of the tasks completed. There is no corresponding item for conferring with Reese in Thompson's list of tasks. Because both

additional issues with the fee request. To the extent that billing for travel time, or non-productive travel time, may constitute an underlying problem,[30] it does not appear to have been sufficiently extensive to have a large impact on the number of reasonable hours worked. (See Sella Decl., Ex. C.)

Third, the Court turns its focus to the declarations filed in support of the claimed lodestar, subject to the Court's familiarity with the litigation over which it has presided since early 2019. The seven phases of the case are as follows: (1) Initiation of Pre-Filing Investigation through Filing of the Complaint; (2) Filing of the Complaint through Remittitur from Court of Appeal; (3) Remittitur from Court of Appeal through Class Certification Order; (4) Class Certification Order through August 31, 2018 Scheduled Close of Fact Discovery; (5) Scheduled Close of Fact Discovery through Last *Sargon* Hearing; (6) Last *Sargon* Hearing through Dismissal of the Jury; and (7) Day after Dismissal of the Jury through Filing of Fee Motion. (See, e.g., Grossman Decl., Ex. 14.)

In Phase 1, Class Counsel claims 2,277.55 hours. (Grossman Decl. ¶ 59 [603 hours]; Wheeler Decl. ¶ 336 [1,083.3 hours]; Bird Decl. ¶ 56 [0 hours]; Small Decl. ¶ 47 [423.25 hours]; Grossman-Swenson Decl. ¶ 43 [168 hours].) Broadly,[31] the work performed during Phase 1 included investigating and evaluating the potential claims, consulting with potential experts, meeting and communicating with "representatives of the California Attorney General," preparing a preliminary damages analysis,

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entries are block billed, it is not possible to verify the accuracy of the discrete tasks, and associated times, by comparing the two entries against each other.

[30] In *Roe v. Halbig* (2018) 29 Cal.App.5th 286, 312-13, the Court of Appeal recently "observe[d] that attorney's fees for travel hours may be awarded if the court determines that they were reasonably incurred[,]" albeit in a different context. The parties have cited District Court opinions taking varying approaches. (Compare *Transbay Auto Service, Inc. v. Chevron U.S.A., Inc.* (N.D. Cal. Mar. 6, 2013) 2013 WL 843036, at *6-*7 [court has discretion to award or reduce travel time; awarding travel time in full, including block-billed travel time and time dedicated solely to travel]; with *Ridgeway*, 269 F.Supp.3d at 989-90 [distinguishing between occasional out-of-town case-related travel – which fee-paying clients regularly pay for – and commuting expenses that should be absorbed in counsel's overhead, characterizing some of the travel requested as commute time and some of the travel as compensable time, noting that block billing also occurred, and applying a 30% reduction to entries for travel time]; *Grace v. Apple, Inc.* (N.D. Cal. Mar. 31, 2021) 2021 WL 1222193, at *4 [finding that billing for non-productive travel time is categorically unreasonable].) This is a case where travel time was reasonably incurred, including to attend depositions and hearings. Accordingly, the Court finds it reasonable to compensate Class Counsel for at least a substantial portion of their travel time by including those hours in the lodestar calculation.

[31] The methodology pursuant to which the declarations were prepared, for each firm, is to list the tasks that were performed by each biller during the phase and to state the total number of hours that the biller worked during the phase. It is not easy to summarize the tasks that consumed more than 100,000 hours of attorney time, even if those tasks are separated into seven phases. Accordingly, sacrifices are made here for the sake of brevity.

evaluating the federal proceedings in *Sidibe* (a similar lawsuit against Sutter), evaluating the Alta Bates/Summit Hospital merger case pertaining to Sutter and another merger case not pertaining to Sutter, preparing a discovery plan and initial discovery requests, communicating with UEBT, and preparing, drafting, revising, and filing the lengthy complaint that served as the basis for this lawsuit. (See Grossman Decl., Ex. 14; Wheeler Decl. ¶¶ 13-17, Ex. 17; Small Decl. ¶¶ 49-53; Grossman-Swenson Decl., Ex. 8.)[32]

