

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

David F. Sorensen (Pro Hac Vice)
Neill W. Clark (Pro Hac Vice)
BERGER & MONTAGUE, P.C.
1622 Locust Street
Philadelphia, PA 19103
Tel: (215) 875-3000
Fax: (215) 875-4604
dsorensen@bm.net
nclark@bm.net
Co-Lead Class Counsel and Attorneys for Plaintiffs
Additional Counsel on Signature Page

**UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA**

**Cindy Johnson, Stephanie L. Walker, and
Barbara A. Craig, on behalf of themselves and
all others similarly situated,**

Plaintiffs,

v.

**Arizona Hospital and Healthcare Association,
et al.,**

Defendants.

CV-07-01292 SRB

**PLAINTIFFS’MOTION FOR AN
AWARD OF ATTORNEYS’ FEES,
REIMBURSEMENT OF EXPENSES
AND INCENTIVE AWARDS TO THE
CLASS REPRESENTATIVES FOR
THEIR EFFORTS ON BEHALF OF
CLASS MEMBERS, AND
MEMORANDUM IN SUPPORT**

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

I. INTRODUCTION.....2

II. FACTS REGARDING THE CONTRIBUTIONS OF CLASS COUNSEL AND THE CLASS REPRESENTATIVES IN CREATING THIS COMMON FUND.....4

III ARGUMENT.....8

A. The Court Should Award the Requested Attorney Fees.....8

1. A Reasonable Percentage of the Fund Recovered is the Appropriate Method For Awarding Class Counsel’s Attorneys’ Fees in this Common Fund Settlement.10

2. A Fee Award of 25% of the Common Fund Is Fair and Reasonable.13

a. Class Counsel Obtained Excellent Results.14

(i) The Result Is Excellent Considering the Quality of Opposing Counsel15

b. This Litigation Was Very Risky16

c. The Settlement Provides Benefits Beyond the Settlement Fund.16

d. Class Counsel Carried the Financial Burden of this Litigation, the Time Devoted to this Matter Could Have Been Invested in Other Litigation, and Market Rates for Contingent Litigation Exceed the Recovery Counsel Seek Here17

e. Analysis of the *Vizcaino* Factors Provides No Basis for Awarding a Fee Below the Benchmark.....19

f. The Reaction of the Settlement Classes to the Settlement Thus Far Strongly Supports the Requested Fee19

3. A Lodestar Cross-Check Verifies That The Requested Fee Is Fair and Appropriate.20

4. Conclusion22

B. Reimbursement of Cost and Expenses Reasonably and Necessarily Incurred and Advanced by Counsel is Appropriate.....22

C. An Incentive Award to the Class Representatives is Appropriate.24

IV. CONCLUSION26

TABLE OF AUTHORITIES

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

	Page(s)
CASES	
<i>Alpine Pharmacy, Inc. v. Chas. Pfizer & Co.</i> , 481 F.2d 1045 (2d Cir. 1973).....	9
<i>Boeing Co. v. Van Gemert</i> , 444 U.S. 472 (1980).....	10
<i>Camden I Condo Ass’n v. Dunkle</i> , 946 F.2d 768 (11 th Cir. 1991)	11
<i>Carter v. Anderson Merchandisers, LP</i> , No. 08-0025, 2010 U.S. Dist. LEXIS 55629 (C.D. Cal. May 11, 2010)	20
<i>Caudle v. Bristow Optical Co.</i> , 224 F.3d 1014 (9th Cir. 2000)	20
<i>Craft v. Cnty. of San Bernardino</i> , 624 F. Supp. 2d 1113 (C.D. Cal. 2008)	21
<i>Eltman v. Grandma Lee’s Inc.</i> , No. 82-1912, 1986 WL 53400 (E.D.N.Y. May 28, 1986)	9
<i>Fischel v. Equitable Life Assurance Society of the United States</i> , 307 F.3d 997 (9th Cir. 2002)	10, 13,15, 21
<i>Francisco v. Numismatic Guaranty Corp. of Am.</i> , No. 06-61677-CIV, 2008 WL 649124 (S.D. Fla. Jan. 31, 2008).....	9
<i>Gottlieb v. Barry</i> , 43 F.3d 474 (10 th Cir. 1994)	11
<i>Hanlon v. Chrysler Corp.</i> , 150 F.3d 1011 (9th Cir. 1998)	10
<i>Harris v. Marhoefer</i> , 24 F.3d 16 (9th Cir. 1994)	"
<i>Hawaii v. Standard Oil Co.</i> , 405 U.S. 251 (1972).....	9

1 *Hughes v. Microsoft Corp.*,
 No. 98-1646, 2001 WL 34089697 (W.D. Wash. Mar. 26, 2001).....24

2

3 *In re Activision Sec. Litig.*,
 723 F. Supp. 1373 (N.D. Cal. 1989).....12, 14

4

5 *In re Cont’l. Illinois Sec. Litig.*,
 962 F.2d 566 (7th Cir. 1992)11

6

7 *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*,
 MDL No. 1486, 2007 WL 2416513 (N.D. Cal. Aug. 16, 2007).....17

8

9 *In re Equity Funding Corp. Sec. Litig.*,
 438 F. Supp. 1303 (C.D. Cal. 1977)15

10

11 *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*,
 55 F.3d 768 (3d Cir. 1995).....11

12

13 *In re Heritage Bond Litig.*, (C.D. Cal. June 10, 2005)
 2005 WL 159438915, 19

14

15 *In re Immune Response Sec. Litig.*,
 497 F. Supp. 2d 1166 (S.D. Cal. 2007).....23

16

17 *In re Media Vision Tech’y Secs. Litig.*,
 913 F. Supp. 1362 (N.D. Cal. 1996)22

18

19 *In re Mego Fin. Corp. Sec. Litig.*,
 213 F.3d 454 (9th Cir. 2000)24

20

21 *In re Mercury Interactive Corp. Securities Litigation*,
 618 F.3d 988 (9th Cir. 2010)3, 10

22

23 *In re Omnivision Techs.*
 559 F.Supp. 2d 1036 (N.D. Cal. 2007)17, 23

24

25 *In re Pacific Enterprises*,
 47 F.3d 373 (9th Cir. 1995)14

26

27 *In re Prudential Sec. Ltd Pshps. Litig.*
 985 F. Supp. 410 (S.D.N.Y. 1997).....19

28 *In re Rite Aid Corp. Sec. Litig.*,
 396 F.3d 294 (3d Cir. 2005).....20

1 *In re Sulzer Hip Prosthesis & Knee Prosthesis Liab. Litig.*,
 268 F. Supp. 2d 907 (N.D. Ohio 2003).....22

2

3 *In re Thirteen Appeals Arising Out of the San Juan DuPont Plaza Hotel Fire Litig.*,
 56 F.3d 295 (1st Cir. 1995).....11, 12

4

5 *In re Washington Pub. Power Supply Sys. Sec. Litig.*,
 19 F.3d 1291 (9th Cir. 1994)8

6

7 *Kirchoff v. Flynn*,
 786 F.2d 320 (7th Cir. 1986)12

8

9 *Mullen v. Treasure Chest Casino, LLC*,
 186 F.3d 620 (5th Cir. 1999), *cert. denied*, 528 U.S. 1159 (2000).....25

10

11 *Paul, Johnson, Alston & Hunt v. Grauldy*,
 886 F.2d 268 (9th Cir. 1989)10

12

13 *Pelletz v. Weyerhaeuser Co.*,
 255 F.R.D. 537 (W.D. Wash. 2009)24

14

15 *Perez v. Safety-Kleen Sys.*,
 253 F.R.D. 508 (N.D. Cal. 2008).....25

16

17 *Petrovic v. Amoco Oil Corp.*,
 200 F.3d 1140 (8th Cir. 1999)11

18

19 *Pillsbury Co. v. Conboy*,
 459 U.S. 248 (1983).....9

20

21 *Rawlings v. Prudential-Bache Properties, Inc.*,
 9 F.3d 513 (6th Cir. 1993)11

22

23 *Reiter v. Sonotone Corp.*,
 442 U.S. 330 (1979).....9

24

25 *Romero v. Producers Dairy Foods Inc.*,
 235 F.R.D. 474 (E.D. Cal. 2006)25

26

27 *Rosiles-Perez v. Superior Forestry Serv.*,
 250 F.R.D. 332 (M.D. Tenn. 2008)25

28 *Scott v. Aetna Servs. Inc.*,
 210 F.R.D. 261 (D. Conn. 2002).....25

1 *Sheppard v. Consolidated Edison Co. of New York, Inc.*,
 2 No. 94-CV-0403, 2002 WL 2003206 (E.D.N.Y. Aug. 1, 2002).....25

3 *Six Mexican Workers v. Ariz. Citrus Growers*,
 4 904 F.2d 1301 (9th Cir. 1990)10

