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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Spinedex Physical Therapy, U.S.A., Inc., et al., **Plaintiffs,** **vs.** **United Healthcare of Arizona, Inc.,** et al., **Defendants.**	**No. CV 08-457-PHX-ROS** **PLAINTIFFS' MOTION FOR CLASS COUNSEL'S ATTORNEY'S FEES, EXPENSES, AND SERVICE AWARDS** **(Final Fairness Hearing scheduled for August 1, 2019 at 10:00 a.m.)**

Pursuant to Rules 23(e) and (h) of the Federal Rules of Civil Procedure, Rule 54.2(c) of the Local Rules of Civil Procedure, and the Order (Doc. 823) of this Court preliminary approving the Settlement Agreement dated December 21, 2018 (the "Settlement Agreement" or the "Settlement"), Plaintiffs respectfully move the Court for the following relief: i) an award of attorney's fees for Class Counsel in the amount of $491,666.00 (one-third of the gross monetary consideration of $1,475,000) and expenses of $126,000 payable from the common fund created by the Settlement; and ii) service awards in the amount of $40,000 and $10,000 for class representatives Spinedex Physical Therapy, U.S.A., Inc. ("Spinedex") and Claude Aragon, respectively, also payable from the common fund created by the Settlement.

In support of this Motion, Plaintiffs respectfully submit the Declarations of Joseph A. Garofolo ("Garofolo Decl."), Joseph A. Creitz ("Creitz Decl."), Susan J. Martin ("Martin Decl."), Thomas E. Blankenbaker ("Blankenbaker Decl."), and Claude Aragon ("Aragon Decl.") filed herewith, and request that the Court consider all pleadings and records on file, all matters of judicial notice, and any arguments and evidence presented at the final fairness hearing scheduled for August 1, 2019.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

After more than 10 years of vigorous litigation, Plaintiffs and Class Counsel have achieved a strong result for a class of participants and beneficiaries of health plans who received nonsurgical spinal decompression therapy ("Decompression Therapy") and providers of such therapy. The Settlement, if finally approved, establishes a settlement fund of $1,475,000 in monetary consideration (the "Settlement Fund") and requires important revisions to two policies maintained by United[1] that apply to all plans governed by the Employee Retirement Income Security Act of 1974, as amended ("ERISA"). The Settlement also requires a meeting between United and stakeholders of

[1] Collectively, United Healthcare of Arizona, Inc., United Healthcare, Inc., United HealthCare Insurance Company, United HealthCare Services, Inc., UnitedHealth Group Inc., and Ingenix, Inc. are referred to as "United."

Decompression Therapy to discuss its medical efficacy.

Plaintiffs' request for Class Counsel's attorney's fees of one-third of the Settlement Fund, reimbursement of expenses of $126,000 from the common fund, and total service of awards of $50,000 are appropriate and supported by controlling Ninth Circuit authority. This is especially true in light of the fact that the requested percentage of the Settlement Fund does not factor in the value of the important nonmonetary consideration required by the Settlement. Moreover, the attorney's fees, expenses, and service awards requested are eminently reasonable after taking into account the difficulty of the issues involved in this case and the history of the litigation, including the three summary judgment motions that Plaintiffs opposed, the successful appeal to the Ninth Circuit, and the petition for a writ of certiorari filed by United with the Supreme Court that Plaintiffs defeated.

Finally, the negative multiplier revealed by the lodestar cross-check demonstrates the reasonableness of the request for Class Counsel's attorney's fees—Plaintiffs are requesting less than one-tenth of the amount produced by a lodestar cross-check.

Accordingly, this Motion should be granted.

II. ARGUMENT[2]

A. Plaintiffs' Request for Attorney's Fees and Expenses from the Settlement Fund Meets the Conditions for Eligibility Under LRCiv 54.2(c)(1) and Controlling Law.

1. Class Counsel is eligible for common fund attorney's fees and expenses under applicable law, the Settlement Agreement, and their fee agreement.

Where, as here, attorney's fees and expenses are sought from a common fund recovery achieved for a settlement class, it is well established that the plaintiffs' attorneys are eligible to be compensated from the settlement fund. *See Boeing Co. v. Van Gemert*, 444 U.S. 427, 478 (1980) ("[T]his Court has recognized consistently that a

[2] This section tracks the requirements of LRCiv 54.1(c), including a description of the nature of the case as required by LRCiv 54.1(c)(1). However, for a more detailed description of the litigation, including its history, Plaintiffs respectfully refer the Court to pages 2-6 of their memorandum in support of preliminary approval of the Settlement ("Preliminary Approval Brief") (Doc. 808).

litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole."); *In re Wash Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1300 (9th Cir. 1994). ERISA litigation is no exception. *See Fischel v. Equitable Life Assur. Soc'y of the United States*, 307 F.3d 997, 1006 (9th Cir. 2002) ("When counsel recover a common fund which confers a 'substantial benefit' upon a class of beneficiaries, they are entitled to recover their attorney's fees from the fund."); *Downey Surgical Clinic, Inc. v. OptumInsight, Inc.*, 2016 U.S. Dist. LEXIS 145000, at *28 (C.D. Cal. May 16, 2016); Mark Howard Berlind, *Attorney's Fees Under ERISA: When Is an Award Appropriate*, 71 Cornell L. Rev. 1037, 1060 (1986).

Consistent with the Ninth Circuit's recognition that common fund attorney's fees and expenses are appropriate in ERISA cases, Plaintiffs are authorized to seek attorney's fees and expenses under their fee agreement and the Settlement Agreement. (*See* Garofolo Decl. ¶ 27 & Ex. C). There is no relevant judgment for purposes of LRCiv 54.2(c)(1).

2. The nature of the case and the claims and defenses in this litigation support the requested award of attorney's fees and expenses.

This lawsuit was filed in March of 2008 as a class action with Spinedex as the only plaintiff. Three additional plaintiffs, two plan participants and an association of chiropractors, joined this lawsuit prior to the filing of the Second Amended Complaint ("Amended Complaint" or "SAC") (Doc. 38) on July 9, 2008. The Amended Complaint alleges that United systematically violates ERISA when processing and denying physical therapy and Decompression Therapy claims submitted under employer-sponsored health plans. (*E.g.*, SAC ¶¶ 1, 101, 106-21).

As to United's processing and denials of Decompression Therapy claims, Plaintiffs allege a class of plan participant and medical providers with assignments, including chiropractors, who submitted claims under ERISA-covered plans and were improperly denied claims based on a medical policy maintained by United. (*Id.* at ¶ 97).

That policy characterizes Decompression Therapy as experimental, investigational, or unproven and, therefore, not covered under ERISA plans. (*Id.* at ¶ 78). Plaintiffs allege that United's denial of such claims under the policy is improper and violates ERISA because it, *inter alia*, fails to consider the terms of the health plans and misapplies such terms. (*Id.* at ¶¶ 78-85).