In Phase 2, Class Counsel claims 8,750.7 hours. (Grossman Decl. ¶ 61 [2,135.9]; Wheeler Decl. ¶ 338 [4,542.9 hours]; Bird Decl. ¶ 56 [0 hours]; Small Decl. ¶ 54 [1,099.5 hours]; Grossman-Swenson Decl. ¶ 45 [972.4 hours].) Broadly, the work performed in Phase 2 included continuations of the investigation, research, and discovery preparation in Phase 1, coordination of the work between counsel, preparation of jury instructions, commencement of initial discovery, defending against Sutter's motion to compel arbitration and subsequent appeal, resisting Sutter's efforts to initiate arbitration, monitoring an arbitration between Blue Shield and Sutter regarding UEBT's initiation of this action, litigating sealing issues, negotiating regarding Sutter's threat to terminate in-network pricing to workers covered by UEBT's healthcare benefits, and exploring the possibility of early settlement. (Grossman Decl., Ex. 14; Wheeler Decl. ¶¶ 18-56, Ex. 18; Small Decl. ¶¶ 56-60; Grossman-Swenson Decl., Ex. 9.)

In Phase 3, Class Counsel claims 39,770.1 hours. (Grossman Decl. ¶ 63 [4,931.3 hours]; Wheeler Decl. ¶ 340 [11,854.8 hours]; Bird Decl., Ex. 7 [6,417.2 hours]; Small Decl. ¶ 61 [12,576.5 hours]; Grossman-Swenson Decl. ¶ 47 [3,990.3 hours].) Broadly, the work performed in Phase 3 included extensive and contentious discovery and related motion practice, several case management conferences, development of expert reports, correspondence with the United States Department of Justice and the North Carolina Attorney General regarding an antitrust action against Carolinas Healthcare Hospital System that echoed the legal theories in this action, keeping abreast of the developments in *Sidibe*, preparation of briefing relating to and litigation pertaining to a demurrer, motion for judgment on the pleadings, motion for a protective order, and class certification motion, and time spent on sealing issues.

[32] It appears that involvement of four firms in the investigation and drafting process created some duplication of effort in terms of overlapping investigations, a large number of individuals becoming involved in the drafting process, and associated meetings.

(Grossman Decl., Ex. 14; Wheeler Decl. ¶¶ 57-93, Ex. 19; Bird Decl. ¶¶ 58-76; Small Decl. ¶¶ 63-75; Grossman-Swenson Decl., Ex. 10.)

In Phase 4, Class Counsel claims 61,150.45 hours. (Grossman Decl. ¶ 65 [7,578.55 hours]; Wheeler Decl. ¶ 342 [17,653.1 hours]; Bird Decl., Ex. 8 [13,725.65 hours]; Small Decl. ¶ 76 [18,337.25 hours]; Grossman-Swenson Decl. ¶ 49 [3,855.9 hours].)[33] Broadly, Phase 4 work included resolving the remaining sealing issues regarding class certification, attending to post-certification issues regarding the scope of the class definition, providing notice to the class, opposing Sutter's petition for writ review of the class certification motion, ongoing contentious discovery with related motion practice, ongoing case management conferences, ongoing efforts to develop a trial strategy and narrative, the development of expert reports, and consolidation with the People's action. (Grossman Decl., Ex. 14; Wheeler Decl. ¶¶ 94-145, Ex. 20; Bird Decl. ¶¶ 77-100; Small Decl. ¶¶ 78-96; Grossman-Swenson Decl., Ex. 11.)

