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14 UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

15 DUANE WATERS, DEBRA TURNER and
16 RUDY FAJARDO, on behalf of themselves,
17 all others similarly situated and the general
public,

18 Plaintiffs,

19 vs.
20

21 AT&T SERVICES, INC. (formerly SBC
22 Services, Inc.) and DOES 1 through 10;

23 Defendants.
24
25

Case No.: CV 09-3983 BZ

**PLAINTIFFS' NOTICE OF MOTION
AND MOTION FOR AWARD OF
ATTORNEYS' FEES, COSTS, CLAIMS
ADMINISTRATION EXPENSES AND
CLASS REPRESENTATIVE
ENHANCEMENTS; MEMORANDUM
OF POINTS AND AUTHORITIES IN
SUPPORT THEREOF**

Date: February 9, 2011
Time: 1:30 p.m.
Courtroom: G

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TO ALL INTERESTED PARTIES AND THEIR ATTORNEYS OF RECORD:

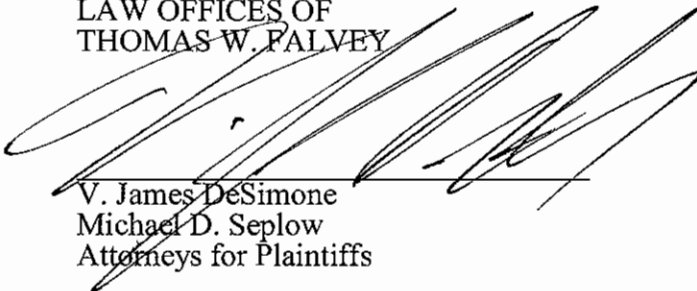
PLEASE TAKE NOTICE that on February 9, 2010 at 1:30 p.m., or as soon thereafter as the matter may be heard, in the United States District Court, Northern District of California, Courtroom G, Plaintiffs Duane Waters, Debra Turner and Rudy Fajardo, on behalf of themselves, the general public, and all others similarly situated (“Representative Plaintiffs”) will and hereby do move this Court for an Order Awarding Attorneys’ Fees, Costs, Claims Administration Expenses and Class Representative Enhancements.

This Motion is made pursuant to Federal Rule of Civil Procedure 23(e). The motion is based on this Notice of Motion and Motion, the Memorandum of Points and Authorities, Declarations and Exhibits filed herewith, the pleading and papers filed in this action, as well as any further documentation submitted to the Court and oral argument of counsel.

DATED: December 22 , 2010

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Class Counsel obtained an excellent result for the Class in which Class Members will
4 receive an average payment of over \$18,000, with some Class Members receiving more than
5 \$32,000. Remarkably, 84.4% of the Class Members have submitted claims, amounting to 87.5%
6 of the compensable workweeks. There have been only eight (8) opt-outs and no objections. As
7 detailed in the concurrently filed Motion for an Order Granting Final Approval of Class Action
8 Settlement (“Motion for Final Approval”), the \$17,000,000 total settlement in this case is
9 eminently fair and reasonable and confers a substantial benefit upon the Class.

10 This exceptional outcome, in which at least 568 out of 673 Class Members will be
11 receiving over \$10,272,705 in total payments, was achieved through the diligent efforts of Class
12 Counsel and the class representatives, who devoted substantial time and effort in pursuing this
13 case and in reaching out to the Class Members to ensure the maximum participation. In
14 recognition of this outstanding result, in which Class Counsel were able to negotiate a fair and
15 prompt settlement that will provide a tremendous benefit to the Class in the short term, Plaintiffs’
16 Motion for An Award of Attorneys’ Fees, Costs and Enhancement Awards should be granted in
17 its entirety.

18 As a direct consequence of the diligence, resourcefulness, experience and reputation of
19 Class Counsel, each Class Member in this case will receive a substantial benefit. From the very
20 inception of this case, Class Counsel spent tremendous time and effort in analyzing the claims,
21 communicating with potential class members, reviewing documents and data, calculating
22 potential damages and advocating vigorously on behalf of the Class. The fruits of these efforts
23 were recognized in the \$17,000,000 class settlement, which has been preliminarily approved by
24 the Court.

25 However, Class Counsel’s work on this case did not cease after preliminary approval.
26 Indeed, Class Counsel redoubled their commitment on behalf of the Class Members with the aim
27 of attaining maximum participation. Towards this end, Class Counsel made it their goal to
28 contact each and every class member to alert them to the terms of the Settlement, including the

1 deadline for submitting claims, and to respond to any concerns or questions they might have.
2 This required substantial efforts to locate class members, who might have moved or were no
3 longer working for Defendant AT&T Services, Inc. (“AT&T” or “Defendant”). Class Counsel
4 fielded inquiries from scores of Class Members, and has also worked diligently to investigate and
5 resolve any disputes concerning compensable work weeks and eligibility. This is a case where
6 Class Counsel truly went “the extra mile” on behalf the Class. The result of Class Counsel’s
7 commitment can be seen in the outstanding participation rates of 84.4% of the Class Members
8 and 87.5% of the workweeks. In light of the extraordinary work by Class Counsel, both before
9 and after preliminary approval, and the substantial benefit conferred upon the Class as a result of
10 Class Counsel’s representation, Class Counsel respectfully submit that an attorneys’ fee award of
11 30% of the maximum settlement value is eminently fair and justified.

12 With the guiding principle that early class action settlements are favored and may not
13 diminish an award of attorneys’ fees as set forth below, Class Counsel submit that their fee
14 request is fair and reasonable in light of: (1) the enormous benefits to the Class Members by
15 providing them with compensation for disputed claims for overtime, including missed meal and
16 rest breaks; (2) the substantial time and effort expended by Class Counsel in order to reach a
17 settlement; (3) the litigation risks and complexity of the case; (4) the experience and diligence of
18 counsel; (5) the fees commonly awarded in cases of this type; and (6) the extensive efforts by
19 Class Counsel to increase participation by Class Members during the claims administration
20 process resulting in 87.5% of the available workweeks being claimed. Therefore, Class Counsel
21 respectfully petitions the Court for an award of attorneys’ fees which amounts to 30% of the
22 Maximum Payout amount or \$5,100,000.

23 The attorneys’ fees requested by Class Counsel are justified by their skill, experience, and
24 diligence, which resulted in a settlement which less experienced or less diligent counsel likely
25 could not have reached. Accordingly, Plaintiffs’ Counsel submit that in light of the excellent
26 result, including the extremely high claims rate, that an award of 30% of the total maximum
27 settlement is justified in this case.

28 The concurrently filed declarations from Class Counsel, the declarations from other

1 attorneys with expertise regarding class actions and the attorneys' fees awarded in similar cases,
2 provide ample support for awarding the requested fees.