As to processing of claims for Decompression Therapy and physical therapy, Plaintiffs allege that United violates ERISA's full and fair review requirement and the corresponding claims regulation, 29 C.F.R. § 2560.503-1 ("Claims Regulation"), and generally breaches its fiduciary duties. (*Id.* at ¶¶ 110-119). Among the alleged violations, Plaintiffs assert that United: i) fails to consider terms of the formal plan instrument and instead relies only on summaries of the plan instrument; ii) describes benefit denials in a manner that cannot be understood by participants; iii) inhibits claims and appeals by failing to properly process appeals; and iv) fails to properly compile and preserve administrative records. (*See* Plfs.' Opposition to Defs.' Mot. for Partial Summary Judgment (Doc. 726) at 19).

The procedural history of the litigation is relevant to the nature of the case and the claims and defenses involved in the lawsuit. After this Court entered final judgment on all of Plaintiffs' claims on October 23, 2012, Plaintiffs appealed to the Ninth Circuit. The Ninth Circuit reversed in part, affirmed in part, vacated in part, and remanded the case.[3] *See Spinedex Physical Therapy USA Inc. v. United Healthcare of Ariz., Inc.*, 770 F.3d 1282 (9th Cir. 2014). The Ninth Circuit affirmed the dismissal of Plaintiffs Adams and the Arizona Chiropractic Society on statute of limitations and standing grounds and remanded the exhaustion issue with guidance as to how it should be analyzed with regard to remaining benefit denial claims. *See id.* at 1293, 1299. The appellate court affirmed this Court's ruling that Plaintiff Spinedex's assignments did not encompass ERISA claims for fiduciary breach and held that such assignments only covered benefit claims. *See id.* at 1292.

[3] Appellants were represented by two of the three law firms representing Plaintiffs.

The Ninth Circuit also held that Plaintiff Aragon could only assert claims for fiduciary breach and could not assert claims for denied benefits because he had assigned his claims to Spinedex. *See id.* at 1293. The ruling left open the question of "whether, in the case's current procedural posture, [Plaintiff] Aragon has Article III standing." *Id.* at 1294. The appellate court elaborated by identifying the issue of "whether Aragon would have standing to bring a claim for breach of fiduciary duty if he cannot pursue his claim for denial of benefits because he has assigned it to Spinedex." *Id.* Finally, the Ninth Circuit vacated and remanded the ruling that United was not a proper defendant with respect to Plaintiffs' benefit denial claims relating to self-funded plans for further factual development. *Id.* at 1298.

United filed a petition for a writ of certiorari asking the Supreme Court to review the issue of whether United was a proper defendant with regard to self-funded plans.[4] On October 13, 2015, after briefing, the Supreme Court denied United's petition for a writ of certiorari. *See United Healthcare of Ariz. v. Spinedex Physical Therapy USA, Inc.*, 136 S. Ct. 317 (2015).

Thereafter, at the January 26, 2016 status conference, this Court determined that another summary judgment motion was appropriate to address the standing issue identified by the Ninth Circuit relating to Plaintiff Aragon and other issues raised by Defendants. Defendants were also granted leave to expand their summary judgment motion to include a statute of limitations argument relating to Plaintiff Spinedex's benefit denial claims based on *Blood Systems, Inc. v. Roesler*, 972 F. Supp. 2d 1150, 1154-57 (D. Ariz. 2013). In *Blood Systems*, this Court held that the statute of limitations relating to subrogation claims brought under ERISA was one year under Arizona Revised Statutes § 12-541(3). Defendants filed their third motion for summary judgment on February 29, 2016. (*See* Defs.' Mot. for Partial Summary Judgment ("Third MSJ") (Doc. 634)).

The Court granted in part and denied in part Defendants' Third MSJ in a detailed

[4] Plaintiffs were again represented by two of the firms serving as counsel in this case.

ruling. (*See* Order dated December 15, 2017 ("12/15/17 Order") (Doc. 768)). Answering the question raised by the Ninth Circuit, the Court held that Plaintiff Aragon has standing to bring claims for injunctive and declaratory relief. (*See id.* at 1-9). But the Court agreed with Defendants that a one-year statute of limitations applies to Plaintiff Spinedex's claims for benefits. (*See id.* at 9-15). Defendants were also granted summary judgment relating to anti-assignment provisions for five plans. (*Id.* at 15-17).

Thus, when the case settled, Plaintiffs' claims that remained after the 12/15/17 Order fell into the following two categories: i) Plaintiff Aragon's claims for widespread and systematic fiduciary breaches and prohibited transactions by United of ERISA on behalf of putative Decompression Therapy and physical therapy classes; and ii) Plaintiff Spinedex's ERISA benefit denial claims limited to those asserted within the one-year statute of limitations as determined by the Court in the 12/15/17 Order, also on behalf of alleged Decompression Therapy and physical therapy classes. With regard to the former, Plaintiff Aragon's claims were limited to injunctive and declaratory relief. (*See id.* at 6:3-9:1).

In addition to contesting the elements of proof for Plaintiffs' claims, Defendants listed 21 defenses[5] on pages 52-59 of the Joint Proposed Case Management Plan ("Case Management Plan") (Doc. 617). While the 12/15/17 Order disposed of certain issues relating to standing that are included among the defenses listed in the Case Management Plan, notably, Defendants' exhaustion defense (which they did not press in their summary judgment motion) remained. (*See* Third MSJ at 2 n.3; Rule 16 Scheduling Order (Doc. 781) at 4:10-11 (permitting Defendants to file a fourth summary judgment motion)). Moreover, the parties disputed the standard of review applicable to claims involving Decompression Therapy and physical therapy—an issue also not addressed in summary judgment briefing. (*See* Case Management Plan (Doc. 617) at 24:3-9).

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[5] Although nominally designated as "affirmative defenses," the defenses include those that would not normally be considered affirmative defenses, such as "plaintiffs cannot demonstrate that Defendants violated any obligations set forth by ERISA or the terms of the plans." (Case Management Plan at 55:21-22).

Accordingly, as further discussed below, Class Counsel and Plaintiffs achieved a strong result in the face of difficult and uncertain issues.

B. Based on the Substantial Benefit Test and LRCiv 54.2(c)(2), Attorney's Fees and Expenses Should be Awarded From the Common Fund.

As recognized by the Ninth Circuit, class counsel is entitled to attorney's fees and expenses from a common fund when such fund provides a "'substantial benefit' upon a class of beneficiaries." *Fischel*, 307 F.3d at 1006 (citing *Lewis v. Anderson*, 692 F.2d 1267, 1270 (9th Cir. 1982)).[6] The substantial benefit test is not a high bar, especially when monetary relief is recovered from defendants in a class action settlement.

In *Lewis*, the Ninth Circuit explained the following:

> [N]either federal nor California law requires a plaintiff to obtain judgment as a pre-condition for fees. . . . [B]oth federal and California law permit a fee recovery when a substantial benefit arises from a settlement rather than a judgment. . . . [F]ederal law permits a fee award if a benefit arises from . . . remedial action that moots the plaintiff's claim.
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> The unifying principle . . . is that even if a plaintiff does not ultimately prevail, attorney's fees are nonetheless awardable if his action creates a substantial benefit.