In Phase 5, Class Counsel claims 43,669.65 hours. (Grossman Decl. ¶ 67 [4,494 hours]; Wheeler Decl. ¶ 344 [15,268 hours]; Bird Decl., Ex. 9 [10,194.3 hours]; Small Decl. ¶ 97 [9,364.75 hours]; Grossman-Swenson Decl. ¶ 51 [4,348.6 hours].)[34] Broadly, Phase 5 work included ongoing extensive fact discovery and associated motion practice, ongoing case management conferences, expert discovery, three rounds of *Sargon* motions, three summary judgment and/or adjudication motions filed by Sutter, two offensive summary adjudication motions filed by Plaintiffs, a decertification motion, ongoing trial preparation, and the commencement of mediation. (Grossman Decl., Ex. 14; Wheeler Decl. ¶¶ 146-189, Ex. 21; Bird Decl. ¶¶ 101-123; Small Decl. ¶¶ 99-112; Grossman-Swenson Decl., Ex. 12.)

In Phase 6, Class Counsel claims 31,002.05 hours. (Grossman Decl. ¶ 69 [1,517.75 hours]; Wheeler Decl. ¶ 346 [9,289.6 hours]; Bird Decl., Ex. 10 [12,307.5 hours]; Small Decl. ¶ 113 [5,619 hours]; Grossman-Swenson Decl. ¶ 53 [2,268.2 hours].)[35] Broadly, Phase 6 work included further discovery and discovery disputes, hearings and motion practice regarding the use of certain expert opinions and reports at trial, motions in limine, preparation of and disputes regarding jury instructions

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[33] The Attorney General's Office also claimed 3,247.75 hours during Phase 4. (Varanini Decl. ¶ 29.) During portions of Phase 4, the Attorney General's action had not been consolidated with UEBT's action. (See *id.* at 6 n.6.)

[34] The Attorney General's Office also claimed 6,203.75 hours during Phase 5. (Varanini Decl. ¶ 56.)

[35] The Attorney General's Office also claimed 4,833.25 hours during Phase 6. (Varanini Decl. ¶ 81.)

and antitrust standards, resolution of disputes regarding the structure of the trial, trial preparation, resolution of sealing disputes, jury selection, and ongoing mediation and settlement discussions. (Grossman Decl., Ex. 14; Wheeler Decl. ¶¶ 190-252, Ex. 22; Bird Decl. ¶¶ 124-150; Small Decl. ¶¶ 115-127; Grossman-Swenson Decl., Ex. 13.)

In Phase 7, Class Counsel claims 8,054.7 hours. (Grossman Decl. ¶ 71 [585.6 hours]; Wheeler Decl. ¶ 348 [3,589.1 hours]; Bird Decl., Ex. 11 [1,712.6 hours]; Small Decl. ¶ 128 [1,420.5 hours]; Grossman-Swenson Decl. ¶ 55 [746.9 hours].)[36] Broadly, Phase 7 work included dismantling the trial office, resolving remaining sealing issues, executing the settlement agreement and associated protective orders, selecting a monitor, and securing preliminary approval. (Grossman Decl., Ex. 14; Wheeler Decl. ¶¶ 253-289, Ex. 23; Bird Decl. ¶¶ 151-165; Small Decl. ¶¶ 130-136; Grossman-Swenson Decl., Ex. 14.)[37]

Having considered the record presented and the Court's own familiarity with this case, the Court finds that this is a case that required Class Counsel to reasonably expend a very large number of hours worked. At the same time, based on the same considerations, the Court finds the hours claimed unreasonably high.[38] To account for this, the Court reduces the base lodestar from the claimed amount,

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[36] The Attorney General's Office also claimed 2,130.25 hours during Phase 7. (Varanini Decl. ¶ 95.)

[37] Class Counsel also anticipated prospective work securing final approval and overseeing settlement administration, which had not occurred when the fee motion was filed. (See Wheeler Decl. ¶ 291.) Class Counsel does not seek to include time spent litigating the fee dispute in its lodestar. (See *id.* at ¶ 290.)