5 *Staton v. Boeing Co.*,
 6 327 F.3d 938 (9th Cir. 2003)23, 24

7 *Swedish Hosp. Corp. v. Shalala*,
 8 1 F.3d 1261 (D.C. Cir. 1993).....11

9 *Thornberry v. Delta Air Lines, Inc.*,
 10 676 F. 2d 1240 (9th Cir. 1982), *vacated*22

11 *Torrisi v. Tucson Elec. Power Co.*,
 12 8 F.3d 1370 (9th Cir. 1993)10

13 *Van Vranken v. Atlantic Ritchfield Co.*,
 14 901 F. Supp. 294 (N.D. Cal. 1995)14, 23

15 *Vincent v. Hughes Air West, Inc.*,
 16 557 F.2d 759 (9th Cir. 1977)8, 22

17 *Vizcaino v. Microsoft Corp.*,
 18 290 F.3d 1043 (9th Cir. 2002) passim

19 **STATUTES**

20 A.R.S. § 44-140116

21 15 U.S.C. § 1.....16

22 **OTHER AUTHORITIES**

23 Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee*
 24 *Awards*, 7 J. EMPIRICAL LEGAL STUD. (forthcoming 2010)13

25 Charles Silver, *Class Actions in the Gulf South Symposium: Due Process and the*
 26 *Lodestar Method: You Can’t Get There From Here*, 74 Tul. L. Rev. 1809 (June
 27 2000)12

28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Denise N. Martin, Vinita M. Juneja, Todd M. Foster & Frederick C. Dunbar, *Recent Trends IV: What Explains Filings and Settlements in Shareholder Class Actions?* Stan. J.L. Bus. & Fin. (1996)13

F. Patrick Hubbard, *Substantive Due Process Limits on Punitive Damages Awards: “Morals Without Technique”?*, 60 FLA. L. REV. 349 (2008).....18

Fed R. Civ. P. 23(f).....5

Fed. R. Civ. P. 23(h) and 54(d)(2)1

Herbert M. Kritzer, *The Wages of Risk: The Returns of Contingency Fee Legal Practice*, 47 DEPAUL L. REV. 267 (1998)18

Joni Hersch, Jeffrey O’Connell & W. Kip Viscusi, *An Empirical Assessment of Early Offer Reform for Medical Malpractice*, 36 J. LEGAL STUD. S231 (2007)18

Lester Brickman, *ABA Regulation of Contingency Fees: Money Talks, Ethics Walks*, 65 FORDHAM L. REV. 247 (1996)18

Report of the Third Circuit Task Force, 108 F.R.D. 237, 254-59 (1985)11, 12

Thomas E. Willging, Laural L. Hooper & Robert J. Niemic, *Empirical Study of Class Actions in Four Federal District Courts: Final Report of the Advisory Committee on Civil Rules* at 69 (Fed. Judicial Ctr. 1996).....13

1 Plaintiffs hereby respectfully move, pursuant to Fed. R. Civ. P. 23(h) and
2 54(d)(2), for an award of attorneys' fees in an amount equal to 25% of the \$22,476,818.18
3 Settlement Fund created plus interest earned thereon until the date of payment¹ ("Settlement
4 Fund" or "Common Fund"), reimbursement of expenses in the amount \$872,524.62², and
5 incentive awards of \$15,000 each to plaintiffs Ms. Stephanie L. Walker and Ms. Barbara A.
6 Craig, and \$30,000 to Ms. Cindy Johnson for serving as Class Representatives.³
7
8

9
10 ¹ The Settlement Fund is contained in two separate escrow accounts. The Multiple
11 Defendant Escrow Account holds the \$22,256,818.17 deposited within 30 days of the
12 Court's September 27, 2010 Order Granting Plaintiffs' Motion for Preliminary Approval of
13 Settlement, Certification of the Settlement Classes, and Approval of the Form of Notice
14 (Doc No. 642) ("Preliminary Approval Order") by the Defendants that signed the Class
15 Settlement Agreement and Release dated September 3, 2010 ("Class Settlement
16 Agreement"). *See* Ex. 2 to Class Settlement Agreement and ¶ 22 (attached as Ex. A to
17 Plaintiffs' Motion for Preliminary Approval of Settlement, Certification of the Settlement
18 Classes, Approval of the Form of Notice and Memorandum in Support. (Doc. No. 639)
19 ("Plaintiffs' Preliminary Approval Motion"). The AzHHA Escrow Account contains the
\$110,000 AzHHA deposited within 30 days of the Court's Preliminary Approval Order
pursuant to the AzHHA Settlement Agreement and Release dated September 3, 2010
("AzHHA Settlement Agreement") and will also hold the additional \$110,000 AZHHA
is to deposit by March 31, 2010. As of January 28, 2011, the total interest earned by both
escrow accounts was \$10,089.42.

20 ² Of this amount, \$57,858.41 are outstanding expenses for expert and court reporting
21 services. *See* Declaration of David F. Sorensen On Behalf of Class Counsel and Berger &
22 Montague, P.C. In Support of Plaintiffs' Motion For An Award of Attorneys' Fees
23 Reimbursement of Expenses and Incentive Awards to Class Representatives for Their
24 Efforts On Behalf of Class Members at ¶¶ 12-13. (attached to the Compendium of Firm
25 Declarations In Support of Plaintiffs' Motion For Approval of Attorneys' Fees
26 Reimbursement of Expenses and Incentive Awards to Class Representatives for Their
Efforts On Behalf of the Class) ("Compendium of Firm Declarations") (attached as Exhibit
A).

27 ³ Plaintiffs are not submitting a proposed order with this motion as Plaintiffs' request for
28 attorneys' fees, reimbursement of expenses and incentive awards to the class
representatives is included in the proposed Final Judgment Order that was attached as an
exhibit to the Class Settlement Agreement and the AZHHA Settlement Agreement that
were both included as exhibits to Plaintiffs' Preliminary Approval Motion. *See* Ex. 9 to

1 Plaintiffs' Motion is based on the memorandum below and its exhibits, and all other
2 pleadings and matters of record. As provided by ¶ 53 of the September 3, 2010 Class
3 Settlement Agreement and Release ("Class Settlement Agreement") and the AzHHA Class
4 Settlement Agreement and Release ("AzHHA Settlement Agreement") (collectively, the
5 "Settlement"), the Defendants⁴ participating in this Settlement take no position with respect
6 to Plaintiffs' Motion.⁵
7

8 **I. INTRODUCTION**

9
10 After more than three years of vigorous litigation and hard fought, arms-length
11 negotiation by highly experienced, capable counsel, Plaintiffs reached a settlement with
12 nearly all Defendants that provides class members both significant monetary recovery, as
13 well as important prospective, structural relief. The Settlement provides \$22,476,818 in
14 cash plus interest for members of Per Diem Settlement Class and the Traveler Settlement
15 Class (collectively, "Class Members").⁶ In addition to the Settlement Fund, the Settlement
16 provides significant and valuable structural relief aimed at ensuring that the anticompetitive
17
18

19 Exs. A & C in Plaintiffs' Motion for Preliminary Approval. Plaintiffs may submit a revised
20 Final Judgment Order with their Motion For Final Approval of Settlement that is currently
21 due on February 25, 2011. Preliminary Approval Order at ¶ 16.

22 ⁴ The Defendants joining this settlement are Arizona Hospital and Healthcare Association
23 ("AzHHA") and AzHHA Service Corporation and the Defendants listed on Exhibit 1 to the
24 Class Settlement Agreement (attached as Exhibit A to Plaintiffs' Motion for Preliminary
25 Approval of Settlement, Certification of the Settlement Classes, Approval of the Form of
26 Notice and Memorandum in Support (Doc. No.639) (collectively, the "Settling Defendants").

27 ⁵ The Class Settlement Agreement is attached as Exhibit A and the AzHHA Class Settlement
28 Agreement is attached as Exhibit C to Plaintiffs' Motion for Preliminary Approval of
Settlement, Certification of the Settlement Classes, Approval of the Form of Notice and
Memorandum in Support ("Plaintiffs' Preliminary Approval Motion") (Doc. No. 639).

⁶ Preliminary Approval Order at ¶¶ 1-2.

1 conduct that gave rise to this litigation will not re-occur. Both the cash recovery and the
2 structural relief were the result of this litigation and settlement. The prior action brought by
3 the United States Department of Justice and the Arizona Attorney General (the “DOJ
4 Action”) was brought against the Arizona Hospital and Healthcare Association (“AzHHA”)
5 only, not its member hospitals, and did not seek any compensation for the temporary nursing
6 personnel whose compensation was allegedly suppressed by the alleged anticompetitive
7 conduct of AzHHA and the hospitals. Nor was the structural relief obtained by the DOJ
8 expressly aimed at the hospitals. In short, this litigation has resulted in a settlement that, if
9 finally approved, will bring significant monetary and non-monetary relief to Class
10 Members.⁷

11
12
13
14 On September 27, 2010, this Court certified classes of Per Diem and Traveler
15 Nurses for settlement purposes (the Per Diem class had previously been certified),
16 preliminarily approved the settlement, ordered the sending of notice to members of the
17 settlement classes, and scheduled a final Fairness Hearing for March 4, 2011. That Court-
18 approved notice informed all Class members that Class Counsel would seek an award of
19 attorneys’ fees of up to 25% of the Settlement Fund created plus interest. *See* Mailed Notice
20 at question/answer Nos. 11 & 18 and Published Notice at 2.⁸

21
22
23 In accordance with *In re Mercury Interactive Corp. Securities Litigation*, 618 F.3d
24 988 (9th Cir. 2010), counsel appointed by this Court as Co-Lead Class Counsel (David F.
25

26 ⁷ The date of the Final Fairness Hearing is March 4, 2011. Preliminary Approval Order at ¶
27 17.