692 F.2d at 1270 (internal citation omitted).

The Ninth Circuit also rejected the contention that the relief obtained must achieve "long-standing procedural changes . . . or monetary recovery." *Id.* at 1271. In applying the substantial benefits test, federal courts have held that increased disclosure is sufficient to satisfy an award of attorney's fees. *See, e.g.*, *In re Schering Plough/Merck Merger Litig.*, 2010 U.S. Dist. LEXIS 29121, at *50 (D.N.J. March 25, 2010) ("a

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[6] Although the Ninth Circuit has also described the substantial benefit test as distinct from the common fund doctrine, *see Vincent v. Hughes Air West, Inc.*, 557 F.2d 759, 768 (9th Cir. 1977), in *Fischel*, the Ninth Circuit applied elements of both in an ERISA case: "When counsel recover *a common fund which confers a 'substantial benefit'* upon a class of beneficiaries, they are entitled to recover their attorney's fees from the fund." 307 F.3d at 1006 (emphasis added, citation omitted). The *Fischel* analysis is most appropriate in this case where both monetary and nonmonetary relief has been secured.

substantial benefit was conferred as a consequence of the efforts of Class counsel to obtain for shareholders more complete, informative and material supplemental disclosures for the purposes of exercising their vote").

The only other requirement articulated by the Ninth Circuit in *Lewis* is that the suit must be "meritorious." 692 F.2d at 1270. This merely means that the lawsuit "has sufficient merit to survive a motion to dismiss on the pleadings." *Id.* at 1270-71.

Plaintiffs easily satisfy the Ninth Circuit's requirements entitling Class Counsel to recover attorney's fees and expenses from the common fund as they have achieved a substantial benefit for a class of participants (and medical providers with assignments). Plaintiffs have obtained important nonmonetary relief and monetary consideration as described below. *See infra* at 16-18. Moreover, Plaintiffs' claims were "meritorious" because such claims remained after Defendants' motion to dismiss and material claims also survived three summary judgment motions. *See Lewis*, 692 F.2d at 1270.

C. The Requested Award is Reasonable.

Plaintiffs request that the Court award Class Counsel one-third of the $1,475,000 common fund created by the Settlement. Although a district court has discretion to award attorney's fees using a percentage or a lodestar/multiplier method, generally courts in the Ninth Circuit prefer awards based on a percentage of the common fund. *See In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1046 (N.D. Cal. 2007). Among the reasons for this preference, as recognized by the Ninth Circuit, is that "the lodestar method creates incentives for counsel to expend more hours than may be necessary on litigating the case so as to recover a reasonable fee." *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1050 (9th Cir. 2002).

In *Vizcaino*, the Ninth Circuit rejected the argument of objectors to the district court's award of attorney's fees based on a percentage of the common fund. *Id.* at 1051. The Ninth Circuit approved of the district court's reliance on the factors outlined in *Kerr v. Screen Actors Guild, Inc.*, 526 F.2d 67, 69-70 (9th Cir. 1975). *See Vizcaino*, 290 F.3d at 1051. There, the Ninth Circuit articulated the same factors set forth in LRCiv

54.2(c)(3)(A)-(L). *See Kerr*, 536 F.2d at 70 (adopting the factors outlined by the Fifth Circuit in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974)). Consistent with the Local Rules, the Ninth Circuit has cautioned that "[s]election of the [25%] benchmark or any other rate must be supported by findings that take into account all of the circumstances of the case." *Vizcaino*, 290 F.3d at 1048.

The factors set forth in LRCiv 54.2(c)(3) demonstrate that Class Counsel should be granted the attorney's fees and expense sought in this Motion.

1. Over 10 years of time and labor were required of Class Counsel (LRCiv 54.2(c)(3)(A)).

Class Counsel has devoted more than ten years to this litigation. (Garofolo Decl. ¶ 14). Plaintiffs opposed a motion to dismiss and three voluminous summary judgment motions—the Rule 56.1 Statement of Undisputed Facts (Doc. 635) filed by Defendants in support of their Third MSJ alone was 59 pages and 384 paragraphs. (*Id.*). As discussed below, Plaintiffs filed a successful appeal and defeated a petition for a writ of certiorari asking the Supreme Court to review an important issue. Defendants produced over 60,000 pages of documents and Plaintiffs produced almost 25,000 pages. (*Id.* at ¶ 15). Plaintiffs also took the depositions of multiple individuals associated with United and propounded and responded to discovery requests, including a set of 377 requests for admission to Spinedex relating to exhaustion and balance billing and another set of 63 requests for admission relating primarily to balance billing. (*Id.*).

Simply put, Plaintiffs' attorneys were required to work extremely hard on this litigation over sustained periods of time. The three firms that represented Plaintiffs spent total professional time of 10,593.35 hours equating to $5,253,389.50 at reasonable rates.[7] (*See* Garofolo Decl. ¶¶ 25; Creitz Decl. ¶ 18; Martin Decl. ¶ 13). Task-based

[7] This total does not include time for preparation of this Motion and related documents, but includes travel time. The Local Rules disallow compensation for air travel time. *See* LRCiv 54.2(e)(2)(D). However, at least one judge in the District of Arizona has recognized that the Local Rule is "invalid" where a separate statute would otherwise permit the compensation that Local Rule 54.2(e) disallows. *See 11333, Inc. v. Certain Underwriters at Lloyd's, London*, 2018 U.S. Dist. LEXIS 85737, at *3-6 (D. Ariz. May

itemized statements of attorney's fees in the format required by LRCiv 54.2(e)(1) have been submitted for Garofolo & Ramsdell, LLP and Martin & Bonnett, PLLC, and Joseph Creitz has summarized his total hours in his declaration filed herewith.[8] (Garofolo Decl. ¶¶ 23-26 & Ex. B; Creitz Decl., ¶ 18; Martin Decl. ¶¶ 12-13 & Ex. A). Summaries of the rates, hours, and totals for all attorneys and paralegals are also provided. (Garofolo Decl. ¶ 25; Creitz Decl. ¶ 18; Martin Decl. ¶ 13).

2. The novelty and difficulty of the questions presented supports the requested award of fees and expenses (LRCiv 54.2(c)(3)(B)).

The following were among the difficult and novel issues that arose in this litigation and effectively would have precluded the relief that was achieved by the Settlement had Defendants' arguments prevailed before the Ninth Circuit:

- Defendants vigorously argued that balance billing was required in order for Spinedex and Aragon to bring any of their ERISA claims. This Court recognized that the issue was "a close one." (Sealed Order (Doc. 399) at 5:16).
- Defendants asserted that the "factual predicates" of fiduciary breach and prohibited transaction claims alleged in this litigation were intertwined with benefit denial claims and therefore were required to be exhausted. (*See* Defs.' Mot. for Partial Summary Judgment ("First MSJ") (Doc. 237) at 17:23-18:2).
- The standard for deemed exhaustion of benefit denial claims was disputed with Defendants contending that substantial compliance with the Claims

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22, 2018). The costs of travel, including travel time, are typically compensable under ERISA's fee-shifting provision, ERISA § 502(g). *See Gurasich v. IBM Ret. Plan*, 2016 U.S. Dist. LEXIS, at *32-33 (N.D. Cal. July 12, 2016).