[38] The Court's primary concerns are as follows. First, the number of hours claimed is overwhelmingly high. Using 2,080 hours of work (40 hours times 52 weeks) as a proxy one year of work, 194,642.6 hours is about 93.6 years of work, or more than 7 years of work for 13 attorneys. Second, the descriptions of the work performed by counsel throughout the seven phases of this case identify tasks by biller rather than identifying biller by tasks. This issue is compounded by the absence of any information apportioning the time worked by a biller on a given task within a given phase. This structure presents two related problems: (1) The declarations do not set forth the time spent on any given litigation task, such that the Court cannot satisfy itself that the time spent on any given litigation task was reasonable – instead the Court is given a long list of tasks and a statement of ultimate fact (the hours worked on all tasks combined); and (2) The declarations do not, except at a high level and very generally, permit assessment of the extent to which the five firms that constitute Class Counsel unreasonably duplicated efforts, even when there were only four firms in the case. (Compare, e.g., Grossman Decl., Ex. 14 [Mr. Grossman reviewed research regarding ERISA preemption issues and discussed the research with co-counsel in Phases 1 and 2]; Wheeler Decl., Exs. 17-18 [Alex Reese researched ERISA preemption in Phase 1; Alex Reese and Roderick Thompson both researched ERISA preemption in Phase 2; Christopher Wheeler analyzed and supervised research into ERISA preemption in Phase 2]; Small Decl. ¶ 57 [Karen Handorf "provided valuable guidance regarding the scope and effect of ERISA preemption" in Phase 2]; Grossman-Swenson Decl., Ex. 9 [Florence Culp conducted legal research on ERISA preemption in Phase 2 and conferred with co-counsel regarding the same; Elizabeth Lawrence reviewed and revised the ERISA section of UEBT's appellate brief in Phase 2; in Phase 2, Ms. Grossman-Swenson researched ERISA preemption, wrote a memorandum on ERISA preemption, conferred with co-counsel regarding ERISA preemption, researched and drafted the ERISA preemption section of UEBT's appellate brief, drafted a

$103,270,104,[39] to $93,270,104.[40]

**c. Multiplier and Conclusions Regarding Percentage of the Recovery and Lodestar Cross-Check**

As noted above, the Court's selection of an appropriate percentage of the recovery award and the lodestar cross-check, including the selection of an appropriate multiplier, turn on similar factors. These factors include the contingent risk presented, the novelty and difficulty of the issues, the skill shown by counsel, and the results obtained. (See *Laffitte*, 1 Cal.5th at 489, 504.)[41] For the reasons that follow, the Court concludes that awarding 26.5% of the common fund to Class Counsel, or $152,375,000, is reasonable in this case in the first instance and is adequately supported by a lodestar cross-check.

The Court finds that the fee award is properly enhanced for the risk presented by this litigation,[42]

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response to an amicus brief regarding ERISA preemption, and assisted in the preparation of counsel for appellate argument on ERISA preemption].) Third, the Attorney General's Office was also substantially involved in the latter phases of this litigation. While the Attorney General's Office took on less hours of work, consistent with a role that focused on higher level involvement, this amplifies the Court's concerns regarding duplication and makes it more difficult to justify the total number of hours claimed by Class Counsel. Fourth, the Court takes the credibility concerns into account. Ultimately, considering the number of hours claimed, the work described in the declarations, and the Court's involvement in this litigation, including presiding over many of the hearings held in the lead up to the trial date, the Court finds that 194,642.6 hours is unreasonably high, resulting from, at least in part, unreasonable duplication of efforts. That said, the Court is satisfied that this litigation was a monumental undertaking requiring Class Counsel to reasonably work a vast number of hours.

[39] Motion, 34.