3 This Court should also approve the requested Enhancement Payments to the Class
4 Representatives in the amount of \$25,000 for the risks they undertook in lending their names to
5 this lawsuit, the work they performed and the superior result achieved on behalf of the Class.

6 Further, the amounts requested for costs expended by Class Counsel and for claims
7 administration are reasonable and warrant approval. Accordingly, Plaintiffs' motion should be
8 granted in its entirety.

9
10 **II. THE REQUESTED ATTORNEYS' FEES ARE BOTH FAIR AND REASONABLE**
11 **IN LIGHT OF THE EXCELLENT RESULT ACHIEVED FOR THE CLASS**
12 **BASED ON THE DILIGENT EFFORTS OF CLASS COUNSEL.**

13 **A. Class Counsel's Fee Is Properly Calculated as a Percentage of the Total Class**
14 **Settlement.**

15 The United States Supreme Court has held when a litigant's efforts create or preserve a
16 fund from which others derive benefits, the court may spread litigation costs proportionately
17 among all the beneficiaries to compensate those who created the benefits. *See Boeing Co. v. Van*
18 *Gemert*, 444 U.S. 472, 478 (1980) (“[A] lawyer who recovers a common fund for the benefit of
19 persons other than ... his client is entitled to a reasonable attorneys' fee from the fund as a
20 whole.”); *see also Mills v. Electric Auto-Lite Co.* 396 U.S. 375, 392-93 (1970) (discussing the
21 acceptance of awarding attorneys' fees and expenses from a settlement where “litigation has
22 conferred a substantial benefit on the members of an ascertainable class.”). The common fund
23 doctrine allows a court to award attorneys' fees based upon a percentage of the available fund
24 that is created for the satisfaction of Class Members' claims when a class action reaches
25 settlement or judgment. *Newberg on Class Actions*, (4th Ed.), 2010, § 14:6.¹

26
27 ¹ Courts often use the term “common fund” to refer to both reversionary and
28 non-reversionary settlements. *See e.g., Camden I Condominium Ass'n, Inc. v. Dunkle*, 946 F.2d
768, 774-75 (11th Cir. 1991) (analyzing the settlement as a common fund even though unclaimed
funds would revert to the defendant); *In re Cendant Corp. PRIDES Litigation*, 243 F.3d 722, 732

1 However, even in cases such as this, where the unclaimed funds revert back to the
 2 defendant, it is settled law that the percentage of attorneys' fees is properly awarded on the basis
 3 of total settlement value, rather than actual amount of funds claimed. *See e.g. Williams v.*
 4 *MGM-Pathé Communications Co.*, 129 F.3d 1026, 1027 (9th Cir. 1997) (concluding that the
 5 district "court abused its discretion by basing the fee on the Class Members' claims against the
 6 fund rather than on the percentage of the entire fund or on the lodestar," even though unclaimed
 7 money reverted back to defendants); *Waters v. Intern. Precious Metals Corp.*, 190 F.3d 1291,
 8 1296-97 (11th Cir. 1999) (upholding district court award of attorneys' fees of 33 1/3 % on
 9 settlement funds "potentially available to be claimed" where unclaimed portions of the settlement
 10 would revert to defendants); *see also Boeing Co.*, 444 U.S. at 480-82 (affirming attorneys' fee
 11 award as a percentage of the total fund where unclaimed amounts reverted to Defendant and
 12 reasoning that class members' "right to share the harvest of the lawsuit. . . whether or not they
 13 exercise it, is a benefit in the fund created by the efforts of the class representatives and their
 14 counsel."); Declaration of Barrett S. Litt ("Litt Decl."), ¶ 26 ("It is well established that it is
 15 appropriate to award class fund attorney's fees based on the gross settlement . . .").

16 Numerous Ninth circuit cases have endorsed the percentage of the benefit method for
 17 awarding attorneys' fees. *See, e.g., Glass v. UBS Financial Services, Inc.*, 331 Fed.Appx. 452,
 18 456 (9th Cir. 2009), *cert. denied*, 130 S.Ct. 797 (2009) and 130 S.Ct. 801 (2009); *Williams v.*
 19 *MGM-Pathé Communications Co.*, 129 F.3d 1026, 1027 (9th Cir. 1997); *Paul, Johnson, Alston*
 20 *& Hunt v. Graulty*, 886 F.2d 268, 272-73 (9th Cir. 1989). Indeed, as one court noted, the Ninth

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 23 (3d Cir. 2001) (analyzing the settlement as a common fund, despite the fact that unclaimed funds
 24 would revert to the defendant); *Skelton v. General Motors Corp.*, 860 F.2d 250, 259 (7th Cir.
 25 1988), (rejecting defendant's argument that it was not a common fund case because unclaimed
 26 funds reverted to defendant), *abrogated on other grounds by City of Burlington v. Dague*, 505
 27 U.S. 557 (1992). In this case, the Settlement is described as creating a "Maximum Payment"
 28 rather than a "fund" because the amounts attributable to any unclaimed workweeks revert back to
 Defendant. *See* Joint Stipulation of Class Settlement and Release ("Settlement Agreement"), ¶
 20. Nonetheless, as set forth above, regardless of whether the unclaimed amounts revert back to
 Defendant, the amount of the attorneys' fees award is based on the percentage of the monies that
 could have been claimed by the Class Members (not the actual amount claimed).

1 Circuit “has made the percentage-of-the-benefit approach the preferred method for determining
2 fees” *Lealao v. Beneficial California, Inc.*, 82 Cal.App.4th 19, 31 (2000) (citing *In re*
3 *Pacific Enterprises Securities Litigation*, 47 F.3d 373, 379 (9th Cir. 1995)). This is because the
4 lodestar approach encourages inefficiency and wasteful attorney hours. *See* Litt Decl., ¶¶ 22-29;
5 *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1050 (9th Cir. 2002) (“it is widely recognized that
6 the lodestar method creates incentives for counsel to expend more hours than may be necessary
7 on litigating a case so as to recover a reasonable fee.”), *cert. denied*, 537 U.S. 1018 (2002).
8 Accordingly, it is a well accepted practice in wage and hour class action settlements to award
9 attorney’s fees to Class Counsel based on a percentage of the total settlement value agreed upon
10 by the parties. *See Section B(3), infra*.