[8] Mr. Creitz's 789.3 hours at his rate of $800 total $631,440 and thus do not materially affect the negative multiplier for the lodestar cross-check. (*See* Creitz Decl. ¶ 18). If the Court, however, determines that Mr. Creitz's task-based time entries are necessary to support the requested award of attorney's fees, Mr. Creitz will promptly submit such entries for the Court's review. (*See id.*). The time entries for Mr. Garofolo's firms and Martin & Bonnett, PLLC have been redacted for attorney-client privilege and work product protection. (*See* Garofolo Decl. ¶ 24). If the Court determines that the redacted entries provide insufficient detail to substantiate the requested attorney's fees, Mr. Garofolo and Martin & Bonnett, PLLC will promptly submit unredacted entries for in camera review.

Regulation is sufficient and Plaintiffs asserting that strict compliance is necessary. With the benefit of the views of the Secretary of Labor as amicus curiae, the Ninth Circuit adopted a de minimis standard: "Because the Secretary's interpretation is not 'plainly erroneous or inconsistent with the regulation,' we adopt it here. Where United's failure to comply with claims procedures went beyond mere de minimis violations, patients' claims must be deemed exhausted under 29 C.F.R. § 2560.503-1(l)." *Spinedex*, 770 F.3d at 1299 (citation omitted).

- United contended that when an insurer/claims administrator is not the funding source of benefits or a named plan administrator under ERISA, it cannot be sued as a defendant in a claim for benefits. Although the Ninth Circuit vacated and remanded this Court's ruling for a determination of whether United was a de facto administrator, the Ninth Circuit acknowledged the novelty of the issue: "As the district court noted, the reach of *Cyr* [*v. Reliance Standard Life Ins. Co.*, 642 F.3d 1202 (9th Cir. 2011) (*en banc*),] was left unclear in our opinion." *Spinedex*, 770 F.3d at 1297. United then filed a petition for a writ of certiorari with the Supreme Court that Plaintiffs and Class Counsel defeated after briefing. *See United Healthcare of Ariz. v. Spinedex Physical Therapy USA, Inc.*, 136 S. Ct. 317 (2015).

Although the novel and difficult issues in this case are not limited to those summarized above, in addition to being novel and difficult, the ultimate outcome of the issues set forth above was not only important for Plaintiffs to achieve the Settlement, it had a positive impact on protecting the rights of participants and beneficiaries.

3. The case demanded considerable skill (LRCiv 54.2(c)(3)(C)).

ERISA has been aptly described as a "veritable Sargasso Sea of obfuscation." *Travelers Ins. Co. v. Cuomo*, 14 F.3d 708, 717 (2d Cir. 1993), *rev'd sub nom. Blue Cross & Blue Shield v. Travelers*, 514 U.S. 645 (1995). As reflected by the issues discussed above, a high level of skill was required to properly litigate this complex ERISA case. (*See* Garofolo Decl. ¶ 18).

A few examples are illustrative. The issue of whether Plaintiffs had standing to bring their ERISA claims when Spinedex had not balance billed patients implicated Article III standing and ERISA concepts. *See Spinedex*, 770 F.3d at 1289 ("Spinedex *patients* . . . have standing *under ERISA and Article III* to bring suit on their own behalf

under the Plans of which they are beneficiaries.") (emphasis added). Similarly, the case involved Plaintiff Aragon's Article III standing to bring ERISA claims for injunctive and declaratory relief, an issue that implicated Constitutional issues and ERISA. (*See* 12/15/17 Order at 7:21-23) ("The Ninth Circuit has not overruled *Shaver* and district courts have concluded its approach still dictates the proper standing analysis for breach of fiduciary duty claims under ERISA."). And the case involved issues, such as exhaustion, that were governed exclusively by ERISA. *See Spinedex*, 770 F.3d at 1294, 1298-99.

Additionally, United is one of the largest insurers in the United States and was defended by a reputable law firm based in New York and local counsel, both skilled and reputable. (*See* Garofolo Decl. ¶ 16). A different reputable law firm and counsel represented United in connection with its petition for a writ of certiorari that Plaintiffs defeated. (*Id.*).

To obtain the Settlement, a high degree of skill was required.

4. Counsel was precluded from other employment because of this litigation (LRCiv 54.2(c)(3)(D).

Garofolo & Ramsdell, LLP and Mr. Garofolo's predecessor firms were precluded from other employment due to this litigation. Mr. Garofolo's firm and predecessor firms are (or were) all small firms and could not accept matters that they could have otherwise taken on because of this case. (*Id.* at ¶ 19). Indeed, for extended periods, this case occupied the majority of Mr. Garofolo's time as lead counsel because he performed most of the work in this litigation. (*Id.*).

5. The fee customarily charged in ERISA matters supports the requested award (LRCiv 54.2(c)(3)(E)).

"Although . . . the 'relevant community,' when determining appropriate attorneys' rates, is generally the one in which the district court sits, . . . ERISA cases involve a national standard, and attorneys practicing ERISA law in the Ninth Circuit tend to practice in different districts." *Mogck v. Unum Life Ins. Co. of Am.*, 289 F. Supp.

2d 1190, 1191 (S.D. Cal. 2003) (some internal quotations and citations omitted). Other courts in the Ninth Circuit and elsewhere agree. *See, e.g.*, *McAfee v. Metro. Life Ins. Co.*, 625 F. Supp. 2d 956, 975 (E.D. Cal. 2008) (quoting *Mogck* for the same proposition); *Ark. Teacher Ret. Sys. v. State St. Bank & Trust Co.*, 2018 U.S. Dist. LEXIS 111409, at *209 (D. Mass. June 28, 2018) ("Courts reviewing fee petitions in ERISA cases have routinely considered the comparable rates of ERISA attorneys in other jurisdictions and determined that ERISA cases involve a 'national standard.'"); *Frommert v. Conkright*, 223 F. Supp. 3d 140, 151 (W.D.N.Y. 2016) ("[P]laintiffs have demonstrated that the subject matter—ERISA benefits, involving numerous beneficiaries—required special expertise, that it was reasonable for plaintiffs to use out-of-district counsel, and that the hourly rates to be applied here are not strictly bound by what would be typical for counsel from this district.").

The *Mogck* court further held that the existence of a national market is supported by the fact "that ERISA cases are often considered to be complex, ERISA plaintiff cases are often undesirable, and Plaintiff's attorneys possess extensive experience in ERISA law." 289 F. Supp. 2d at 1191. Accordingly, in ERISA cases, declarations of Arizona attorneys and "attorneys in other jurisdictions" should be considered when determining the market rate. *See id.*; *McAfee*, 625 F. Supp. 2d at 975.