28 ⁸ The Mailed Notice was attached as Exhibit 3 and the Published Noticed was attached as
Exhibit 4 to the Class Settlement Agreement and AZHHA Settlement Agreement.

1 Sorensen of Berger & Montague, P.C., and David Balto of Law Offices of David Balto),
2 along with other class counsel (Keller Rohrback, P.L.C., Keller Rohrback L.L.P., Brownstein
3 Hyatt Farber Schreck, LLP, and Kaplan Fox & Kilsheimer, LLP) (collectively, “Class
4 Counsel”) respectfully submit this memorandum in support of their motion for an award of
5 attorneys’ fees, reimbursement of costs and expenses, and incentive awards to the Class
6 Representatives for their services to the certified settlement classes. As previously explained
7 in the Mailed and Published Notice, copies of this motion and all supporting materials will be
8 posted on all the Class Counsel’s websites and the website established for this litigation by
9 the Claims Administrator.⁹ Hence Class Members can review the motion before the
10 February 11, 2011 deadline for objections. Preliminary Approval Order at ¶15.

14 **I. FACTS REGARDING THE CONTRIBUTIONS OF CLASS COUNSEL AND**
15 **THE CLASS REPRESENTATIVES IN CREATING THIS COMMON FUND**

16 Plaintiffs’ Memorandum in Support of their Motion for Preliminary Approval of
17 Settlement (Doc No. 639) set forth in some detail the history of this litigation. Class
18 Counsel worked diligently and incurred substantial out-of-pocket expenses to bring this case
19 from filing (in July 2007), to the motion for preliminary approval of the Settlement (filed in
20 September 2010). The substantial monetary recovery and significant structural relief is the
21 culmination of Class Counsel’s hard work over the course of three years of vigorous
22 litigation. Those efforts included substantial motion practice, extensive discovery of the 45
23
24
25
26
27
28

⁹ See Mailed Notice at question/answer No. 18 and Published Notice at 2-3.

1 separate defendants¹⁰ and thirteen third-party temporary nurse staffing agencies, and two
2 separate mediation sessions followed by months of settlement discussions.

3 Class counsel were required to brief, inter alia: (1) certain Defendants' Motion to
4 Dismiss¹¹; (2) Plaintiffs' Motion for Class Certification¹²; (3) Defendants' Proposal
5 regarding Disclosure of Plaintiffs' Identities¹³; (4) Defendants' motion to exclude Plaintiffs'
6 expert, Dr. Hal J. Singer and reconsideration of this Court's Order denying Defendants'
7 motion¹⁴; (5) Plaintiffs' Motion for Partial Reconsideration of the Court's Class Certification
8
9
10
11
12
13

14 ¹⁰ There are 45 separately named defendants in Plaintiffs' Consolidated Third Amended
15 Complaint (Doc. No. 317), though a number are associated with a particular parent company.
16 There are 39 Settling Defendants, including AzHHA and the AzHHA Service Corporation.
See Ex. 1 to Class Settlement Agreement; AzHHA Class Settlement Agreement.

17 ¹¹ *See* Plaintiffs' Response In Opposition Defendants' Mayo Clinic Arizona and Phoenix
18 Children Hospital's, Motion to Dismiss Plaintiffs' Third Amended Complaint dated
19 January 9, 2009 (Doc. No. 408). Oral Argument was held on February 13, 2009 (Doc. No.
20 440).

21 ¹² *See* Plaintiffs' Motion for Class Certification dated December 22, 2008 (Doc. No. 403);
22 Plaintiffs' Reply Memorandum in Support of Class Certification dated June 5, 2009 (Doc.
23 No. 556).

24 ¹³ *See* Plaintiffs' Response to Defendants' Proposal on Disclosure of Plaintiffs' Identities
25 dated April 16, 2008 (Doc. No. 174).

26 ¹⁴ On April 13, 2009 the Court entered an Order Striking Defendants' Motion and
27 Memorandum of Law to Exclude the Report of Hal J. Singer and denied as Moot the
28 Stipulation Regarding Extension of Time for Plaintiffs to Respond to Defendants' Motion
to Exclude the Report of Hal J. Singer (Doc. No. 470). On May 8, 2009 Plaintiffs' filed
their Response to Defendants' Motion for Reconsideration of Order Striking *Daubert*
Motion (Doc. No. 494). On May 26, 2009 the Court denied Defendants' Motion for
Reconsideration of Order Striking *Daubert* Motion (Doc. No. 511).

1 Order¹⁵; and (6) Plaintiffs' Fed R. Civ. P. 23(f) appeal of this Court's Class Certification
2 Order¹⁶.

3 Discovery in this case was extensive. Plaintiffs engaged in vigorous discovery,
4 including: (1) propounding three separate Requests for Production of Documents on
5 Defendants; (2) obtaining and reviewing many thousands of documents from Defendants; (3)
6 obtaining and analyzing electronic data from Defendants; (4) serving subpoenas on thirteen
7 third party temporary nurse staffing agencies and obtaining and reviewing documents and
8 data obtained pursuant to those subpoenas; (5) obtaining and reviewing the discovery record
9 from *PC Healthcare Enterprises, Inc. dba Health Temp v. Arizona Hospital and Healthcare*
10 *Association, et al.*, No. CV-05-1793-PHX-MHM (D.Ariz.) ("Health Temp" case); (6) taking
11 or defending 17 fact and expert depositions, including taking the depositions of current and
12 former employees of Defendants and Defendants' Expert Dr. David Scheffman, and
13 defending the depositions of the three Class Representatives and Plaintiffs' Expert Dr. Hal J.
14 Singer; and (7) propounding, responding to and negotiating and drafting stipulations to
15 Interrogatories.
16
17
18
19
20
21
22

23 ¹⁵ Plaintiffs' Motion for Partial Reconsideration of Order Dated July 14, 2009 dated July 28,
24 2009 (Doc. No. 588).

25 ¹⁶ Plaintiffs filed their 23(f) Petition on September 1, 2009. *See Cindy Johnson et al v.*
26 *Arizona Hospital and Healthcare et al.*, No. 09-80142, (Doc. No. 1) and Defendants filed
27 their Answer to Plaintiffs' Petition to Appeal Under 23(f) and Conditional Cross Appeal on
28 September 14, 2009 (Doc. No. 2). Plaintiffs' Answer to Respondent's Conditional Cross
Petition was filed on October 5, 2009 (Doc. 30). The Ninth Circuit has stayed Plaintiffs'
Petition to Appeal and Defendants' Cross Petition pending the settlement. *See* Doc. Nos.
31, 34, 35, 40, 44, 45, 50.

1 Plaintiffs' extensive motion practice and discovery efforts were followed by two
2 rounds of mediation conducted by an outside mediator, the Honorable Edward Infante (Ret.)
3 of JAMS, a leading alternative dispute resolution firm over four full days in the summer of
4 2009, in June and August. Subsequently the parties engaged in months of discussions,
5 working out numerous issues and complexities involved in settling a case with so many
6 defendants. Through those difficult and complex settlement negotiations over the course of
7 nearly a year, Plaintiffs obtained the \$22,476,818.18 Settlement Fund. These efforts required
8 the investment of thousands of hours in this case, representing a total lodestar of \$7,048,969
9 at their standard current hourly rates, and necessary costs and expenses of \$872,524.62
10 (primarily for the cost of developing and presenting expert economic analysis). *See*
11 *Compendium of Firm Declarations* (attached as Ex. A). In addition to the time and money
12 invested already, Class Counsel will continue to incur additional attorney hours and claims
13 administration expenses¹⁷ in connection with final approval of the Settlement, responding to
14 inquiries from Class members, interacting with the settlement administrator, determining the
15 amount of and overseeing the disbursement of each Class Member's settlement distribution
16 and generally overseeing the implementation of the Settlement.¹⁸

17
18
19
20
21
22 As to the Class Representatives, during over three years of litigation they have fully
23 cooperated in discovery including responding to document requests (including for certain
24

25
26 ¹⁷ Pursuant to the Class Settlement Agreement and Release at ¶ 30(c) and the AzHHA
27 Settlement Agreement and Release at ¶ 30(b), costs of notice and claims processing are
deducted from the Settlement Fund. *See* Preliminary Approval Motion at Exs. A and C.

28 ¹⁸ In addition, Class Counsel and the Class Representatives will continue to litigate
against the non-Settling Defendants.