11 Indeed, many other courts have declared a preference for the percentage method because
12 it better reflects the realities of the marketplace, whereas the lodestar approach provides a
13 disincentive to early settlement and leaves room for abuses in billing practices. Litt Decl., ¶ 22
14 (“the percentage of the available fund analysis is the preferred approach in class action fee
15 requests because it more closely aligns the interests of the counsel and the class”). For
16 example, in *In re Thirteen Appeals Arising Out of San Juan*, 56 F.3d 295, 305-07 (1st Cir. 1995),
17 the Court specifically noted that “it is the lodestar method, not the [percentage of the fund]
18 method, that breaks from precedent.” *See also In re Telik, Inc. Sec. Litig.*, 576 F.Supp.2d 570,
19 586 (S.D.N.Y. 2008) (administrative problems associated with the lodestar method, and the
20 advantages presented by the percentage of recovery approach led courts in the Second Circuit to
21 adopt the percentage method, which is “consistent with the national precedent concerning this
22 issue.”).

23 The Court in *In re Thirteen Appeals Arising Out of San Juan* reasoned that “because the
24 [percentage of the settlement] technique is result-oriented rather than process-oriented, it better
25 approximates the workings of the marketplace.” *Id.* at 307. Other courts have held the lodestar
26 approach “encourages significant elements of inefficiency,” by giving attorneys an “incentive to
27 spend as many hours as possible” and “a strong incentive against early settlement.” *Swedish*
28 *Hosp. Corp. v. Shalala*, 1 F.3d 1261, 1266-67 & fn.3, 1271 (D.C. Cir. 1993) (also concluding the

1 percentage approach “more accurately reflects the economics of litigation practice”); *see*
 2 *also Camden I Condominium Ass'n, Inc. v. Dunkle*, 946 F.2d 768 (11th Cir. 1991) (expressing a
 3 preference for the percentage method since “the lodestar approach . . . fail[s] to achieve any of
 4 [the goals of fair and reasonable compensation, discouragement of abuses in fee-setting process,
 5 and encouragement of early settlement] in common fund cases . . .”).

6 Critically, the percentage of the settlement method also more accurately reflects the
 7 appropriate and fair attorneys’ fee and the benefit conferred upon the class in cases, like this one,
 8 where there is an early resolution of the case. *See* Litt Decl. ¶¶ 28-29 (noting that “percentage of
 9 the available fund awards are particularly well suited where there is an early settlement of a class
 10 action.”). For example in *Glass v. UBS Financial Services, Inc.*, No. C-06-4068 MMC, 2007
 11 WL 221862, 16 (N.D.Cal. 2007), *aff’d*, 331 Fed.Appx. 452 (9th Cir. 2009), the Court employed
 12 the percentage of the fund method, reasoning that “Class counsel’s prompt action in negotiating a
 13 settlement . . . should be fully rewarded.”² *See also Mashburn v. National Healthcare, Inc.*, 684
 14 F.Supp. 679, 695 (M.D. Ala.1988) (“[o]ne of the reasons for supporting a percentage fee award is
 15 to encourage early settlement of cases,” *citing*, H. Newberg, *Attorney Fee Awards*, § 2:07 at
 16 48-51). Numerous courts have specifically noted that the percentage of recovery approach to
 17 attorneys fees is preferred in that it benefits the Class Members greatly by fostering early
 18 settlements. As one court explained:

19 [T]he actual amount of recovery, if any, which ultimately goes to plaintiffs
 20 in the majority of cases is inversely proportional to the time spent in
 21 litigation . . . concluding litigation quickly and with a fair result is
 22 beneficial to the general public in that it frees the resources of the courts to
 23 deal with other matters. [internal citations omitted]

24 *In re M.D.C. Holdings Sec. Litig.*, No. CV89-0090 E, 1990 WL 454747, 8 (S.D. Cal. 1990); *see*
 25 *also In re Smithkline Beckman Corp. Sec. Litig.*, 751 F.Supp. 525, 534 (E.D. Pa.1990) (holding
 26 that “[early settlement] is precisely the sort of result that the percentage of recovery fee method is
 27

28 ² The *Glass* Court further declined to conduct a lodestar cross check, holding that “the Court may, but is not required to, compare the lodestar.” *Glass*, 2007 WL at *15

1 intended to foster and stands as a counterexample to the perennial laments about the slow pace of
2 complex litigation.”); *In re Quantum Health Resources, Inc.*, 962 F.Supp. 1254, 1257 (C.D. Cal.
3 1997) (employing the percentage method and reasoning that “the lodestar method . . . creates
4 disincentive for early settlement”); *In re Businessland Sec. Litig.*, No. C-90-20476-RFP,
5 1991 WL 427887, at *1 (N.D. Cal. 1991) (awarding attorneys’ fees in the amount of 30% of the
6 settlement fund, reasoning that “Counsel conferred a substantial benefit on the class through the
7 prosecution and expedited resolution of the case.”).

8 Recent decisions in wage and hour class actions have reinforced this rationale. For
9 instance, in *Rotuna v. West Customer Management Group, LLC*, No. 09-1608, 2010 WL
10 2490989, at *7 (N.D. Ohio June 15, 2010), the Court awarded 33 1/3 % of the settlement “[i]n
11 light of the exceptional result obtained, and the accomplishment of reaching a resolution before
12 additional resources were expended” *See also Dillworth v. Case Farms Processing, Inc.*,
13 08-1694, 2010 WL 776933, at *7 (N.D. Ohio Mar. 8, 2010) (awarding attorneys’ fees of 33 1/3
14 % in part based on the “early settlement before substantial fees and expenses [had]
15 accumulated.”); Litt Decl., ¶¶ 14, 23, 26 (noting that in this case, the relief was both fast and
16 substantial); Declaration of V. James DeSimone (“DeSimone Decl.”), ¶ 7 (emphasizing the
17 strong value in the early resolution of this case).

18 Accordingly, in light of Class Counsel’s substantial efforts in arriving at a fair and prompt
19 resolution benefitting the class, the Court should utilize the percentage of the Maximum Payment
20 method to award attorneys’ fees. *See* Declaration of Douglas Silverstein (“Silverstein Decl.”), ¶
21 18 (“Wage and hour class action attorneys’ fees are typically based on a percentage of the
22 settlement . . . [and it] is the preferred method of compensation in the Ninth Circuit”).
23 Notably, Class Counsel should be recognized for their efforts to reach a prompt and early
24 settlement, as well as their success in negotiating a fair and substantial recovery for the Class,
25 and in achieving an extremely high class participation rate. *See* Declaration of Randy Renick
26 (“Renick Decl.”) ¶¶ 6, 9 (discussing the participation rate achieved in this case, and noting that it
27 must have required Plaintiffs’ Counsel “to dedicate substantial personnel, time and expense to
28 communicating with the class, and early settlement will result in a tremendous benefit to the

1 Class Members who will not have to wait years for the outcome of the litigation.”); *see*
2 *also* Declaration of Todd M. Schneider (“Schneider Decl.”), ¶ 19 (describing the participation
3 rate as “an impressive result by any measure.”).