Plaintiffs have submitted the time and rates of each professional who performed work in this litigation. (Garofolo Decl. ¶¶ 21, 25; Creitz Decl. ¶ 18; Martin Decl. ¶¶ 13-14). Attorneys have worked a total of 9,860.45 hours on this case, excluding time relating to this motion. The rates for attorneys range from $200 to $800 an hour.[9]

[9] These rates are generally current rates because the Ninth Circuit has approved of the use of such rates for the purpose of the lodestar calculation to compensate for the delay in payment. *See In re Wash. Pub. Power Supply Sys. Secs. Litig.*, 19 F.3d 1291, 1305 (9th Cir. 1994). However, the rate at the time that the work was performed has been used for associates and for Jon F. Doyle with Mr. Garofolo's predecessor firms rather than current rates. (Garofolo Decl. ¶ 21). This understates the lodestar cross-check because the Ninth Circuit has made clear that an upward adjustment is applicable even for attorneys that are no longer with the firms seeking common fund fees. *In re Wash. Pub. Power Supply Sys. Secs. Litig.*, 19 F.3d at 1305.

(Garofolo Decl. ¶ 25; Creitz Decl. ¶ 18; Martin Decl. ¶ 13). Rates for paralegals range from $100 to $190. (Garofolo Decl. ¶ 25; Martin Decl. ¶ 13). The rate for Mr. Garofolo, who performed the majority of the work in this case, is $575 for work before this Court, $650 for appellate work, and $750 for work relating to United's petition for a writ of certiorari filed with the Supreme Court. (Garofolo Decl. ¶¶ 21, 25). These rates are substantially below market. (*See* Garofolo Decl. ¶¶ 2-10, 21-22 & Ex. A; Creitz Decl. ¶ 16 & Exs. A-D; Martin Decl. ¶ 14). Class Counsel has submitted declarations complying with LRCiv 54.2(d)(4) and included declarations from other ERISA practitioners demonstrating that the rates for all of Plaintiffs' attorneys are at or below the relevant market rate for ERISA attorneys. (*See* Garofolo Decl. ¶¶ 2-13, 23-26; Creitz Decl. ¶¶ 2-18 & Exs. A-D; Martin Decl. ¶¶ 2-14). The experience, reputation, and ability of Messrs. Garofolo and Creitz and Ms. Martin and Ms. Kroll are also described in more detail below, *infra* at 18-20, and in the declarations supporting this Motion. (*See* Garofolo Decl. ¶¶ 2-10 & Ex. A; Creitz Decl. ¶¶ 2-9 & Exs. A-D; Martin Decl. ¶¶ 2-6).

The above rates and number of hours spent by attorneys to litigate this case strongly support the requested fee award based on a lodestar cross-check. The Ninth Circuit has acknowledged that "the lodestar calculation can be helpful in suggesting a higher percentage when litigation has been protracted" and that such calculation can "provide a useful perspective on the reasonableness of a given percentage award." *Vizcaino*, 290 F.3d at 1050. The lodestar cross-check is typically used to confirm the reasonableness of the requested percentage of the common fund based on a multiplier of the lodestar. *See id.* at 1051 & n.6 (approving a multiplier of 3.65 and citing *In Re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 341 (3d Cir. 1998)), for the proposition that "[m]ultiples ranging from one to four are frequently awarded in common fund cases when the lodestar method is applied").

Here, however, the lodestar cross-check demonstrates that the requested one-third of the monetary consideration of $1,475,000 (at counsel's reasonable rates)—less than

one-tenth of the lodestar—is extremely reasonable. Courts in the Ninth Circuit have held that a "negative multiplier" is a relevant consideration in evaluating the requested fee award. *See, e.g.*, *Dudum v. Carter's Retail, Inc.*, 2016 U.S. Dist. LEXIS 166881, at *24-25 (N.D. Cal. Dec. 2, 2016) ("This unusual negative multiplier supports the reasonableness of the fee request.").

Indeed, district courts in the Ninth Circuit and in other Circuits have repeatedly focused on the negative multiplier as support for an award totaling one-third or more the common fund. *See, e.g.*, *Taylor v. Shippers Transp. Express, Inc.*, 2015 U.S. Dist. LEXIS 191461, at *36, 51-52 (C.D. Cal. May 14, 2015) (awarding $3,680,000 constituting one-third of the common fund in light of negative multiplier); *Brown v. Hain Celestial Grp., Inc.*, 2016 U.S. Dist. LEXIS 20118, at *18, 24 (N.D. Cal. Feb. 18, 2015) (awarding $3,541,000 in attorney's fees when the lodestar exceeded this amount and a $7,500,000 settlement fund was achieved); *Alvarado v. Nederend*, 2011 U.S. Dist. LEXIS 52793, at *23, 27 (E.D. Cal. May 17, 2011) (approving one-third of a common fund and explaining that "[t]his is significantly less than Class Counsel's asserted lodestar"); *In re Auto. Refinishing Paint Antitrust Litig.*, 2008 U.S. Dist. LEXIS 569, at *18-19 (E.D. Pa. Jan. 3, 2008) (citing the "negative lodestar" as support for an award of $13,000,000 in attorney's fees equaling one-third of the common fund).

6. The fee contracted for between Class Counsel and Plaintiffs was contingent (LRCiv 54.2(c)(3)(F)).

Class Counsel entered into contingent fee agreements for all work, including representation relating to the Ninth Circuit appeal and the petition for a writ of certiorari. Class Counsel also agreed to advance all expenses. Accordingly, Class Counsel has foregone any compensation relating to the matter for more than 10 years and spent over $125,000 (not including mediation costs to be reimbursed by Defendants) to prosecute this case. (*See* Garofolo Decl. ¶ 28 & Ex. D; Creitz Decl. ¶ 20 & Ex. E; Martin Decl. ¶ 15 & Ex. B). This factor further supports the requested award of attorney's fees and expenses. *See Knight v. Red Door Salons, Inc.*, 2009 U.S. Dist. LEXIS 11149, at *16-17

(N.D. Cal. Feb. 2, 2009) ("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.")

As required by LRCiv 54.2(d)(2), all relevant fee agreements have been submitted herewith. (Garofolo Decl., Ex. C).

7. Time limitations were effectively imposed (LRCiv 54.2(c)(2)(G)).

Time limitations were imposed due to deadlines for discovery, summary judgment briefing, and other motion practice. *See Newby v. Enron Corp.*, 586 F. Supp. 2d 732, 796 (S.D. Tex. 2008) (focusing on, *inter alia*, the demands of motion practice and discovery). This is particularly so with regard to Defendants' summary judgment motions and the voluminous discovery requests for admission discussed above. (Garofolo Decl. ¶ 19).

8. The Settlement constitutes an excellent result based on United's policy revisions and the monetary consideration obtained (LRCiv 54.2(c)(3)(H)).