1 personal income tax documents), answering interrogatories, and sitting for depositions.
2 Notably, the initial plaintiffs in this case each filed suit under pseudonyms out of fear of
3 retaliation. After the initial plaintiffs withdrew, the three representative plaintiffs stepped
4 forward and agreed to have their names be made public. Their determination eliminated the
5 issue of the use of pseudonyms from the case, to the benefit of class members. Ms. Johnson,
6 Ms. Walker and Ms. Craig have performed a great service for class members, and the service
7 (or incentive) awards sought are comparatively modest.
8
9

10 **II. ARGUMENT**

11 **A. The Court Should Award the Requested Attorney Fees.**

12 Courts have long recognized that “a private plaintiff, or his attorney, whose efforts
13 create, discover, increase or preserve a fund to which others also have a claim is entitled to
14 recover from the fund the costs of his litigation, including attorneys’ fees.” *Vincent v.*
15 *Hughes Air West, Inc.*, 557 F.2d 759, 769 (9th Cir. 1977). This doctrine avoids unjust
16 enrichment so that “those who benefit from the creation of the fund should share the wealth
17 with the lawyers whose skill and effort helped create it.” *In re Washington Pub. Power*
18 *Supply Sys. Sec. Litig.*, (“WPPSSSL”) 19 F.3d 1291, 1300 (9th Cir. 1994). Pursuant to this
19 doctrine, Class Counsel request an award of attorneys’ fees of 25% of the Settlement Fund
20 plus all interest earned thereon until the date attorneys fees and expenses are paid. By
21 comparison, as discussed below, the total lodestar of class counsel (hours worked multiplied
22 by hourly rates) is \$7,048,969.¹⁹ As discussed in Section III (A)(2) below, it is standard in
23
24
25
26
27
28

¹⁹ Indeed, as explained in Section III A(3) , comparing Class Counsel’s fee award under the percentage method with the fee award under the lodestar method results in Class Counsel

1 this Circuit to award attorneys' fees of 25% of a settlement fund in class cases . Although
2 Class Counsel believes the circumstances here could merit an upward adjustment from the
3 25% benchmark, they are not seeking any such adjustment.

4
5 Calculating the fee award based upon the percentage method is both straightforward
6 and fair under the circumstances of this case, and was the method stated in the Class Notice
7 distributed to Class members. Moreover, cross-checking this fee request against the lodestar
8 fee calculation validates its reasonableness, as explained below.

9
10 Awarding attorneys' fees in antitrust cases such as this one is particularly appropriate
11 because the Supreme Court has repeatedly recognized the importance of private antitrust
12 litigation as a necessary and desirable tool to assure the effective enforcement of the antitrust
13 laws. *See e.g. Pillsbury Co. v. Conboy*, 459 U.S. 248, 262-63 (1983); *Reiter v. Sonotone*
14 *Corp.*, 442 U.S. 330, 331 (1979); *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 266 (1972). "In
15 the absence of adequate attorneys' fee awards, many antitrust actions would not be
16 commenced" *Alpine Pharmacy, Inc. v. Chas. Pfizer & Co.*, 481 F.2d 1045, 1050 (2d
17 Cir. 1973). Fee awards in successful cases encourage and support meritorious class actions,
18 and promote private enforcement of, and compliance with, the antitrust laws.. "[A] financial
19 incentive is necessary to entice capable attorneys, who otherwise could be paid regularly by
20 hourly-rate clients, to devote their time to complex, time-consuming cases for which they
21 may never be paid." *Francisco v. Numismatic Guaranty Corp. of Am.*, No. 06-61677-CIV,
22 2008 WL 649124, at * 13 (S.D. Fla. Jan. 31, 2008) (quoting *Mashburn v. Nat'l Healthcare*,

23
24
25
26
27
28

obtaining a negative multiplier because the amount of Class Counsel's fee award under the
percentage method, not including interest earned on the Settlement Fund is \$5,619,204.55.

1 *Inc.* 684 F. Supp. 679, 687 (M.D. Ala. 1988). “To make certain that the public is represented
2 by talented and experienced trial counsel, the remuneration should be both fair and
3 rewarding.” *Eltman v. Grandma Lee’s Inc.*, No. 82-1912, 1986 WL 53400, at * 9 (E.D.N.Y.
4 May 28, 1986).

5
6 **1. A Reasonable Percentage of the Fund Recovered is the**
7 **Appropriate Method For Awarding Class Counsel’s Attorneys’**
8 **Fees in this Common Fund Settlement.**

9 The Ninth Circuit has repeatedly approved the use of the percentage method in
10 awarding fees in class actions. *See, e.g., Six Mexican Workers v. Ariz. Citrus Growers*, 904
11 F.2d 1301 (9th Cir. 1990); *Torrissi v. Tucson Elec. Power Co.*, 8 F.3d 1370 (9th Cir. 1993);
12 *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043 (9th Cir. 2002). In *Boeing Co. v. Van Gemert*,
13 444 U.S. 472, 478 (1980), the Court concluded that the attorneys for the class may recover a
14 fee based on the entire common fund created for the class, even if some class members make
15 no claims against the fund so that money remains in the fund. While the Ninth Circuit
16 recently re-affirmed that “[t]he district court may exercise its discretion to choose between
17 the lodestar and percentage method in calculating fees,” *Mercury Interactive*, 618 F.3d at
18 992, since *Paul, Johnson, Alston & Hunt v. Graulity*, 886 F.2d 268 (9th Cir. 1989), district
19 courts in this Circuit have almost uniformly shifted to the percentage method in awarding
20 fees in representative actions.²⁰ This movement, which has occurred over the same time
21
22
23
24

25
26 ²⁰ To the extent courts in this Circuit still apply the lodestar method, this tends to occur
27 either: (1) when the primary relief is non-financial, *Hanlon v. Chrysler Corp.*, 150 F.3d 1011,
28 1029 (9th Cir. 1998) (“In employment, civil rights and other injunctive relief class actions,
courts often use a lodestar calculation because there is no way to gauge the net value of the
settlement or any percentage thereof.”); or (2) to avoid a possible windfall in cases with large
settlements early in the litigation where “[t]here has been no discovery, no lengthy settlement
negotiations, no protracted litigation of any kind.” *Fischel v. Equitable Life Assurance*

1 frame in many Circuits, follows the findings of a task force established by the Third Circuit
2 to examine the issue of awards of attorneys' fees in common fund cases. *See, Court*
3 *Awarded Attorney Fees, Report of the Third Circuit Task Force*, 108 F.R.D. 237, 254-59
4 (1985) ("*Task Force*").

5
6 The trend in this Circuit is consistent with decisions nationwide awarding fees in
7 common fund cases based on a percentage of the total recovery. Manual For Complex
8 Litigation (Fourth) §14.121 (2004) (noting that "the vast majority of courts of appeals now
9 permit or direct district courts to use the percentage-fee method in common fund cases"). In
10 addition to this circuit, at least eight other circuits - the First, Third, Sixth, Seventh, Eighth,
11 Tenth, Eleventh and the D.C. Circuit - have endorsed the percentage-of-recovery method as
12 an appropriate method for awarding attorneys' fees.²¹ The rationale for compensating
13

14
15
16

Society of the United States, 307 F.3d 997, 1003 (9th Cir. 2002) (citations omitted). Neither
17 circumstance applies here.

18 ²¹ *See In re Thirteen Appeals Arising Out of the San Juan DuPont Plaza Hotel Fire*
19 *Litig.*, 56 F.3d 295, 305 (1st Cir. 1995) ("[c]ontrary to popular belief, it is the lodestar
20 method, not the [percentage] method, that breaks from precedent"); *Gottlieb v. Barry*, 43
21 F.3d 474, 484 (10th Cir. 1994) (fee award should be calculated using the percentage method;
22 "use of the lodestar in common fund cases is 'out of fashion'"); *Rawlings v. Prudential-*
23 *Bache Properties, Inc.*, 9 F.3d 513, 515-16 (6th Cir. 1993) (noting "the recent trend toward
24 adoption of a percentage of the fund method," and permitting use of the "percentage of the
25 fund method" in common fund cases); *In re Cont'l. Illinois Sec. Litig.*, 962 F.2d 566, 572 (7th
26 Cir. 1992) ("The class counsel are entitled to the fee they would have received had they
27 handled a similar suit on a contingent fee basis, with a similar outcome, for a paying client").
28 "*Petrovic v. Amoco Oil Corp.*, 200 F.3d 1140, 1157 (8th Cir. 1999) ("It is well established in
this circuit that a district court may use the 'percentage of the fund' methodology to evaluate
attorney fees in a common-fund settlement."); *Camden I Condo Ass'n v. Dunkle*, 946 F.2d
768, 774-75 (11th Cir. 1991) (percentage method mandatory in common fund cases); *Swedish*
Hosp. Corp. v. Shalala, 1 F.3d 1261, 1271 (D.C. Cir. 1993) ("[W]e join the Third Circuit
Task Force . . . in concluding that a percentage-of-the-fund method is the appropriate
mechanism for determining the attorney fees award in common fund cases."); *In re General*
Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 822 (3d Cir. 1995)

1 counsel on the basis of a percentage of the fund created by their efforts is sound, and
2 Plaintiffs respectfully suggest should be followed here. First, it is consistent with practice in
3 individual litigation where contingent attorney fees are customarily determined as a
4 percentage of recovery. Second, it more closely aligns the lawyer's interest in being
5 compensated with the interest of the class in achieving the maximum possible recovery as
6 efficiently as possible.²² Third, use of the percentage method decreases the burden on the
7 court (and the resulting delay in distributing funds) by eliminating a full-blown, detailed and
8 time consuming lodestar analysis. *See, In re Activision Sec. Litig.*, 723 F. Supp. 1373, 1375-
9 76 (N.D. Cal. 1989) (noting that, based on the court's experience, a lodestar analysis
10 "consume[s] an undue amount of court time with little resulting advantage to anyone, but, in
11 fact, it may be to the detriment of the class members.").²³
12
13
14
15

16 ("[i]n common fund cases, a district judge can award attorneys' fees as a percentage of the
17 fund recovered"); *Task Force*, 108 F.R.D. at 254-59.