4
5 **B. Class Counsel’s Request for Thirty Percent (30%) of the Maximum Payment**
6 **Amount Is Eminently Reasonable.**

7 Historically, attorneys’ fee awards in settlement fund cases range from 20% to 50% of the
8 fund, depending on the circumstances of the case. *Newberg on Class Actions*, (4th Ed.), 2010, §
9 14:6; *see also* Litt Decl., ¶¶ 21, 25 (noting that in cases where the settlement is under \$25
10 Million, fee awards of 30% reflect the common market expectation). Moreover, “[e]mpirical
11 studies show that . . . fee awards in class actions average around one-third of the recovery.”
12 *Newberg on Class Actions*, (4th Ed.), 2010, § 14:6.

13 According to Newberg:

14 No general rule can be articulated on what is a reasonable percentage of a
15 common fund. Usually 50% of the fund is the upper limit on a reasonable
16 fee award from a common fund in order to assure that the fees do not
17 consume a disproportionate part of the recovery obtained for the class,
18 although somewhat larger percentages are not unprecedented.

19 *Newberg on Class Actions*, (4th Ed.), 2010, § 14:6.

20 Numerous federal courts within the Ninth Circuit have awarded attorneys’ fees equal to
21 or higher than 33 1/3 percent of the settlement both before and after class certification: *In re*
22 *Pacific Enterprises Securities Litigation*, 47 F.3d 373, 379 (9th Cir. 1995) (upholding award of
23 33 1/3% of \$12 million settlement); *Stuart v. Radioshack Corp.*, No. C-07-4499-EMC, 2010 WL
24 3155645, at *5 (N.D. Cal. Aug. 9, 2010) (1/3 of \$4.5 million); *Singer v. Becton Dickinson and*
25 *Co.*, No. 08-CV-821-IEG, 2010 WL 2196104, at *8 (S.D. Cal. June 01, 2010) (33 1/3% of \$1
26 million in a wage and hour class action); *Romero v. Producers Dairy Foods, Inc.*, No. 05-0484-
27 DLB, 2007 WL 3492841, at *2-*4 (E.D. Cal. Nov. 14, 2007) (33 1/3% of \$240,000 in a wage
28 and hour class action); *In re Heritage Bond Litigation*, No. 02-ML-1475-DT, 2005 WL 1594403,

1 at *19 (C.D. Ca. June 10, 2005) (33 1/3% of \$27.83 million); *Antonopulos v. North American*
 2 *Thoroughbreds, Inc.*, No. 87-0979G, 1991 WL 427893, at *1 (S.D. Cal. May 6, 1991) (33 1/3 of
 3 \$3.1 million); *In re Activision Securities Litigation*, 723 F. Supp. 1373, 1375 (N.D. Cal. 1989)
 4 (awarding 32.8% of \$42 million and holding that “[a]doption of a policy of awarding
 5 approximately 30% of the fund as attorneys' fees in the ordinary case is well-justified in light of
 6 the lengthy line of cases which find such an award appropriate and reasonable.”); *In re*
 7 *Businessland Sec. Litig.*, No. C-90-20476-RFP, 1991 WL 427887, at *1 (N.D. Cal. 1991)
 8 (awarding 30% of \$6 million, noting that recent trends indicated that thirty percent of the
 9 settlement amount is about average) (internal citations omitted).³

10 In this case, the recovery was negotiated in the face of uncertainties in the law with regard
 11 to the analysis required for these allegedly misclassified positions, whether Defendant complied
 12 with the applicable laws with respect to classifying Class Members as exempt, the providing of
 13 meal and rest periods, the compensable sums payable for overtime and rest and/or meal periods,
 14 and the difficulty with certification of such claims, as described in the accompanying Motion for
 15 Final Approval. See DeSimone Decl., ¶ 6; Declaration of Michael D. Seplow (“Seplow Decl.”),
 16 ¶ 19; see also Renick Decl., ¶ 8 (noting that wage and hour class actions, especially ones
 17 involving issues of statutory exemptions from overtime laws, can be highly risky and can involve
 18 years of litigation); Declaration of Matthew Righetti (“Righetti Decl.”), ¶ 12 (“It cannot be
 19 overlooked that Plaintiffs’ counsel faced a very significant level of risk in this case, as the law in
 20

21 ³ Courts outside of the Ninth circuit have also routinely awarded attorneys’ fees equal to
 22 or higher than 33 1/3 percent in class action settlements. See, e.g., *Rotuna v. West Customer*
 23 *Management Group, LLC*, No. 09-CV-1608, 2010 WL 2490989, at *7 (N.D. Ohio June 15,
 24 2010) (1/3 of settlement fund in wage and hour class action); *Dillworth v. Case Farms*
 25 *Processing, Inc.*, No. C-07-4499-EMC, 2010 WL 776933, at *7 (N.D. Ohio Mar. 8, 2010) (1/3
 26 of settlement fund in wage and hour class action); *Cullen v. Whitman Medical Corp.*, 197 F.R.D.
 27 136, 146-47 (E.D. Pa. 2000) (1/3 of \$5.97 million); *In re Crazy Eddie Securities Litigation*, 824
 28 F. Supp. 320, 323, 326-327 (E.D.N.Y. 1993) (33.8% of \$42 million with unclaimed funds
 reverting to defendants); *Will v. General Dynamics Corp.*, No. 06-698-GPM, 2010 WL 4818174
 (S.D. Ill. 2010) (33 1/3 % of \$15.5 million); *In re Safety Components International, Inc.*, 166
 F.Supp.2d 72, 109 (D.N.J. 2001) (1/3 of net \$4.31 million); *In re Ampicillian Antitrust*
Litigation, 526 F.Supp. 494 (D.D.C. 1981) (awarding 45% of \$7.3 million settlement fund); *Van*
Gemert v. Boeing Co., 516 F.Supp. 412, 420 (S.D.N.Y. 1981) (awarding 36% of the settlement
 fund).

1 the area of class-based challenges to wage and hour violations is always evolving and fraught
2 with obstacles.”).

3 Various Ninth Circuit cases discuss the benchmark rate of 25% as the *starting point* for
4 settlement fund fee analysis. *See Six(6) Mexican Workers v. Arizona Citrus Growers*, 904 F.2d
5 1301, 1311 (9th Cir. 1990). The district court may adjust this rate when circumstances warrant a
6 higher or lower percentage. *In re Pac. Enter. Sec. Litig.*, 47 F.3d 373, 378-79 (9th Cir. 1995)
7 (approving award of 33% of \$12 million settlement in derivative class action); *see also Vizcaino*
8 *v. Microsoft Corp.*, 290 F.3d at 1048 (approving attorneys’ fees of 28% of \$96.885 million
9 settlement). Assessing an appropriate fee based on a percentage of the settlement involves in
10 part, the following factors: results obtained for the class, risks of litigation, including the risk of
11 loss and, in the event of success, delay in payment to the class. *See Vizcaino v. Microsoft Corp.*,
12 *supra*, 290 F.3d at 1048.