As discussed below, the Settlement consists of significant nonmonetary relief and monetary consideration. The result obtained is an important factor and the result here comports with awards of attorney's fees of one-third or more from the common fund recovery. *See In re Pacific Enters. Sec. Litig.*, 47 F.3d 373, 377 (9th Cir. 1995) (considering nonmonetary benefits of settlement and affirming one-third award where only $12 million recovered out of an estimated $1 billion potential liability); *In re Gen. Instruments Sec. Litig.*, 209 F. Supp. 2d 423, 431, 434 (E.D. Pa. 2001) (one-third of common fund awarded with recovery estimated at 11% of plaintiffs' losses); *In re Crazy Eddie Sec. Litig.*, 824 F. Supp. 320, 324, 326 (E.D.N.Y 1993) (33.8% awarded when 10% recovery achieved).

As to the nonmonetary relief, the Settlement requires United to revise its policies governing ERISA claims and mandates that United's medical policy committee meet with Decompression Therapy stakeholders. The revisions to United's policies

correspond to some of the most important allegations made by Plaintiff Aragon for declaratory and injunctive relief. Specifically, the Settlement requires United to revise its appeal policy applicable to ERISA plans so that United must request the plan document from the employer/customer under appropriate circumstances when adjudicating appeals of denied claims. The Settlement also requires United to unequivocally recognize that medical providers may be deemed authorized representatives of participants.

With respect to document requests submitted by ERISA plan participants, under a revised policy, United is required to provide all documents that fall within the definition of 29 C.F.R. 2560.503-1(m)(8), the portion of the Claims Regulation that defines relevant documents. The policy also specifies that the documents that must now be produced include United's internal communications when determining a claim and that the plan instrument is among the documents that should be produced when responding to a participant request. These revisions directly impact the information available to participants and beneficiaries of ERISA plans upon request and Plaintiffs believe that it will also impact the manner that United creates and retrieves administrative records. Notably, while these revisions were secured in connection with the Decompression Therapy settlement class, they apply equally to physical therapy claims that will be dismissed (but not released) if the Settlement is approved.

The Settlement further requires United to consider additional post-2010 medical literature and engage in a meeting with stakeholders (to be selected by Plaintiffs) to discuss the medical efficacy of Decompression Therapy. Although there are no guarantees that this will lead United to change its policy regarding coverage of Decompression Therapy under ERISA plans, this settlement term could have a positive outcome. Plaintiffs believe that Decompression Therapy is a safe and effective treatment that would ultimately create savings for United and the plans it administers because costly spinal surgery may often be avoided.

The Settlement also provides for $1,475,000 in monetary consideration. Plaintiffs secured reimbursement of mediation costs from United amounting to

$9,168.60, which otherwise would have been sought by counsel from the Settlement Fund. Thus, the total monetary recovery from the Defendants is $1,484,168.60 when mediation costs are included. Based on very liberal estimates (likely overestimates) of Defendants' total exposure,[10] Plaintiffs determined that this monetary consideration amounts to between approximately 11% and 13% of Defendants' estimated exposure relating to Decompression Therapy claims, including interest, from March 7, 2002 through April 30, 2019, or between approximately 18% and 20% if a period from March 7, 2007 to April 30, 2019 (twelve years and two months, consistent with the Court's ruling that there is a one-year statute of limitations applicable to ERISA benefit claims). Plaintiffs' counsel, experienced ERISA litigators with significant class action experience, concluded that the monetary consideration was a strong result based on all relevant considerations. (*See* Garofolo Decl. ¶ 20).

This factor supports granting the requested award of one-third of the monetary consideration obtained in the Settlement, which equates to less than one-third when value is placed on the nonmonetary consideration of the Settlement. *See, e.g.*, *In re Netflix Privacy Litig.*, 2013 U.S. Dist. LEXIS 37286, at *21 (N.D. Cal. March 18, 2013) (considering injunctive and other relief in evaluating the settlement).

9. Plaintiffs were represented by experienced, reputable, and able counsel (LRCiv 54.2(c)(3)(I)).

To meet the challenges presented and United's vigorous defense of this litigation, Plaintiffs retained experienced, reputable, and able ERISA attorneys. Joseph Garofolo, who serves as lead counsel and who has devoted the most time to this litigation, has worked in the field of ERISA since 1999. (Garofolo Decl. ¶ 2). Mr. Garofolo has served as class counsel in multiple ERISA class actions and has a national ERISA litigation practice. (*Id.* at ¶ 5). Mr. Garofolo has litigated ERISA cases in federal courts throughout the country and federal courts have repeatedly recognized his skills as

[10] Pages 21 through 23 of Plaintiffs' Preliminary Approval Brief provide a more detailed analysis of the monetary consideration and assumptions underlying the reasonableness of such consideration.

counsel. *See, e.g.*, *LaPointe, et al. v. The Elec. Workers Pension Trust for N. Nev.*, *et al.*, Case No. 3:08-cv-00225 (D. Nev. Mar. 9, 2010) (Hicks, J.); (Garofolo Decl., Ex. A (curriculum vitae at 2-3)).[11] He received a 2012 California Lawyer Attorneys of the Year ("CLAY") Award in 2012 in the field of employee benefits.[12] (Garofolo Decl. ¶ 6). For the last six years Mr. Garofolo has been selected to the Northern California Super Lawyers list. (*Id.*). He also has been retained as a testifying expert on issues relating to health and welfare plans and various ERISA matters, and has been qualified as an expert in federal court. (*Id.* at ¶ 8); *see Greenbrier Hotel Corp. v. Unite Here Health*, 2016 U.S. Dist. LEXIS 114898, at *25 n.9 (S.D.W. Va. Aug. 26, 2016) ("The Court found Mr. Garofolo's [expert] testimony particularly helpful.").

Plaintiffs' counsel Creitz & Serebin, LLP and Martin Bonnett, PLLC also contributed to the prosecution of this case. Joseph Creitz, Susan Martin, and Jennifer Kroll are all recognized ERISA litigators of the highest caliber. (*See* Creitz Decl. ¶¶ 6-9 & Exs. A-D; Martin Decl. ¶¶ 3-6). For example, Mr. Creitz received a 2012 CLAY Award in the field of employee benefits, has handled numerous claims involving health and welfare benefit plans, and—according to another experienced ERISA litigator familiar with his skills—has reached "the top of the profession for ERISA counsel." (Creitz Decl. ¶¶ 5-6 & Ex. A (Declaration of Ronald Dean ¶ 15)).[13] Susan Martin has been practicing in the field of employee benefits for over 40 years and has successfully represented employees and retirees as counsel or lead counsel in a wide variety of

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[11] Mr. Creitz, who has co-counseled this and other ERISA cases with Mr. Garofolo, sings high praises of him. (*See* Creitz Decl. ¶ 16).

[12] CLAY Awards recognize attorneys who "have changed the law, substantially influenced public policy or the profession, or achieved a remarkable victory for a client or for the public." (Garofolo Decl. ¶ 6). Messrs. Garofolo and Creitz both received the award for their work in *Cyr*, 642 F.3d 1202, where an *en banc* Ninth Circuit overruled prior Ninth Circuit authority holding that only a named plan administrator or a plan could be sued in an ERISA claim for benefits.