18 ²² The court in *Kirchoff v. Flynn*, 786 F.2d 320, 325-326 (7th Cir. 1986) explained how
19 the contingent fee method of awarding attorneys' fees aligned the lawyers' and clients'
20 interests:

21 The contingent fee uses private incentives rather than careful monitoring to align the
22 interests of lawyer and client. The lawyer gains only to the extent his client gains . . .
23 . At the same time it automatically aligns interests of lawyer and client, rewards
24 exceptional successes, and penalizes failure, the contingent fee automatically handles
compensation for the uncertainty of litigation.

25 *See also* Charles Silver, *Class Actions in the Gulf South Symposium: Due Process and the*
26 *Lodestar Method: You Can't Get There From Here*, 74 Tul. L. Rev. 1809 (June 2000).

27 ²³ *See also Task Force*, 108 F.R.D. at 258 (referring to the lodestar query as the
28 "cumbersome, enervating, and often surrealistic process of preparing and evaluating fee
petitions" and favoring the percentage approach); *In re Thirteen Appeals Arising out of the*
San Juan Dupont Plaza Hotel Fire Litig., 56 F.3d 295, 307 (1st Cir. 1995) (noting that the
First Circuit allows a court to choose between a lodestar or percentage of the fund ("POF")

1 In evaluating whether any deviation from the benchmark is warranted, a court may
2 consider (1) the result achieved; (2) the risk of the litigation; (3) non-monetary benefits
3 achieved; (4) market rates; and (5) the extent to which counsel had to forego other work and
4 had to invest significant out-of-pocket funds in the litigation. *Vizcaino*, 290 F.3d at 1048-
5 49.²⁵ Plaintiffs respectfully suggest that these factors not only support the award of 25%
6 sought by Class Counsel, but would support an upward adjustment, though no such upward
7 adjustment is sought.²⁶
8
9

10 **a. Class Counsel Obtained Excellent Results.**

11 The settlement here for over \$22 million in cash, plus prospective structural relief, is
12 a significant achievement. The numerous Defendants argued, inter alia, that the agreement
13 between AzHHA and the participating hospitals in the AzHHA Registry Program was not a
14 prohibited agreement to fix wages, but a legitimate joint purchasing arrangement.
15 Defendants also hotly disputed that their conduct and agreement had any effect on the
16 compensation to Class Members. Despite these, and other, defenses, Plaintiffs were able to
17
18

19 *Actions in Four Federal District Courts: Final Report of the Advisory Committee on Civil*
20 *Rules* at 69 (Fed. Judicial Ctr. 1996).

21
22 ²⁵ A survey by the *Vizcaino* Court revealed that a majority of “mega fund” cases can
23 result in fee awards in the 20-30 percent range. *Id. at 1050 n. 4*. Indeed in *Vizcaino*, the Court
24 adjusted the benchmark upward and awarded the attorneys 28% of the \$96 million settlement
25 fund. Given the comparatively more modest size of the fund created here, an award of 25%
26 is imminently reasonable.

27 ²⁶ Indeed, many courts in this Circuit have approved common fund fee awards greater
28 than the percentage requested here. *See e.g., Van Vranken v. Atlantic Ritchfield Co.*, 901 F.
Supp. 294, 297-298 (N.D. Cal. 1995) (citing cases awarding an award of 33%); *In re Pacific*
Enterprises, 47 F.3d 373, 379 (9th Cir. 1995) (affirming an award equal to 33% of common
fund); *In re Activision Sec. Litig.*, 723 F. Supp. 1373, 1375 (N.D. Cal. 1989) (awarding
32.8% of the common settlement fund).

1 obtain a cash settlement of more than \$22 million, as well as prospective relief (though in
2 settling, Defendants have not acknowledged any wrongdoing or liability). Plaintiffs' counsel
3 pursued written discovery, voluminous document and data review, took or defended 17
4 depositions; developed economic evidence and analysis; defeated (in part) Defendants'
5 motion to dismiss, and more. In the end, the settlement that was reached provides real and
6 significant financial benefit to members of the class. It is a substantial and excellent result
7 for Class Members that was the result of effective, hard-fought litigation on the part of
8 Plaintiffs' Counsel.

11 **(i) The Result Is Excellent Considering the Quality of**
12 **Opposing Counsel.**

13 This result is particularly commendable given the quality of opposing counsel, an
14 important factor in evaluating the quality of the work done by Class Counsel. *See e.g., In re*
15 *Equity Funding Corp. Sec. Litig.*, 438 F. Supp. 1303, 1337 (C.D. Cal. 1977) (recognizing that
16 "plaintiffs' attorneys in this class action have been up against established and skillful defense
17 lawyers, and should be compensated accordingly"). The 39 Settling Defendants were
18 represented by, inter alia, 25 separate, experienced and well-known law firms. The ability of
19 Class Counsel to obtain such a significant settlement in the face of such skilled legal
20 opposition further reflects on the quality of Class Counsel's work.²⁷

21 ²⁷ *See also In Heritage Bond Litig.*, 2005 WL 1594389, at *12 (C.D. Cal. June 10, 2005)
22 ("The experience of [Class] counsel is also a factor in determining the appropriate fee
23 award."). Class Members here were represented by attorneys with substantial antitrust
24 experience from firms with long and successful track records in such cases. *See Firm*
25 *Biographies* attached as Exhibits to the Compendium of Firm Declarations.

1 (beginning when the settlement becomes final) with provisions and restrictions similar to
2 those agreed to by AzHHA. *See* Class Settlement Agreement attached as Ex. A to Plaintiffs'
3 Preliminary Approval Motion; *see also* Plaintiffs' Preliminary Approval Motion at 15-16.
4

5
6 **d. Class Counsel Carried the Financial Burden of this**
7 **Litigation, the Time Devoted to this Matter Could Have**
8 **Been Invested in Other Litigation, and Market Rates for**
9 **Contingent Litigation Exceed the Recovery Counsel Seek**
10 **Here.**

11 The Ninth Circuit has confirmed that a determination of a fair and reasonable fee
12 must include consideration of the contingent nature of the fee and the obstacles surmounted
13 in obtaining the settlement.

14 It is an established practice in the private legal market to reward attorneys for
15 taking the risk of non payment by paying them a premium over their normal
16 hourly rates for winning contingency cases. *See* Richard Posner, *Economic*
17 *Analysis of Law*, § 21.9, at 534-535 (3d ed. 1986). Contingent fees that may
18 far exceed the market value of the services rendered on a non contingent basis
19 are accepted in the legal profession as a legitimate way of assuring competent
20 representation for plaintiffs who could not afford to pay on an hourly basis
21 regardless whether they win or lose. *WPPSSSL*, 19 F.3d 1291, 1299 (9th Cir.
22 1994).²⁹

23 Class Counsel have litigated this case for over three years without any compensation.
24 In addition to the thousands of hours invested in it, they have placed \$872,524.62 at risk by
25

26 ²⁹ *See In re Dynamic Random Access Memory (DRAM) Antitrust Litig*, 2007 WL
27 2416513, at * 1 (N.D. Cal, Aug. 16, 2007) (“Plaintiffs’ counsel risked time and effort and
28 advanced costs and expenses with no ultimate guarantee of compensation.”); *see also In re*
Omnivision Techs. 559 F.Supp. 2d 1036, 1047 (N.D. Cal. 2007), (“The importance of
assuring adequate representation for plaintiffs who could not otherwise afford competent
attorneys justifies providing those attorneys who do accept matters on a contingent fee basis a
larger fee than if they were billing by the hour or on a flat fee.”) (citations omitted)

1 advancing that amount for litigation expenses.³⁰ Litigating this case over that extended
2 period of time necessarily diverted counsel from working on other remunerative matters.