[40] With respect to Class Counsel's claimed lodestar, the blended rate is $530.56 per hour - $103,270,104/194,642.6 hours. Part of the reason for the relatively low blended rate is the extensive work performed by contract attorneys in this case. The Court's concerns regarding the inflation of the lodestar relate, however, to individuals at higher billing rates. To account for this, and the fact that the nature of the record generated by Class Counsel in connection with the Court's cross-check is not readily parsed along specific entries, the Court expresses its reduction of hours in terms of a reduction of the based lodestar. While this reduction equates to a reduction of about 18,848 hours at the blended rate, the reduction is properly understood as a slightly smaller reduction of hours weighted to impact individuals at higher billing rates.

[41] The foregoing discussion of the base lodestar is also relevant to fixing the appropriate percentage fee because it provides an objective measure of the number of hours worked at the asserted hourly rates – factors properly considered in setting a percentage fee. (*Laffitte*, 1 Cal.5th at 504.) The Court considers the number of hours worked at the asserted hourly rates in fixing the reasonable percentage fee in this case.

[42] The extent to which the fee award should be enhanced to reflect the risk presented by this litigation is contested. Several federal cases have determined that governmental involvement may reduce litigation risks. (See Objection, 14 [citing *Goldberger v. Integrated Resources, Inc.* (2d Cir. 2000) 209 F.3d 43, 54-55 [measuring risk at time litigation was initiated, government's prior efforts dramatically increased the chances of success in a securities fraud action arising out of one of the most notorious financial frauds of the 1980s]; *In re Renaissancere Holdings Ltd. Securities Litigation* (S.D.N.Y Jan. 18, 2008) 2008 WL 236684, at *5 [securities litigation was not risky because (1) all but a small percentage of securities class actions settle; and (2) suit was filed after federal investigations were commenced and SEC investigations

the fact that the risk was undertaken on a contingency basis,[43] the quality of representation,[44] the novelty

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pressure defendants to settle securities cases]; *In re Elan Securities Litigation* (S.D.N.Y. 2005) 385 F.Supp.2d 363, 375 [securities litigation was not risky because SEC investigation commenced either contemporaneously with filing or at least prior to appointment of lead counsel, and efforts to secure appointment as lead counsel demonstrated confidence in likelihood of success]; *In re Bristol-Myers Squibb Securities Litigation* (S.D.N.Y. 2005) 361 F.Supp.2d 229, 233-36 [where complaint had been dismissed with prejudice and settlement was reached while appeal was pending, and simultaneous settlement of an SEC settlement was reached five days later, record reflected that the Company's desire, prompted by the SEC, to put its house in order caused the settlement, not the efforts of Lead Counsel]; *Lealao v. Beneficial Cal., Inc.* (2000) 82 Cal.App.4th 19, 48 [class action attorney may have lower search costs if piggybacking on a prior governmental action]].) Here, the pre-filing governmental involvement was quite limited. Pursuant to the record before it, including the statements Mr. Grossman made at the final approval hearing, the Court finds that before the complaint in this action was filed: (1) One or more representative(s) from the Attorney General's Office had personally confirmed to Mr. Grossman that the Attorney General's Office was conducting an antitrust investigation into Sutter's contracting practices; (2) One or more representative(s) from the Attorney General's Office had indicated to Mr. Grossman that the Attorney General had a personal interest in the matter; and (3) One or more representative(s) from the Attorney General's Office had encouraged Mr. Grossman to file private suit, including by endorsing the legal theories pursued in this action. (See Grossman Decl., Ex. 14 at 1 [prefiling work included "Meetings and communications with representatives of the California Attorney General"]; Whitehead Sur-Reply Decl. ¶¶ 4-6.) Thus, Class Counsel, through Mr. Grossman, had inside information regarding the Attorney General's Office's investigation and analysis of legal theories that was baked into the risk calculus at the time of filing. Of course, the risk calculus also accounted for the possibility that the Attorney General's Office would not intercede. (See Grossman Response to Sur-Reply Decl. ¶ 3.) Nevertheless, the Court is persuaded by UEBT's position that the prospective risk undertaken in the litigation, viewed at the time it was initiated, was moderate. UEBT is the client on whose behalf Class Counsel filed suit and was privy to the risk assessment performed before this action was filed. (See Whitehead Sur-Reply Decl. ¶¶ 4-6.) Of course, the Court also considers the hurdles that Class Counsel overcame throughout litigation, and the circumstances that actually developed, in fixing a fee award.