13 As explained more fully herein, the substantial monetary settlement achieved for the
14 Class, the high level of participation by Class Members⁴, the risks of protracted litigation, and the
15 uncertainty in the law relating to key issues in this case, all support an upwards adjustment to
16 30% for Class Counsel’s attorneys’ fees. *See* Litt Decl., ¶¶ 22, 25, 28, 39 (discussing the
17 propriety of an award of 30% in this case); *see also* Silverstein Decl., ¶ 19 (same); Righetti Decl.,
18 ¶ 16 (“The superb result obtained, the complexity and novelty of issues . . . and the extraordinary
19 contingent risk of this action amply justify . . . a common fund percentage of thirty percent . . .”).

21 1. Excellent Result Achieved for the Class.

22 The proposed settlement is fair, adequate, reasonable and an excellent result for the Class.
23 This recovery was negotiated in the face of serious questions which existed regarding exempt
24

25
26 ⁴ At the hearing for Preliminary Approval of Settlement on August 4, 2010, this Court
27 expressed the opinion that it expected to see class member participation of approximately 50%.
28 *See* Hearing for Preliminary Approval, Tr. 39:25-40:1; 60:23-24 (Aug. 4, 2010). The fact that
Class Counsel achieved a participation rate of 84.4% of Class Members with 87.5% of
compensable workweeks, numbers which far exceed the Court’s expectation, strongly militates
in favor of attorneys’ fees in the amount of 30% of the Maximum Payment.

1 classification of the Class Members, the amount compensable for meal and rest breaks as well as
2 the uncertainty of class certification.

3 In particular, Defendant denied Plaintiffs' allegations, and maintained that:

- 4 ● The job duties of Class Members, including those with identical job titles, varied
5 greatly depending upon location, supervisor and employee;
- 6 ● Because the job duties of Class Members varied greatly, establishing liability and
7 class certification were unlikely;
- 8 ● The Class Members were subject to the administrative exemption, a developing
9 area of the wage and hour law; and
- 10 ● Class Certification for missed meal and rest breaks was highly uncertain.

11 Seplow Decl., ¶¶ 17-20.

12 Notwithstanding these uncertainties, the Parties agreed to mediate a settlement. Class
13 Counsel's comprehensive legal briefing, along with their restitution and damages calculations,
14 were critical to achieving the settlement. DeSimone Decl., ¶ 11; Seplow Decl., ¶ 39.

15 Class Counsel is convinced that this settlement is in the best interests of the Class based
16 on the negotiations and a detailed knowledge of the issues present in this action. DeSimone
17 Decl. ¶ 16; Seplow Decl. ¶ 21. Specifically, Class Counsel balanced the terms of the proposed
18 settlement against the probable outcome of class certification, summary judgment, liability and
19 the range of recovery at trial. Seplow Decl., ¶ 21; DeSimone Decl., ¶ 7.

20 The \$17,000,000 Maximum Payout amount constitutes a significant benefit to the
21 members of the Class. *See* Litt Decl., ¶ 14 ("The fact that class counsel succeeded in obtaining a
22 very favorable settlement in such a short time substantially benefits the class."); *see also* Righetti
23 Decl., ¶ 11 ("By any measure, the result obtained in this case is extraordinary."). Each
24 participating Class Member will receive approximately \$124 per week worked during the Class
25 Period. Based on this payment rate, the highest payment to a participating class member is
26 estimated to be \$32,708.94, with an average payment of \$18,085.75, and a total amount claimed
27 estimated to be \$10,272,705. Green Decl., ¶ 15; Seplow Decl., ¶ 21. This is an excellent result
28 for the settlement class. *See* Litt Decl., ¶ 18 (attesting to "the very substantial relief for

1 individual class members.”); *see also* Renick Decl., ¶ 8 (“The fact that Plaintiffs were able to
2 reach a settlement of this case relatively early is highly commendable.”).

3
4 **2. Plaintiffs’ Counsel Have Expended Significant Time and Effort**
5 **Pursuing this Litigation Which Supports the Requested Award of**
6 **Attorneys’ Fees.**

7 The declarations of V. James DeSimone, Michael D. Seplow, Thomas W. Falvey and J.D.
8 Henderson establish that Plaintiffs’ Counsel, including their associates, paralegals and support
9 staff, have expended significant time and effort in obtaining a favorable settlement in this case.⁵
10 From the outset, the two law offices which prosecuted this case engaged in a multifaceted
11 approach in their outreach to potential Class Members, including telephone calls, email
12 correspondence, letters and surveys. DeSimone Decl., ¶¶ 10, 15, 35; Seplow Decl., ¶ 38;
13 Declaration of Thomas Falvey (“Falvey Decl.”), ¶¶ 15-17, 76. This is a process that continued,
14 and indeed intensified, after the Settlement was reached.

15 Once preliminary approval was granted, Class Counsel devoted substantial time and
16 effort to direct outreach to Class Members to inform them of the Settlement, respond to any
17 questions and concerns, and to remind Class Members to submit Claim Forms to ensure that each
18 and every class member would have the opportunity to participate in the benefits of the
19 Settlement. DeSimone Decl., ¶¶ 14-17; Falvey Decl. ¶¶ 18, 20, 22, 26-28, 33-35, 44-47, 51, 59-
20 60, 67-70; Seplow Decl., ¶ 40; Henderson Decl. ¶¶ 8, 12-13. Class Counsel sent out “hundreds
21 of letters, sometimes more than one letter to a potential class member . . . so as to assist class
22 members make a fair and reasoned decision as to whether they wanted to participate in the class.”
23 Falvey Decl., ¶ 44.⁶ Because AT&T would not agree to inform Class Counsel of the identity and
24

25 ⁵ Plaintiffs’ Counsel will provide their detailed, actual time sheets/billing records to the
26 Court for an *in camera* review should the Court require.

27 ⁶ As the declaration of Thomas Falvey attests, Plaintiffs’ Counsel engaged in an
28 extraordinary effort to locate and inform class members of their rights under the Settlement
Agreement. Falvey Decl., ¶ 34 (“Hundreds of hours were used in attempts to contact class
members, as well as to verify that claim forms had been received.”); Falvey Decl., ¶ 35

1 contact information of each Class Member, Class Counsel used numerous search engines,
2 retained a private firm to seek out current addresses, and hired extra staff to make calls at night
3 and on weekends to ensure Class Members received the benefits to which they were entitled.
4 DeSimone Decl., ¶¶ 14, 17; Falvey Decl. ¶ 26, 33, 60. At the August 4, 2010 hearing regarding
5 preliminary approval, Mr. Falvey emphasized Class Counsel’s diligent approach to fulfilling
6 their responsibilities: “Our firms handle class actions differently. We don’t sit back after the
7 settlement is made, simply waiting to pick up our checks. We do our utmost, our very best, to see
8 that every single person who has the right to file a claim does so.” Falvey Decl., ¶ 67.