3 As to a comparison with market rates, as discussed below, the 25% fee sought would
4 result in a fee that is *below* the combined lodestar of Class Counsel. And the 25% figure is a
5 commonly accepted benchmark in this circuit, and is below the standard privately-negotiated
6 contingent fee recovery of 33% or more. See Lester Brickman, *ABA Regulation of*
7 *Contingency Fees: Money Talks, Ethics Walks*, 65 FORDHAM L. REV. 247, 248 (1996)
8 (noting that “standard contingency fees” are “usually thirty-three percent to forty percent of
9 gross recoveries” (emphasis omitted)); Joni Hersch, Jeffrey O’Connell & W. Kip Viscusi, *An*
10 *Empirical Assessment of Early Offer Reform for Medical Malpractice*, 36 J. LEGAL STUD.
11 S231, S238 (2007) (referencing “the more typical one-third contingency fee rate”); F. Patrick
12 Hubbard, *Substantive Due Process Limits on Punitive Damages Awards: “Morals Without*
13 *Technique”?*, 60 FLA. L. REV. 349, 383 (2008) (referring to “the usual 33-40 percent
14 contingent fee”) (quoting *Mathias v. Accor Econ. Lodging, Inc.*, 347 F.3d 672, 677 (7th Cir.
15 2003)); Herbert M. Kritzer, *The Wages of Risk: The Returns of Contingency Fee Legal*
16 *Practice*, 47 DEPAUL L. REV. 267, 286 (1998) (reporting the results of a survey of
17 Wisconsin lawyers, which found that “a contingency fee of 33% was by far the most
18 common, accounting for 92% of [negotiated contingent fee] cases”). Indeed, courts in the
19 Ninth Circuit have often awarded fees above 25%. See *supra* note 26.

20
21
22
23
24
25
26
27
28

³⁰ This amount includes \$57,858.41 in outstanding expert and court reporting expenses.
Supra note 2.

1 and reimbursement of expenses.³² See *In re Heritage Bond Litig.*, 2005 WL 1594389 at 48-
2 50; See e.g., *In re Prudential Sec. Ltd Pshps. Litig.* 985 F. Supp. 410, 416 (S.D.N.Y. 1997)
3 (“In determining the reasonableness of a requested fee, numerous courts have recognized that
4 ‘the lack of objection from members of the class is one of the most important reasons.’”)
5 (quoting *In re Gen Pub. Utils. Sec. Litig.* 1983 U.S. Dist. LEXIS 11641 at * 22 (D.N.J. Nov.
6 16, 1983) .
7
8
9

10 **3. A Lodestar Cross-Check Verifies That The Requested Fee Is Fair**
11 **and Appropriate.**

12 Evaluation of the lodestar here confirms the reasonable of the fee sought. See *Carter*
13 *v. Anderson Merchandisers, LP*, No. 08-0025, 2010 U.S. Dist. LEXIS 55629 at *11-12 (C.D.
14 Cal. May 11, 2010) (applying lodestar cross-check, citing cases).³³ In applying a lodestar
15 cross-check, courts engage in a two-step process. First, the lodestar is computed by
16 multiplying the number of hours reasonably expended by the reasonable rates requested by
17 the attorneys. *Caudle v. Bristow Optical Co.*, 224 F.3d 1014, 1028 (9th Cir. 2000). Second,
18 the court may compare the lodestar to the percentage-of-the-fund request made by counsel to
19
20
21
22

23 ³² Objections to the Settlement are to be filed with the Court and copies given to David
24 F. Sorensen, Co-Lead Counsel, and Joel W. Nomkin, Counsel for Banner Health and Sun
25 Health Corporation (as liaison counsel for Settling Defendants for, *inter alia*, purposes of
26 notification concerning objections to the Settlement). See Mailed Notice (question 19). As of
27 the date of this filing, no objections appeared on the Docket Report and neither David F.
28 Sorensen nor Joel W. Nomkin have received copies of any objections.

³³ The use of this cross-check is more common in cases that settle very early to guard
against any windfall that a percentage-of-fund method might yield. No such danger is
present here.

1 determine the multiplier that the percentage method would yield.³⁴ *See Vizcaino*, 290 F.3d at
2 1051 n.6. (approving a fee award of 28% of \$96,885,000 settlement, finding that the
3 percentage method of determining attorneys' fees yielded a multiplier of 3.65 and noting that
4 "multiples ranging from one to four are frequently awarded in common fund cases when the
5 lodestar method is applied.") .

7 Class Counsel have invested 17,907.35 hours litigating this matter, for a lodestar of
8 \$7,048,969. This lodestar has been computed based upon the current regular hourly rates
9 charged by counsel. ³⁵ *See* Compendium of Firm Declarations In Support of Plaintiffs'
10 Motion for An Award of Attorneys' Fees, Reimbursement of Expenses, and Incentive
11 Awards to the Class Representatives for Their Efforts on Behalf of Class Members. (attached
12 as Ex. A). The propriety of the lodestar cross-check of the 25% fee requested is supported
13
14
15
16
17
18

19 ³⁴ "The cross check requires neither mathematical precision or bean counting; it allows
20 you to 'rely on summaries submitted by the attorneys and [you] need not review the actual
21 billing records,' *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 306-307 (3d Cir. 2005)." *Barbara Rothstein & Thomas Willging, Managing Class Action Litigation: A pocket Guide*
22 *for Judges*, (Federal Judicial Center 3d ed. 2010.)

23 ³⁵ As allowed under 9th Circuit law, Class Counsel are seeking compensation at current
24 rates for all hours billed during the course of the litigation. *Fischel* ,307 F.3d at 1010
25 ("Attorneys in common fund cases must be compensated for any delay in payment,
26 *Coordinated Pretrial*, 109 F.3d at 609, and thus Plaintiffs' counsel are entitled to such
27 compensation. ... [T]he district court ha[s] discretion to compensate them either '(1) by
28 applying the attorneys' current rates to all hours billed during the course of the litigation; or
(2) by using the attorneys' historical rates and adding a prime rate enhancement.' " (quoting
WPPSSSL, 19 F.3d at 1305).

1 further by the fact that it does not include the continuing work that will be necessary
2 following final approval to administer the settlement.³⁶

3 Even without that additional time, the multiplier produced by cross-checking the 25%
4 award against the total lodestar is negative (i.e., below 1). That obviously falls well within
5 the multipliers commonly awarded in the Ninth Circuit where significant positive multipliers
6 are the norm. *See, e.g., Vizcaino*, 290 F.3d at 1051 n6. (observing that 83% of the courts in
7 common fund cases it surveyed assessed a multiplier between 1 and 4.); *Craft v. Cnty. of San*
8 *Bernardino*, 624 F. Supp. 2d 1113, 1125 (C.D. Cal. 2008) (approving 25% fee award
9 resulting in a multiplier of 5.2, and collecting similar cases). These cases are, again,
10 consistent with nationwide practice. *See, generally, In re Sulzer Hip Prosthesis & Knee*
11 *Prosthesis Liab. Litig.*, 268 F. Supp. 2d 907, 938 n.45 (N.D. Ohio 2003) (relying on a 2003
12 study of fee awards in 1,120 cases to conclude that “the courts’ effective multipliers averaged
13 ... 3.89 across all 1,120 cases”).

14 **4. Conclusion**

15 In light of the above considerations, Plaintiffs respectfully suggest that the requested
16 fee award is reasonable and fair.

17 **B. Reimbursement of Cost and Expenses Reasonably and Necessarily 18 Incurred and Advanced by Counsel is Appropriate.**

19 It is well established that Class Counsel are entitled to reimbursement of all out-of-
20 pocket expenses advanced throughout the litigation so long as those expenses were
21

22 ³⁶ Such work includes preparing for and participating in the final fairness hearing,
23 overseeing the processing of claim forms, answering inquiries from Class members,
24 supervising the distribution of the Settlement Fund to the Class.
25
26
27
28

1 reasonable and necessary to the litigation. *Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir.
2 1994) (approving recovery of “out-of-pocket expenses that ‘would normally be charged to a
3 fee paying client.’”); *Vincent*, 557 F.2d at 769 (“The common fund doctrine provides that a
4 private plaintiff, or his attorney, whose efforts create, discover, increase or preserve a fund to
5 which others also have a claim is entitled to recover from the fund the costs of his
6 litigation...”); *In re Media Vision Tech’y Secs. Litig.*, 913 F. Supp. 1362, 1368 (N.D. Cal.
7 1996) (award of costs subject to reasonableness test).

8
9
10 Certain counsel were required to travel in connection with this case. The travel
11 expenses are reasonable in amount, and are properly charged against the fund created. *See*
12 *Thornberry v. Delta Air Lines, Inc.*, 676 F. 2d 1240, 1244 (9th Cir. 1982), *vacated and*
13 *remanded on other grounds*, 461 U.S. 952 (1983); *In re Immune Response Sec. Litig.*,
14 (“*Immune Response*”) 497 F. Supp. 2d 1166, 1177 (S.D. Cal. 2007).