[43] As noted above, the use of 2020 billing rates is intended to reward counsel for the delay in payment. However, the contingency risk presents a slightly different issue – Class Counsel did not merely experience a delay in payment, Class Counsel invested money (in the form of substantial litigation costs) and considerable amounts of time into this litigation with no guarantee that the litigation would bear fruit. While this is interrelated with the issues presented in the prior footnote, the Court notes here that an upward adjustment beyond the use of 2020 billing rates is warranted.

[44] The Court finds that Plaintiffs' Counsel, including Class Counsel and the Attorney General's Office, demonstrated a high level of skill in providing high quality of representation in this case. The Court takes this into account here, while remaining mindful of the base billing rates so as not to count the same factor twice.

and complexity of the issues presented,[45] and the results obtained,[46] including the injunctive relief.[47] At the same time, the Court is cognizant of concerns that applying an uncritical percentage of the recovery approach where there has been a very large settlement may yield an unearned windfall. (See *id.* at 490,

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[45] Class Counsel had some planks from which to build the case when it was filed – public meetings regarding Sutter's practices, prior merger actions regarding Sutter, the earlier filed *Sidibe* action, and, as discussed in the foregoing footnote, encouragement from one or more members of the Attorney General's Office. (See, e.g., Grossman Decl., Ex. 14 at 1-2 [discussing source material reviewed in preparation for filing the complaint in this action]; Whitehead Sur-Reply Decl. ¶¶ 4-6.) Moreover, a similar lawsuit was filed by public prosecutors outside of California before this action was resolved. (Grossman Decl., Ex. 14 at 11 [referring to communications with DOJ attorneys and the North Carolina Attorney General regarding a US DOJ complaint against Carolinas Healthcare hospital system].) But Class Counsel still had to do much of the work in building the boat and making it float. The theory may not have been completely novel, but there was a strong degree of novelty and the litigation was complex.

[46] At oral argument, UEBT expressed some dissatisfaction with the monetary component of the settlement. Of course, UEBT is the class representative. As such, UEBT approved the settlement as reasonable. More importantly, the balance of the record reflects that the settlement consideration is strong. (See Vistnes Final Approval Decl., 5; Gaynor Decl. ¶¶ 1-2; La Pearle Decl. ¶ 5; Stenerson Decl. ¶ 5; Stuart Decl. ¶ 6.) This is underscored by the absence of any objectors to final approval – the only putative objector is an entity that objects only if it is not treated as a class member because it wishes to participate in the settlement. The ultimate result is strong.