9 Additionally, because Class Counsel was very aware that it did not have contact
10 information for all Class Members, the negotiated Settlement Agreement specifically provided
11 for outreach by the Claims Administrator (“CPT”), by requiring CPT to send out reminder post
12 cards and make follow-up calls to Class Members whose Claims Forms had not been received.
13 DeSimone Decl., ¶ 18. These were terms which Plaintiffs’ counsel insisted upon in negotiations,
14 and to which Defendant agreed, in order to make sure Class Members were informed of their
15 rights pursuant to the Settlement. DeSimone Decl., ¶ 18. Class Counsel was especially
16 motivated to ensure that Class Members were located and received a Claim Form, in light of the
17 current economic climate, when many people have lost their jobs and have moved away. Falvey
18 Decl. ¶¶ 19-20. As Mr. Falvey attests in his declaration, “In the eyes of plaintiffs’ counsel, this
19 was the employees’ money. They were entitled to it, and so they were entitled to know about the
20 claims process, and to the best extent possible, have their questions and doubts answered.” *Id.* at
21 ¶ 37.

22 In short, this is not a situation where Plaintiffs’ Counsel simply filed the complaint, did
23 little or no work to prosecute the action and then quickly settled the case for pennies on the
24 dollar. Plaintiffs’ Counsel has spent at least 2000 hours on this case to date – which is a high
25 number of hours given that the case settled relatively early in the litigation process. *See*

26 _____
27 (“[A]lmost every day, your declarant was reviewing the information gleaned each day by our
28 staff, giving further instructions as to what to do next, and constantly seeking new and different
ways to find class members.”);

1 DeSimone Decl., ¶¶ 33-36 (at least 275 hours, over 145 hours for Michael Morrison, and over
2 130 hours for Courtney Abrams); Seplow Decl., ¶¶ 36-42 (over 575 hours); Falvey Decl., ¶ 80
3 (over 675 hours); Declaration of J.D. Henderson (“Henderson Decl.”) ¶ 13 (over 200 hours).

4 A large amount of hours were spent investigating the claims, including significant pre-
5 litigation investigation work, communicating with Plaintiffs and putative Class Members,
6 analyzing Defendant’s records, working with Plaintiffs’ expert to generate an analysis of the
7 claims/damages and researching important legal issues that were relevant to determining liability.
8 DeSimone Decl., ¶ 35; Seplow Decl., ¶ 38; Falvey Decl., ¶¶ 10, 13, 15, 17, 71; Henderson Decl.,
9 ¶¶ 10-11. Specifically, Class Counsel drafted a survey/questionnaire that was sent to all of the
10 Class Members. Seplow Decl., ¶¶ 9, 38; Falvey Decl., ¶ 71. Thereafter, Counsel reviewed the
11 data and information from more than 150 surveys that were returned, and developed a detailed
12 spreadsheet containing information about each of the Class Members who had responded to the
13 surveys, including information about their job duties and the amount of overtime they worked.
14 Seplow Decl., ¶¶ 9, 38. Class Counsel subsequently interviewed many of these survey
15 respondents personally to obtain additional information. DeSimone Decl., ¶ 35; Seplow Decl.,
16 ¶¶ 9, 38.

17 As a result of Class Counsel’s extraordinary efforts, the participation rate in this case is
18 an outstanding 84.4% of the Class Members and 87.5% of the compensable work weeks, with
19 only eight (8) opt-outs and notably, no objections. Green Decl., ¶¶ 9, 15; DeSimone Decl., ¶¶ 2,
20 19; Seplow Decl., ¶ 16; Falvey Decl., ¶¶ 52-53; Henderson Decl. ¶¶ 12-13; *see also* Renick
21 Decl., ¶ 9 (“The fact that there is over 84% participation in this case is a testament to the hard
22 work and effort of Plaintiffs’ counsel and strongly supports a fee award of 30% of the maximum
23 settlement amount.”); *see also* Righetti Decl., ¶ 11 (“where class counsel is creative and works
24 hard to get funds into the hands of class members via a high claim rate, as here, then it is
25 important for the courts to reward those extra efforts.”).

26 The participation rates are all the more impressive in light of the fact that Class Members
27 expressed fears about retaliation for returning a Claim Form. Falvey Decl., ¶ 54. Additionally,
28 Class Counsel were contacted by Class Members who were concerned that participation in the

1 lawsuit would jeopardize their right to severance benefits. *Id.* at ¶ 54. When Class Counsel
2 learned of this issue, they contacted defense counsel and asked for, and then received, their
3 agreement to inform these Class Members that they could make a claim in this case and not lose
4 their severance benefits. *Id.* at ¶ 54.

5 Class Counsel also spent considerable time and effort responding to disputes from Class
6 Members concerning the amount of compensable workweeks, and will continue to do so until
7 such disputes have been finally resolved, either informally or by the Court. Falvey Decl., ¶ 69;
8 Seplow Decl., ¶ 41.

9 At the time of the filing of this motion, Plaintiffs' Counsel's total lodestar is \$1,259,680.
10 DeSimone Decl., ¶ 36. This does not include additional time that is likely to be spent in the next
11 two months, including preparing for the approval hearing and resolving all final disputes.
12 Seplow Decl., ¶ 42. While Plaintiffs' Counsel's lodestar is less than what they are requesting in
13 fees, this should not be a ground for reducing the fee award for the reasons set forth in this
14 motion. Litt Decl., ¶¶ 19-27, 35 (attesting to the reasonableness of the fee sought in this case).

15 16 3. Risks of Litigation

17 As demonstrated above and in the Motion for Final Approval, AT&T vigorously
18 contested liability, the scope and amount of the claimed damages and the propriety of class
19 certification. DeSimone Decl., ¶ 6; Seplow Decl., ¶¶ 17-19. While Plaintiffs and their attorneys
20 believe that they would have ultimately prevailed on the merits in this litigation, Plaintiffs and
21 Class Counsel realize the risks in litigating against AT&T's positions. *Id.* Resolution of these
22 issues through motion practice, at trial and/or on appeal would not only delay payment to the
23 Class but also present a risk at each juncture that the class might not receive any recovery at all.
24 *See Silverstein Decl.*, ¶ 15 ("Contingent cases present the very real risk of working hundreds if
25 not thousands of hours that may never be entirely compensated."); *see also Litt Decl.*, ¶¶ 16-18
26 (documenting the substantial risk of non-recovery in class action litigation – specifically, that
27 31.7% or less of the filed class cases resulted in successful class outcomes for plaintiffs).⁷ These

28

⁷ Class Counsel actively takes on and prosecutes complex civil and international human rights cases, which involve substantial risk, and are often considered "unwinnable." DeSimone

1 risks must be considered in assessing the fairness of the settlement, which guarantees a prompt
 2 and substantial recovery from AT&T. The Settlement Agreement in this case is therefore
 3 consistent with the “overriding public interest in settling and quieting litigation” that is
 4 particularly true in class action suits. *See Van Bronkhorst v. Safeco Corp.*, 529 F.2d 943, 950
 5 (9th Cir. 1976); *see also Newberg on Class Actions*, (4th Ed.), 2010, § 11:41 (citing cases).