15
16
17 Photocopying, computerized legal research, postage and expert costs are also
18 customarily reimbursed in common fund cases. *Omnivision*, 559 F.Supp.2d at 1048-1049;
19 *Immune Response*, 497 F. Supp. 2d at 1177-78. The services of an experienced mediator
20 were also reasonably necessary because they assisted in achieving a timely settlement of this
21 complex case. The expenses of the mediator should be reimbursed. *Id.* Accordingly, Class
22 Counsel’s request for reimbursement of \$872,524.62 for all such expenses is reasonable and
23 should be granted.³⁷

24
25
26
27 ³⁷ The previously unreimbursed expenses for which Class Counsel now seek
28 reimbursement are contained in the Compendium of Firm Declarations In Support of Class
Counsel’s Motion for An Award of Attorneys’ Fees and Reimbursement of Costs and
Expenses and Incentive Awards to the Class Representatives for Their Efforts on Behalf of
Class Members. Expenses related to the claims administration process have been and will

1 **C. Incentive Award to the Class Representatives Are Appropriate.**

2 Finally, it is well-recognized that “named plaintiffs ... are eligible for reasonable
3 incentive payments” as part of a class action settlement. *Staton v. Boeing Co.*, 327 F.3d 938,
4 977 (9th Cir. 2003). Courts regularly award such enhancements, which are intended to
5 advance public policy by encouraging individuals to come forward and take action to protect
6 their rights and the rights of the class. *See Van Vranken v. Atl. Richfield Co.*, 901 F.Supp.
7 294, 300 (N.D.Cal. 1995). The award also compensates class representatives for their time,
8 effort and inconvenience. *See Staton*, 327 F.3d at 976-77 (collecting cases). When
9 evaluating the reasonableness of a participation award, courts consider factors such as “the
10 actions the plaintiff has taken to protect the interests of the class, the degree to which the
11 class has benefited from those actions ... [and] the amount of time and effort the plaintiff
12 expended in pursuing the litigation.” *Id.* at 977; see also Manual for Complex Litigation, §
13 21.62 n. 971 (4th ed. 2004) (noting that enhancement payments may be “warranted for time
14 spent meeting with class members, monitoring cases, or responding to discovery”). *See, e.g.*,
15 *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 457 (9th Cir. 2000) (affirming \$5,000
16 payments from a \$1.725 million settlement fund); *Pelletz v. Weyerhaeuser Co.*, 255 F.R.D.
17 537, 543 (W.D. Wash. 2009) (awards of \$7,500 to each of the named plaintiffs in a \$1.75
18 million settlement); *Hughes v. Microsoft Corp.*, No. 98-1646, 2001 WL 34089697, at 12-13
19 (W.D. Wash. 2001) (awards of \$7,500, \$25,000, and \$40,000 to the representative plaintiffs).

20
21
22
23
24
25
26
27
28

also be deducted from the Settlement Fund, but Class Counsel are not seeking reimbursement
for those expenses. Instead, consistent with the Settlement Agreements, as those expenses are
incurred, Class Counsel, following the procedures outlined in the Escrow Agreements, will
instruct the Escrow Agent to pay such expenses. *See* Escrow Agreements at ¶ (8)(a)
(attached at Exhibit B and D respectively to Plaintiffs’ Motion for Preliminary Approval).

1 An award of \$15,000 each to Ms. Walker and Ms. Craig, and \$30,000 to Ms. Johnson
2 for serving as Class Representatives is appropriate here for the significant work they have
3 done on behalf of Class Members. The award requested for Ms. Johnson is higher because
4 she is representing the Per Diem Settlement Class, whose allocated share of the settlement is
5 greater in light of the greater litigation risks faced by the Traveler Settlement Class as
6 explained in Plaintiffs' Motion for Preliminary Approval at 30-31. *See* Proposed Allocation
7 Plan by Hal J. Singer PH.D (attached as Exhibit E to Plaintiffs' Motion for Preliminary
8 Approval). It is also noteworthy that Ms. Walker, Ms. Craig and Ms. Johnson stepped
9 forward as plaintiffs and allowed their names to be made public after prior plaintiffs had filed
10 under pseudonyms out of fear of retaliation and who subsequently withdrew as representative
11 plaintiffs.³⁸ These circumstances underscore the significance of the services performed by
12 Ms. Walker, Ms. Craig and Ms. Johnson on behalf of Class Members. The requested awards
13 here are reasonable. *See, e.g., Sheppard v. Consolidated Edison Co. of New York, Inc.*, No.
14 94-CV-0403 2002 WL 2003206 (E.D.N.Y. Aug. 1, 2002) (reviewing cases approving
15 incentive awards, finding most awards were in the \$10,000 to \$50,000 range).³⁹
16 Significantly, the Class Notice advised that Plaintiffs would be seeking incentive awards in
17 the amounts requested and no Class Member has, thus far, objected.
18
19
20
21
22

23
24 ³⁸ Courts have recognized that in the employment context the willingness of a class
25 representative to step forward is worthy of special consideration. *See, e.g., Mullen v.*
26 *Treasure Chest Casino, LLC*, 186 F.3d 620, 624-25 (5th Cir. 1999), *cert. denied*, 528 U.S.
27 1159 (2000); *Romero v. Producers Dairy Foods Inc.*, 235 F.R.D. 474, 485 (E.D. Cal.
28 2006); *Rosiles-Perez v. Superior Forestry Serv.*, 250 F.R.D. 332, 348 (M.D. Tenn. 2008);
Perez v. Safety-Kleen Sys., 253 F.R.D. 508, 520 (N.D. Cal. 2008); *Scott v. Aetna Servs.*
Inc., 210 F.R.D. 261, 268 (D. Conn. 2002).

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

III. CONCLUSION

For the reasons stated above:

(i) The proposed 25% fee award is fair and reasonable and represents an appropriate percentage recovery from the Common Fund in light of all the circumstances.

(ii) The proposed Incentive Awards are fair and reasonable and represent an appropriate reward for the efforts of the Class Representatives in achieving this settlement;

(iii) Class Counsel are entitled to recover the reasonable and necessary expenses they have incurred in this matter, which sums amount to \$872,524.62

Dated: January 28, 2011

BERGER & MONTAGUE, P.C.

By: /s/ David F. Sorensen

David F. Sorensen
Neill W. Clark
1622 Locust Street
Philadelphia, PA 19103
Tel: 215-875-3000
Fax: 215-875-4673

LAW OFFICES OF DAVID BALTO

David Balto
1350 I Street, N.W., Suite 850
Washington, D.C. 20005-3355
Tel: 202-577-5424
Fax: 202-333-4186

KELLER ROHRBACK, P.L.C.

Mark Samson
Ron Kilgard
3101 North Central Avenue, Suite 1400
Phoenix, AZ 85012

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Tel: 602-248-0088
Fax: 602-248-2822

**BROWNSTEIN HYATT FARBER
SCHRECK, LLP**

Allen P. Grunes
1350 I Street, Suite 510
Washington, D.C. 20005-3355
Tel: 202-296-7353
Fax: 202-296-7009

Timothy R. Beyer
Martha F. Bauer
410 Seventeenth Street, Suite 2200
Denver, CO 80202-4432
Tel: 303-223-1100
Fax: 303-223-1111

Jeffrey S. Rugg
100 City Parkway, Suite 1600
Las Vegas, NV 89106-4614
Tel: 702-382-2101
Fax: 702-382-8135

CERTIFICATE OF SERVICE

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

The undersigned hereby certifies that on January 28, 2011 the foregoing Plaintiffs' Motion For An Award Of Attorneys' Fees, Reimbursement Of Expenses And Incentive Awards To The Class Representatives For Their Efforts On Behalf Of The Class, And Memorandum In Support was served via electronic mail to the following parties and notice of this filing will be sent to all parties listed below by operation of the Court's CM/ ECF System:

Keith Beauchamp
Lauren Jacqueline Weinzweig
Roopali H. Desai
**COPPERSMITH SCHERMER
& BROCKELMAN PLC**
2800 North Central Avenue, Suite 1200
Phoenix, AZ 85004
kbeauchamp@csblaw.com
lweinzweig@csblaw.com
rdesai@csblaw.com
*Attorneys for Arizona Hospital and
Healthcare Association and AzHHA
Service Corporation*

Timothy J. Burke
Jamie Brown
FENNEMORE CRAIG PC
3003 North Central Avenue, Suite 2600
Phoenix, AZ 85012
tburke@fclaw.com
pklein@fclaw.com
*Attorneys for Northern Arizona
Healthcare Corporation, Catholic
Healthcare West, Bullhead City
Hospital Corporation, Payson Hospital
Corporation, Oro Valley Hospital, LLC,
Northwest Hospital, LLC*

Teisha C. Johnson
Katherine I. Funk
**SONNENSCHN NATH &
ROSENTHAL LLP**
1301 K Street N.W.
Suite 600 East Tower
Washington, DC 20005
tcjohnson@sonnenschein.com
kfunk@sonnenschein.com
*Attorneys for University Medical Center
Corporation*