[47] UEBT argues that the injunctive relief should not be considered either because it has not been assigned an economic value or because credit should be given to the Attorney General's Office. On the first point, the Court considers the injunctive relief as valuable non-monetary consideration secured on behalf of the class. As such, the Court does not consider the injunctive relief as part of the monetary value of the settlement used as the base against which the percentage of the recovery is multiplied to yield the percentage of the recovery fee. That is, to calculate the fee pursuant to the percentage of the recovery method the Court multiplies by the percentage by $575 million, a figure that does not include any monetary value for the injunctive relief because the record permits only speculation as to the monetary valuation. But, in considering the reasonableness of the compensation sought, the Court considers the injunctive relief. This is necessary, at minimum, to account for the results obtained in fixing an appropriate multiplier. On the second point, a separate governmental action may, at least in some circumstances, indicate that the result achieved was caused by the government rather than the private actors. (See Objection, 16-17 [citing *Bristol-Myers Squibb*, 361 F.Supp.2d at 236; *In re Wells Fargo Collateral Protection Insurance Litigation* (C.D. Cal. Nov. 4, 2019) 2019 WL 6219875, at *5 [where 2.41 multiplier was requested to get an 8% common fund recovery, court applied a 2.3 multiplier instead; the principal basis for the reduction to 2.3 was that governmental investigations and consent orders occurring after the litigation began helped bring about the settlement agreement; the Court also gave less credit to class counsel for taking the action on a contingency basis because there were governmental investigations ongoing long before the lawsuit was filed and the case never proceeded past the pleading stage]; *In re Bausch & Lomb, Inc. Securities Litigation* (W.D.N.Y. 1998) 183 F.R.D. 78, 87 [case settled after SEC issued cease and desist order]; *In re CRM Holdings* (S.D.N.Y. Sept. 7, 2016) 2016 WL 4990290, *3 [20.3% fee award appropriate because, among other things, shareholder derivative plaintiffs piggy-backed on governmental discovery and settlement pressure imposed by governmental investigations]].) It is clear both from this Court's involvement in the case during its latter stages and the record that has been generated in connection with the present motion that Class Counsel and the Attorney General's Office functioned as a partnership in securing the final settlement. The Court does not doubt that having the Attorney General's Office at the table was "instrumental." (Varanini Decl. ¶ 79; see also, e.g., Grossman Decl., Ex. 14 at 25 [describing work preparing UEBT's "detailed and comprehensive requirements for injunctive relief" and harmonizing those requirements with the Attorney General's proposals].) At the same time, the Court is satisfied that Class Counsel deserves a strong share of the credit for the results obtained, including the injunctive relief.

495-96; see also *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.* (2d Cir. 2005) 396 F.3d 96, 121-24 [sheer size of the fund supported use of a lower percentage; counsel sought $609,012,000 – which reflected 18% of the compensatory relief portion of the settlement, 2.14% of the value of the settlement inclusive of injunctive relief, and a 9.68 multiplier on a lodestar of $62,940,045.84; trial court properly awarded $220,290,160.44, which reflected a multiplier of 3.5 and a much lower percentage of the recovery than requested].) Accordingly, in fixing a reasonable percentage in the first instance, the Court gives careful consideration to the work performed in this case – both as reflected in the evidentiary submissions and pursuant to the Court's time presiding over the latter stages of this matter – as well as each of the preceding factors in concluding that a 26.5% fee award reasonably compensates Class Counsel without resulting in an unearned windfall.[48] Cross-checking this result against the lodestar-multiplier analysis, this implies a multiplier of about 1.63 on $93,270,104. The Court finds that multiplier to be within the reasonable range in all of the circumstances, thus supporting the Court's conclusion that 26.5% is reasonable percentage-of-the-recovery award in this action.[49]

**III. UEBT's Service Award**

Having considered the record presented, the Court grants UEBT's request for a $250,000 service award. UEBT's request for an unspecified further monetary reward for objecting to the fee request is, however, denied. (See UEBT Objection, 36-37.) UEBT is adequately compensated for its service to the class through this service award.

**IV. Administration Costs**

Plaintiffs have not completed administration of the settlement. Plaintiffs intend to apply for

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[48] In addition to the factors addressed above, the Court has also considered the significance of the fee agreement between Class Counsel and UEBT and UEBT's acceptance of the arrangement set forth in the settlement. However, the Court considers these agreements to be secondary in significance relative to the issues addressed in more detail above.