6 Furthermore, Class Counsel risked not only a great deal of time but also a great deal of
 7 expense to ensure the successful litigation of this action on behalf of the entire Class. DeSimone
 8 Decl., ¶ 31; Seplow Decl., ¶ 34; Falvey Decl., ¶¶ 51, 78, 80; *see also* Schneider Decl., ¶ 21
 9 (discussing the inherent risk “where, as in this case, Plaintiffs are operating on a contingent fee
 10 basis.”). There was the prospect of the enormous cost inherent in class action litigation, as well
 11 as a long battle with a corporate defendant that had retained a premier defense firm. *See* Renick
 12 Decl., ¶ 8 (“Given the attorneys representing the Defendant, it is a testament to the skill and
 13 excellence of Plaintiffs’ counsel that they were able to reach such a favorable settlement.”); *see*
 14 *also* Righetti Decl., ¶ 15 (“It is difficult to prosecute this kind of case against an obviously well
 15 funded defendant – and especially so when the defendant appears to have given its attorneys a
 16 “blank check” to mount a defense.”); Silverstein Decl., ¶ 16 (“[T]here is the great risk inherent in
 17 advancing tens if not hundreds of thousands of dollars in out-of-pocket expenses.”); Litt Decl., ¶¶

18
 19
 20 Decl., ¶¶ 22, 28, 30. As civil rights lawyers, Class Counsel is only able to take such risks and
 21 prosecute cases, which are essential to the workings of the justice system, when this work is
 22 balanced by cases in which we obtain the benefit of a hard-fought settlement, and receive a
 23 percentage of the recovery Plaintiffs’ counsel negotiate for the class. *See* DeSimone Decl., ¶¶
 24 28-29, 31 (noting Class Counsel’s representation of plaintiffs in *Doe, et al. v. Unocal Corp., et*
 25 *al.*, Case No. CV 96-6959-RSWL (C.D. Cal.) (suing Unocal for human rights abuses committed
 26 during the construction of an oil pipeline in Myanmar), *In re Apartheid Cases*, Case No. 02 Civ.
 27 4712 (S.D.N.Y.) (suing companies who sponsored the Apartheid regime in South Africa),
 28 *Presbyterian Church of Sudan, et al. v. Talisman Energy, Inc., and the Republic of Sudan*, Case
 No. 07-0016) (2d Cir.) (suing Talisman Oil for its assistance in human rights abuses committed
 by the Sudanese government), and *John Roe, et al. v. Bridgestone Corp., et al.* (Southern District
 of Indiana) (suing for human rights abuses committed on Bridgestone’s rubber plantation in
 Liberia); *Xue Lu et. al. v. United States of America*, 621 F.3d 944 (9th Cir. 2010) (ten year
 representation of Chinese asylum applicants who were harassed and extorted by asylum officer);
Taylor Ewing v. City of Los Angeles, No. CV 07-5556 GHK (JWJx) (C.D. Cal. 2010) (civil
 rights action which was described as “unwinnable” based on 97% rate of defense verdicts in
 similar cases).

1 16-18 (documenting the substantial risk of non-recovery in class actions). Therefore, the risks of
 2 litigation undertaken by Class Counsel support the fee requested. Indeed, the perception that
 3 Plaintiffs' Counsel is both prepared and well-qualified to litigate often results in settlement
 4 discussions, hence the strength and reputation of counsel is critical and an important component
 5 of the outstanding result in this matter. *See* Litt Decl., ¶ 14 (attesting to Class Counsel's skill and
 6 experience).

7
 8 **4. The Attorneys' Fees Requested by Class Counsel Are Well Within the**
 9 **Range of Fees Approved in Comparable Cases.**

10 Federal courts have historically awarded fees in the range of 20% to 50% in class action
 11 settlements, depending upon the circumstances of the case. *Newberg on Class Actions*, (4th
 12 Ed.), 2010, § 14:6. Specifically, as set forth above (See *Section II(B)*, *supra*), numerous federal
 13 courts in wage and hour class actions have awarded attorneys' fees equal to or higher than the
 14 30% of the Maximum Payment that Plaintiffs seek.

15 A review of recent of attorneys' fee awards in wage and hour class actions by courts
 16 within the Ninth Circuit reflect routine awards of 30% or higher. *See Singer v. Becton Dickinson*
 17 *and Co.*, No. 08-CV-821-IEG, 2010 WL 2196104, at*8 (S.D. Cal. June 01, 2010) (33 1/3% of
 18 \$1 million based on the favorable results obtained, complexity of litigation, and contingent
 19 nature of the case); *Vasquez v. Coast Valley Roofing, Inc.*, 266 F.R.D. 482, 491-93 (E.D. Cal.
 20 2010) (33 1/3% based on favorable results obtained and litigation of complex legal issues
 21 involving "rest and meal periods, an issue that is pending before the California Supreme
 22 Court."); *Knight v. Red Door Salons, Inc.*, No. 08-01520-SC, 2009 WL 248367, at *5 (N.D. Cal.
 23 Feb. 2, 2009) (30% of \$500,000, noting the excellent results achieved for the class); *Romero v.*
 24 *Producers Dairy Foods, Inc.*, No. 05-0484-DLB, 2007 WL 3492841, at *2-*4 (E.D. Cal. Nov.
 25 14, 2007) (33 1/3% of \$240,000 in a wage and hour class action).⁸ Numerous California courts,⁹
 26

27
 28 ⁸ *See also Barrera v. GameStop Corp.*, No. CV 09-1399-ODW (C.D. Cal. Nov. 29, 2010)
 (33 1/3% attorneys' fee award of \$3.25 million settlement); *Huang v. SBC Services, Inc., et al.*,
 No. 06CV2238 DMS (S.D. Cal. Mar. 14, 2008) (30% attorneys fee award of \$11,200,000
 maximum settlement); *Shoff, et al. v. AT&T et al.*, Case No. CV 07-3289 DSF (AGRx) (C.D.