David A. Ettinger
**HONIGMAN MILLER SCHWARTZ &
COHN LLP**
2290 1st National Building
660 Woodward Avenue
Detroit, MI 48226
dettinger@honigman.com
*Attorneys for Northern Arizona
Healthcare Corporation*

1 Randall Papetti
2 **LEWIS & ROCA LLP**
3 40 North Central Avenue
4 Phoenix, AZ 85004-4429
5 rpapetti@lrlaw.com
6 *Attorneys for University Medical
Center Corporation*

7 Joel W. Nomkin
8 Jessica L. Everett-Garcia
9 Michael T. Liburdi
10 Jill Louise Ripke
11 Scott Sebastian Minder
12 Tyler Reese Bowen
13 **PERKINS COIE BROWN & BAIN PA**
14 P.O. Box 400
15 Phoenix, AZ 85012
16 jnomkin@perkinscoie.com
17 jeverettgarcia@perkinscoie.com
18 mliburdi@perkinscoie.com
19 jripke@perkinscoie.com
sminder@perkinscoie.com
tbowen@perkinscoie.com
*Attorneys for Banner Health
and Sun Health Corporation*

20 Dennis Palmer
21 **POLSINELLI SHUGHART PC**
22 120 West 12th Street, Suite 1700
23 Kansas City, MO 64105
24 *Attorneys for Summit Healthcare
Association and University Physicians
Healthcare*

Andrew L. Pringle
**MARISCAL WEEKS MCINTYRE &
FRIEDLANDER PA**
2901 North Central Avenue, Suite 200
Phoenix, AZ 85012-2705
larry.pringle@mwmf.com
*Attorneys for John C. Lincoln Health
Network*

Allen Spencer Boston
David B. Helms
Richard B. Walsh, Jr.
Stephen Michael Durbin
Winthrop Blackstone Reed, III
LEWIS RICE & FINGERSH LC
500 North Broadway, Suite 2000
St. Louis, MO 63102
aboston@lewisrice.com
dhelms@lewisrice.com
rwalsh@lewisrice.com
sdurbin@lewisrice.com
wreed@lewisrice.com
*Attorneys for Carondelet Health
Network*

CLARKE H. GREGER
RYLEY CARLOCK & APPLEWHITE PC
1 North Central Avenue, Suite 1200
Phoenix, Arizona 85004-4417
cgreger@rcalaw.com
*Attorneys for Carondelet Health
Network*

1 Brian M. Flaherty
2 **POLSINELLI SHUGHART PC**
3 3636 North Central Avenue, Suite 1200
4 Phoenix, Arizona 85012
5 bflaherty@stklaw.com
6 *Attorneys for Summit Healthcare
Association and University Physicians
Healthcare*

James A. Craft
GAMMAGE & BURNHAM PLC
2 North Central Avenue, 18th Floor
Phoenix, AZ 85004
jcraft@gbllaw.com
*Attorneys for Yuma Regional Medical
Center, Inc.*

7 Randy Yavitz
8 **HUNTER, HUMPHREY & YAVITZ, PLC**
9 2633 East Indian School Road, Suite
10 440
11 Phoenix, AZ 85008
12 randy@hhyllaw.com
13 *Attorneys for Cobre Valley Community
Hospital and Brim Healthcare*

Douglas Gerlach
JENNINGS STROUSS & SALMON PLC
201 East Washington, Suite 1100
Phoenix, AZ 85004
dgerlach@jssllaw.com
*Attorneys for Regional Care Services
Corp.*

14 James R. Broening
15 Robert T. Sullivan
16 **BROENING OBERG WOODS &
17 WILSON**
18 P.O. Box 20527
19 Phoenix, Arizona 85036
20 jrb@bowllaw.com
21 rts@bowllaw.com
22 *Attorneys for Sierra Vista Regional
Health Center*

Jeffrey A. LeVee
Catherine T. Broderick
JONES DAY
555 South Flower Street
50th Floor
Los Angeles, CA 90071
jlevee@jonesday.com
cbroderick@jonesday.com
Attorneys for TMC Healthcare

1 Joan McPhee
Jane E. Willis
2 Matthew P. Garvey
3 **ROPES & GRAY LLP**
4 One International Place
5 Boston, MA 02110-2624
6 joan.mcphee@ropesgray.com
jane.willis@ropesgray.com
7 matthew.garvey@ropesgray.com
8 *Attorneys for Iasis Healthcare*
9 *Holdings, Inc., St. Luke's Medical*
10 *Center, L.P., St. Luke's Behavioral*
Hospital, L.P., Mesa General Hospital,
L.P.

11 David B. Rosenbaum
12 Debbie A. Hill
13 Robert T. Weeks
14 **OSBORN MALEDON, P.A.**
15 2929 North Central Avenue
16 Phoenix, AZ 85012-2794
17 drosenbaum@omlaw.com
18 dhill@omlaw.com
19 rweeks@omlaw.com
20 *Attorneys for Iasis Healthcare*
21 *Holdings, Inc., St. Luke's Medical*
Center, L.P., St. Luke's Behavioral
Hospital, L.P., Mesa General Hospital,
L.P.

Jeffrey J. Campbell
CAMPBELL YOST CLARE & NORELL
PC
101 North 1st Avenue, Suite 2500
Phoenix, AZ 85003
jcampbell@cycn-phx.com
Attorneys for TMC Healthcare

Lawrence Allen Katz
P. Bruce Converse
Kami S. Galvani
STEPTOE & JOHNSON LLP
Collier Center
201 East Washington Street, Suite 1600
Phoenix, AZ 85004-2382
lkatz@steptoe.com
bconverse@steptoe.com
kgalvani@steptoe.com
Attorneys for Healthsouth Valley of the
Sun, L.P., Healthsouth Rehabilitation
Institute of Tucson, LLC and Southern
Arizona Regional Rehabilitation
Hospital, L.P.

1 Brian A. Hayles
2 Mark J. Horoschak
3 Debbie Weston Harden
4 **WOMBLE CARLYLE SANDRIDGE &**
5 **RICE PLLC**
6 301 South College Street, Suite 3500
7 Charlotte, NC 28202-6037
8 bhayles@wcsr.com
9 mhroschak@wcsr.com
10 dharden@wcsr.com
11 *Attorneys for Bullhead City Hospital*
12 *Corporation, Payson Hospital*
13 *Corporation, Oro Valley Hospital,*
14 *L.L.C.,*
15 *Northwest Hospital, L.L.C.*

13 James P. McLoughlin, Jr.
14 Tonya L. Mitchell
15 Penny Hirsch Edwards
16 Charles Price
17 **MOORE & VAN ALLEN, P.L.L.C.**
18 100 North Tryon Street, Suite 4700
19 Charlotte, North Carolina 28202
20 jimmccloughlin@mvalaw.com
21 tonyamitchell@mvalaw.com
22 pennyedwards@mvalaw.com
23 Charles.Price@mwmf.com
24 *Attorneys for Arizona Heart Hospital,*
25 *LLC and AHH Management, Inc.*

23 Nicole Maroulakos Goodwin
24 **QUARLES & BRADY LLP**
25 1 Renaissance Square
26 2 North Central Avenue
27 Phoenix, AZ 85004-2391
28 ngoodwin@quarles.com
Attorneys for Select Specialty Hospital
– Phoenix, Inc. and Select Specialty
Hospital – Arizona, Inc.

Kerry Scott Martin
OGLETREE DEAKINS NASH SMOAK &
STEWART
2415 East Camelback Road, Suite 800
Phoenix, AZ 85016
kerry.martin@ogletreedeakins.com
Attorneys for Hospital Development of
West Phoenix, Inc., VHS Acquisition
Subsidiary Number 1, Inc., VHS
Acquisition Corporation, VHS of
Arrowhead, Inc., VHS of Phoenix, Inc.,
VHS Acquisition Company Number 1,
L.L.C., PHC-Fort Mohave, Inc.,
Havasu Regional Medical Center,
L.L.C.,
Kingman Hospital, Inc.

Barry D. Halpern
Daniel Joseph McAuliffe
Dan W. Goldfine
SNELL & WILMER LLP
1 Arizona Center
400 East Van Buren
Phoenix, AZ 85004-2202
bhalpern@swlaw.com
dmcauliffe@swlaw.com
dgoldfine@swlaw.com
Attorneys for Mayo Clinic Arizona,
Phoenix Children's Hospital, Inc.,
Scottsdale Healthcare Corporation

Thomas P. Hanrahan
SIDLEY AUSTIN LLP
555 West Fifth Street, Suite 4000
Los Angeles, California 90013
thanrahan@sidley.com
Attorneys for Kindred Hospitals, West
LLC

1 Franklin J. Hoover
2 **MANGUM, WALL, STOOPS &**
3 **WARDEN, PLLC**
4 100 N. Elden St.
5 P.O. Box 10
6 Flagstaff, Arizona 86002-0010
7 fhoover@mswlaw.com
8 *Attorneys for Navajo Health*
9 *Foundation – Sage Memorial Hospital,*
10 *Inc.*

11 /s/ Neill W. Clark
12 **Neill W. Clark**

13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28