[13] Indeed, two Arizona ERISA attorneys have testified that Mr. Creitz's rate of $800 per hour is reasonable (or below) the relevant ERISA market. (*See* Martin Decl. ¶ 14; Creitz Decl., Ex. D (Patrick Mause testimony that Mr. Creitz's "$800 hourly rate is likely below market value for an attorney of Mr. Creitz's experience and capabilities")).

employee benefit cases, including complex ERISA class actions before this Court. (*See* Martin Decl. ¶ 3). Jennifer Kroll has practiced law since 2001, works with Ms. Martin on ERISA and class action litigation, and is, *inter alia*, the co-chair of the complex litigation subcommittee of the ABA Employment Rights and Responsibilities Committee. (*Id.* at ¶ 6).

This factor also supports the requested award of attorney's fees and expenses.

10. This case was extremely undesirable (LRCiv 54.2(c)(3)(J)).

In addition to the novel and difficult issues discussed above, this case was undesirable because United is well funded, has a reputation of being unwilling to settle, and aggressively litigates ERISA cases, including by requesting attorney's fees under ERISA against plaintiffs who do not prevail. (*See* Garofolo Decl. ¶ 17); *Pac. Shores Hosp. v. United Behavioral Health*, 2012 U.S. Dist. LEXIS 56045 (C.D. Cal. April 2, 2012); (Defs.' Mot. for Attorney's Fees and Non-Taxable Expenses (Doc. 578) at 1). The case also was undesirable because the number of defendants that needed to be joined under existing law at the time the suit was filed made it difficult to manage. *Compare Cyr*, 642 F.3d at 1207, *with Ford v. MCI Commc'ns Health & Welfare Plan*, 399 F.3d 1076, 1081 (9th Cir. 2005).

11. The nature and length of the professional relationship favors the requested award (LRCiv 54.2(c)(3)(K)).

Joseph A. Garofolo represented Spinedex in several cases prior to the instant litigation and Messrs. Garofolo and Creitz represented Spinedex in connection with the Ninth Circuit appeal and United's petition for a writ certiorari. (Garofolo Decl. ¶¶ 5, 13; Creitz Decl. ¶ 7). This factor also supports granting the requested award because this case was litigated for over 10 years.

12. Awards in similar actions support Plaintiffs' request (LRCiv 54.2(c)(3)(L)).

As discussed above, the requested fee award constitutes a negative multiplier in terms of the lodestar cross-check. The one-third fee award is also consistent with ERISA cases involving comparable facts and circumstances, both with negative

multipliers and otherwise. *See Moyle v. Liberty Mut. Ret. Ben. Plan*, 2018 U.S. Dist. LEXIS 34730, at *27 (S.D. Cal. Mar. 2, 2018) (collecting cases and holding that "[d]istrict courts in this circuit have routinely awarded fees of one-third of the common fund or higher after considering the particular facts and circumstances of each case").

This complex ERISA action was undesirable, involved novel and difficult questions, and Plaintiffs and Class Counsel obtained a strong result. The requested amount of attorney's fees is actually less than one-third when the value of the nonmonetary consideration is taken into account. Plaintiffs and Class Counsel took the risk of continuing to litigate after the case had been dismissed, revived the litigation on appeal, and defeated United's petition for a writ of certiorari filed with the Supreme Court. Plaintiffs and Class Counsel ultimately secured monetary consideration and important policy revisions after more than 10 years of litigation.[14] The attorney's fee request of Class Counsel is particularly appropriate in light of the Ninth Circuit's emphasis on compensation for cases involving significant risk. *See Fischel*, 307 F.3d at 1008-1010 ("It is an abuse of discretion to fail to apply a risk multiplier, however, when (1) attorneys take a case with the expectation that they will receive a risk enhancement if they prevail, (2) their hourly rate does not reflect that risk, and (3) there is evidence that the case was risky.").

Under these facts and circumstances, the attorney's fees requested for Class Counsel are eminently reasonable, including when compared with other ERISA cases. *See, e.g.*, *Carter v. San Pasqual Fiduciary Trust Co.*, 2018 U.S. Dist. LEXIS 33834, at *10-11, 23-24 (C.D. Cal. Feb. 28, 2018) (attorney's fees of one-third of the common fund awarded in ERISA case where defendants challenged Article III standing and disputed fiduciary breach allegations); *Savani v. URS Prof'l Solutions LLC*, 2014 U.S.

[14] This was all accomplished without prejudice to physical therapy claims that were determined to be subject to too much risk of achieving a negative outcome. (*See* Garofolo Decl. ¶ 20; Sealed Order dated March 30, 2011 ("3/30/11 Order") (Doc. 399) at 17:22-18:14) (explaining that Defendants' argument relating to physical therapy claims not involving VAX-D treatment "would be better suited to an opposition to class certification.").

Dist. LEXIS 5092, at *20, 27 (D.S.C. Jan. 15, 2014) (ERISA case awarding "39.57% of the available, recovered fund" and "27% of the total value of the recovery"); *Nolte v. Cigna Corp.*, 2013 U.S. Dist. LEXIS 184622, at *16 (C.D. Ill. Oct. 15, 2013) (complex ERISA case granting one-third attorney's fee award of $11,666,667); *Becher v. Long Island Lighting Co.*, 64 F. Supp. 2d 174, 182 (E.D.N.Y. 1999) ("factually and legally complex" ERISA case approving one-third fee award from a settlement of $7.8 with a negative multiplier).

13. Additional matters also support the requested award and fees and expenses (LRCiv 54.2(c)(3)(M)).

After this case was dismissed on summary judgment, Defendants filed a petition seeking fee-shifting under ERISA for more than $360,000 in non-taxable expense and attorney's fees. (*See* Defs.' Fee Petition at 1). Plaintiffs' counsel (Mr. Garofolo's firm) was liable for such an award. *See Ghorbani v. PG&E Group Life Ins.*, 100 F. Supp. 2d 1165 (N.D. Cal. 2000). Although this case likely could have been resolved with an agreement to dismiss the case and a withdrawal of Defendants' fee petition, Plaintiffs and Class Counsel nonetheless appealed and were able to revive this action. (*See* Garofolo Decl. ¶¶ 13-14). This factor further supports the appropriateness of the requested fees and expenses.

D. The Expenses Sought Are Reasonable and Appropriate Supporting Documentation Has Been Submitted.

Reasonable expenses relating to the class action litigation may be reimbursed from the common fund. *See Vincent v. Hughes Air West, Inc.*, 557 F.2d 759, 769 (9th Cir. 1977); *In re Anthem Data Breach Litig.*, 2018 U.S. Dist. LEXIS 140137, at *163 (N.D. Cal. Aug. 17, 2018). In addition to reimbursement for such expenses from the common fund in the total amount of $126,000, Class Counsel requests approval of reimbursement of mediation costs to be paid directly to Class Counsel by the Defendants

in the amount of $9,168.60 if the Settlement is finally approved.[15] (*See* Settlement Agreement, § XV). Class Counsel has submitted supporting declarations and documentation for the reimbursement of expenses. (*See* Garofolo Decl. ¶¶ 28 & Ex. D; Creitz Decl. ¶ 20 & Ex. E; Martin Decl. ¶ 15 & Ex. B).