[49] In *Laffitte*, the California Supreme Court observed that if the multiplier calculated by means of the lodestar cross-check is extraordinarily high or low, the trial court should consider whether the percentage used should be adjusted so as to bring the imputed multiplier within a justifiable range. (*Laffitte*, 1 Cal.5th at 505.) There, the California Supreme Court affirmed an award of 1/3 of the common fund, which imputed a multiplier of 2.03 to 2.13. (*Id.* at 488, 506.) In the Ninth Circuit, federal courts have observed that multipliers in megafund cases have generally fallen between 1 and 4, with most falling between 1.5 and 3. (See *High-Tech Employee*, 2015 WL 5158730 at *11 [discussing *Vizcaino v. Microsoft Corp.* (9th Cir. 2002) 290 F.3d 1043, 1051 n.6, 1052-54; awarding a 2.2 multiplier, which constituted a reduction from the fee requested, "in line with the vast majority of megafund settlements such as [that] one" to "adequately reward Class Counsel for the work performed" in the litigation].)

reimbursement of settlement administration expenses only after they have incurred all, or nearly all, of those expenses. (Motion, 39 n.37.) In the settlement notice, the parties notified the class that Plaintiffs will move for payment from the common fund of current and future settlement related expenses, estimated to total about $350,000 plus any charges for potential data analysis. (See Taylor Decl., Ex. 11 at 1, 8, 11, 14.) Following the final approval hearing, Plaintiffs' Counsel submitted a Second Amended Proposed Order regarding final approval that estimated that the total costs of administration, inclusive of a prospective data analysis, would be $600,000. (Second Amended Proposed Final Approval Order, 2.) As noted above, the present fee motion, which was filed well in advance of the objection deadline, reflected Plaintiffs' intention to seek reimbursement of settlement administration expenses at a later date. (Motion, 39 n.37.) No objections to this process were submitted.

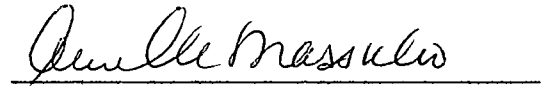
Code of Civil Procedure § 384(b) provides, in relevant part: "Except as provided in subdivision (c), before the entry of a judgment in a class action established pursuant to Section 382 that provides for the payment of money to members of the class, the court shall determine the total amount that will be payable to all class members if all class members are paid the amount to which they are entitled pursuant to the judgment. The court shall also set a date when the parties shall report to the court the total amount that was actually paid to the class members. After the report is received, the court shall amend the judgment to direct the defendant to pay the sum of the unpaid residue or unclaimed or abandoned class member funds, plus any interest that has accrued thereon, to nonprofit organizations or foundations to support projects that will benefit the class or similarly situated persons, or that promote the law consistent with the objectives and purposes of the underlying cause of action, to child advocacy programs, or to nonprofit organizations providing civil legal services to the indigent."

Pursuant to Code of Civil Procedure § 384(b), the Court must determine the total amount that will be payable to all class members if all class members are paid the amount to which they are entitled pursuant to the judgment before entering judgment. Because the award of settlement administration costs will impact the amount of the common fund available to class members – that is, the total amount that will be payable to all class members if all class members are paid the amount to which they are entitled pursuant to the judgment – the Court must account for settlement administration costs before entering

judgment. To do so, the Court provisionally awards $600,000 for the costs of settlement administration. However, this award shall remain in the common fund, and shall not be distributed, until further order of the Court pursuant to a post-judgment motion for reimbursement of settlement administration expenses.[50]

IT IS SO ORDERED.

Dated: August 27, 2021



Anne-Christine Massullo
Judge of the Superior Court

[50] The motion may seek more or less than $600,000. The motion must be accompanied by a proposed amended judgment, if appropriate.

**CERTIFICATE OF ELECTRONIC SERVICE**
(CCP 1010.6(6) & CRC 2.251)

I, Ericka Larnauti, a Deputy Clerk of the Superior Court of the County of San Francisco, certify that I am not a party to the within action.

On August 27, 2021, I electronically served the attached document via File & ServeXpress on the recipients designated on the Transaction Receipt located on the File & ServeXpress website.

Dated: August 27, 2021

T. Michael Yuen, Clerk

By: _____
Ericka Larnauti, Deputy Clerk