E. Plaintiffs' Requests for Service Awards Should be Granted.

"Incentive *awards* are fairly typical in class action cases." *Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 958 (9th Cir. 2009) (citations omitted, emphasis in original). Service awards "are intended to compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action, and, sometimes, to recognize their willingness to act as a private attorney general." *Id.* at 958-59.

Here, the representatives of the class have devoted extraordinary efforts to this litigation on behalf of the class. Plaintiff Spinedex, through Dr. Thomas Blankenbaker, has spent over 250 hours on this case. (Blankenbaker Decl. ¶ 3). Dr. Blankenbaker attended most if not all hearings in this case, attended the oral argument before the Ninth Circuit in San Francisco, participated in the mediation of the case in Los Angeles,[16] and was involved in this case since its inception over 10 years ago. (*Id.* at ¶ 2). He fulfilled Spinedex's obligations by participating in strategy and settlement decisions and fulfilling its duties as class representative by staying informed, preserving evidence, participating in discovery, and considering the best interests of the class. (Garofolo Decl. ¶ 31). Moreover, Dr. Blankenbaker's knowledge of Decompression Therapy was critical to properly litigating the case. (*Id.*; Blankenbaker Decl. ¶ 4). Indeed, Dr. Blankenbaker's

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[15] Plaintiffs will seek approval the costs of settlement administration when the total of such costs incurred through final approval and estimated thereafter are known. Pursuant to Article III of the Settlement Agreement, United is currently paying such costs with the final amount incurred for such services to be offset from the common fund. Thus far, $84,839.09 has been invoiced by Heffler Claims Group and such invoice has been included herewith. (Garofolo Decl. ¶ 29 & Ex. E).

[16] Attendance at the Ninth Circuit appeal, the mediations, and local hearings were all at Dr. Blankenbaker's own expense. (Blankenbaker Decl. ¶ 3). In order to attend hearings, he often had to temporarily close his current practice. (*Id.*).

contributions have made this lawsuit and its resolution possible.[17] (Garofolo Decl. ¶ 31; Blankenbaker Decl. ¶ 4).

Plaintiff Claude Aragon has also contributed greatly to this lawsuit and its Settlement. Mr. Aragon is a participant in the IBM health plan and, like Dr. Blankenbaker, has a strong belief in the policy revisions that were obtained in the Settlement and Decompression Therapy in general, considering the efficacy of the treatment in his case. (Aragon Decl. ¶ 3; Blankenbaker Decl. ¶ 4). He has spent over 40 hours on this case and, like Spinedex, fulfilled his obligations as an excellent class representative for over 10 years. (Aragon Decl. ¶ 4; Garofolo Decl. ¶ 32). In addition to providing evidence and participating in discovery, he was not hesitant to ask questions and provided thoughtful opinions regarding appropriate issues, including the Settlement. (Garofolo Decl. ¶ 32).

Finally, in addition to giving up their claims that would be released as part of the class settlement, Spinedex and Mr. Aragon had to provide a general release (which was required to settle the case), both appealed, and both actively participated as class representatives in the subsequent resolution of the case. (*Id.* at ¶ 33). The general release effectively caused Spinedex to lose a significant amount of physical therapy claims that did not involve Decompression Therapy, even though such claims were preserved for other members of the class.[18] (*Id.*). In sum, both Plaintiffs have contributed in extraordinary ways to this case.

Federal courts have emphasized continued participation in prolonged litigation in awarding service awards. *See, e.g.*, *Van Vranken v. Atl. Richfield Co.*, 901 F. Supp. 294, 299 (N.D. Cal. 1995) (awarding $50,000 to a single class representative whose participation "lasted through many years of litigation"); *Garner v. State Farm Mut. Auto*

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[17] This commitment continues by virtue of Dr. Blankenbaker's intent to participate in the stakeholders' meeting with United to discuss the efficacy of Decompression Therapy. (*See* Settlement Agreement (Doc. 814-1), § IV.A.).

[18] Even with copayments, deductibles, and coinsurance, Spinedex had claims of over $200,000 against United. (Blankenbaker Decl. ¶ 5).

Ins. Co., 2010 U.S. Dist. LEXIS 49477, at *47 n.8 (N.D. Cal. April 22, 2010) ("Numerous courts in the Ninth Circuit and elsewhere have approved incentive awards of $20,000 or more where, as here, the class representative has demonstrated a strong commitment to the class."). It is also appropriate to consider the releases that Plaintiffs were required to execute to achieve the Settlement. *See Eddings v. Health Net, Inc.*, 2013 U.S. Dist. LEXIS 84811, at *22-23 (C.D. Cal. June 13, 2013).

Based on the contributions to this case of the Plaintiffs, the requested service awards should be granted.[19] The $40,000 award requested for Plaintiff Spinedex is appropriate and consistent with awards granted by other courts under similar circumstances. *See, e.g.*, *Van Vranken*, 901 F. Supp. at 299; *Hughes v. Microsoft Corp.*, 2001 U.S. Dist. LEXIS 5976, at *36-37 (W.D. Wash. Mar. 26, 2001) (awarding $40,000 each to the members of a group of six class representatives and distinguishing between class representatives based on their contributions and risk); *Savani v. URS Prof'l Solutions LLC*, 2014 U.S. Dist. LEXIS 5092, at *28 (D.S.C. Jan. 15, 2014) (approving award of $40,000 service award in a "complex ERISA case given the benefits accruing to the entire class in part resulting from Mr. Savani's efforts"). The $10,000 requested for Plaintiff Aragon is modest for his contribution to the case. *See, e.g.*, *Garner*, 2010 U.S. Dist. LEXIS 49477, at *47 n.8.

IV. CONCLUSION

For the foregoing reasons, this Motion should be granted and the following should be approved by the Court: i) an award of one-third of the common fund in the amount of $491,666.00 in attorney's fees; ii) the reimbursement of expenses in the amount of $126,000 from the common fund and $9,168.60 in mediation expenses to be paid directly to Class Counsel by Defendants; and iii) service awards of $40,000 to Plaintiff Spinedex and $10,000 to Plaintiff Claude Aragon.

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[19] Class Counsel and Plaintiffs were careful to avoid even the appearance of a conflict. (*See* Garofolo Decl. ¶ 20). Service awards were addressed in the Settlement Agreement only after all material terms had been agreed upon. (*Id.*). The Settlement is not contingent on the Court granting service awards. (*Id.*; Settlement Agreement, Art. VI).

DATED this 24th day of April, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on this date I electronically transmitted the attached document to the Clerk's office using the CM/ECF System for filing and transmittal of a notice of Electronic Filing to the following CM/ECF registrants:

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I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed on this 24th day of April, 2019, at Lafayette, California.

/s/ Joseph A. Garofolo
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