1 as well as federal courts outside the Ninth Circuit, have also approved attorneys fee awards of
2 30% or more in wage and hour class action cases.¹⁰

3 Accordingly, Class Counsel's request for thirty percent (30%) of the Maximum Payment
4 is in the mid-range of the historical range of fee awards and is justified under the facts of this
5 case for undertaking complex, risky, expensive, and time consuming litigation on a contingent
6 basis under the common fund doctrine. See Litt Decl., ¶¶ 16, 24-25 (noting the percentage Class
7 Counsel seeks reflects the low end of the contingent fee market and the mid-level for class action
8 cases, and citing a Federal Judicial Center study which found substantial risk of non-recovery in
9 class action litigation). See also Silverstein Decl., ¶ 15 (emphasizing that contingent cases

10
11 Cal. Nov. 28, 2008) (30% attorneys' fee award of \$16,000,000 maximum settlement); *Doyle et.*
12 *al. v. AT&T et. al.*, No. CV 08-1275 (JAH) (S.D. Cal. Mar. 1, 2010) (30% attorneys' fee award
13 of \$10,500,000 maximum settlement); *Ingalls v. Hallmark Mktg. Corp.*, No. 08cv4342-VBF
14 (C.D. Cal. Oct. 16, 2009) (33.33% attorneys' fee award of \$5.6 million settlement); *Benitez et.*
15 *al. v. Wilbur*, No. 08-1122-LJO (E.D. Cal. Dec. 14, 2009) (33.33% attorneys' fee award of
16 \$400,000 settlement); *Chavez et. al. v. Petrissans et. al.*, No. 08-00122-LJO (E.D. Cal. Dec. 15,
17 2009) (33% attorneys' fee award of \$250,000 settlement); *Rippee v. Boston Mkt. Corp.*, No. 05-
18 1359-BTM (S.D. Cal. Oct. 10, 2006) (40% attorneys' fee award of \$3.75 million settlement).

19 ⁹ See e.g., *Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles*, 186 Cal.App.4th 399,
20 413 (2010) (affirming settlement including attorneys' fees of 30% of \$1.1 million in wage and
21 hour class action); *In re California Indirect Purchaser X-Ray Film Antitrust Litig.*, No. 960886,
22 1998 WL 1031494, at *3-10 (1998) (affirming attorneys' fee of 30% of \$3.75 million settlement
23 fund).

24 ¹⁰ In wage and hour class actions outside of the Ninth circuit, courts also routinely award
25 fees of 30% or higher. *Westerfield v. Washington Mut. Bank*, Nos. 06-CV-2817-JMA,08-00287-
26 CBA, 2009 WL 5841129, at *4 (S.D.N.Y. Oct. 8, 2009) (30% of \$38 million); *Khait v.*
27 *Whirlpool Corp.*, No. 06-6381-ALC, 2010 WL 2025106, at *7-*10 (E.D.N.Y. Jan. 20, 2010)
28 (33% of \$9.25 million); *Clark v. Ecolab Inc.*, Nos. 07-8623-PAC, 04-4488-PAC, 06-5672-PAC,
2010 WL 1948198, at *8 (S.D.N.Y. May 11, 2010) (1/3 of \$6 million, noting counsel had no
"ultimate guarantee of compensation" and the "substantial work [by counsel in] identifying,
investigating, prosecuting, and settling" claims); *Levinson v. About.Com Inc.*, No. 02-2222-DAB,
2010 WL 4159490, at *3 (S.D.N.Y. Oct. 7, 2010) (33% of Gross Settlement Fund of \$5.75
million); *McMahon v. Olivier Cheng Catering and Events, LLC*, No. 08-8713-PGG, 2010 WL
2399328, at *6 (S.D.N.Y. March 3, 2010) (33% of \$400,000); *DeMunecas v. Bold Food, LLC*,
No. 09-00440-DAB, 2010 WL 3322580, at *7-8 (S.D.N.Y. Aug. 23, 2010) (33% of \$800,000);
Rotuna v. West Customer Management Group, LLC, No. 09-CV1608, 2010 WL 2490989, at *7
(N.D. Ohio June 15, 2010) (1/3 of settlement fund in wage and hour class action); *Dillworth v.*
Case Farms Processing, Inc., No. C-07-4499-EMC, 2010 WL 776933, at *7 (N.D. Ohio March
8, 2010) (1/3 of settlement fund in wage and hour class action).

1 present the very real risk of working hundreds if not thousands of hours that may never be
2 entirely compensated, thereby justifying an enhancement of the hourly rate sought by Plaintiffs’
3 counsel); Renick Decl., ¶ 9 (attesting to the reasonableness of the fee request in light of the
4 substantial benefits that the Class Members will receive).

5
6 **5. Contingent nature of recovery.**

7 This class action was filed in August 2009, and for Class Counsel, the fees were wholly
8 contingent in nature, and Class Counsel’s attention to this difficult case was undertaken in lieu of
9 work on other cases. Seplow Decl., ¶ 34-35; DeSimone Decl., ¶¶ 31-32. The risks in taking on a
10 class action case are enormous. See Litt Decl., ¶¶ 14-15; Renick Decl., ¶ 8; Silverstein Decl., ¶¶
11 15-16. Litigating a wage and hour class action through certification, and then trial, takes years
12 and requires the investment of tens, and sometimes hundreds, of thousands of dollars. DeSimone
13 Decl., ¶ 31; Seplow Decl., ¶ 34.

14 Also, wage and hours laws are still developing, and a change in the law always threatens
15 to wipe out the plaintiffs’ recovery. Seplow Decl., ¶ 19; see also Renick Decl., ¶ 8 (“wage and
16 hour class actions, especially ones involving issues of statutory exemptions from overtime laws,
17 can be highly risky”); *Vasquez v. Coast Valley Roofing, Inc.*, supra, 266 F.R.D. at 491-93
18 (awarding attorneys’ fees of 33 1/3 % of total recovery based in part on “the significant risks in
19 pursuing this case . . . [since] some of the key claims involved the timely provision of rest and
20 meal periods, an issue that is pending before the California Supreme Court.”). This is especially
21 true in this case where the main exemption relied upon by Defendant, the administrative
22 exemption, is still under development. See *Heffelfinger v. Electronic Data Systems Corp.*, 580
23 F.Supp.2d 933, 957 (C.D. Cal. 2008) (currently on appeal, Docket No. 08-56319 (9th Cir.)).
24 Accordingly, Class Counsel respectfully submit that an award of 30% of the Maximum Payment
25 should be awarded for their attorneys’ fees given the risks Class Counsel faced in litigating this
26 case.

27 //

28 //

1 **C. Plaintiffs' Request for Reimbursement of Costs is Reasonable and Proper.**

2 In total, as set forth in the declarations of counsel to this Court, Plaintiffs' Counsel have
3 incurred an aggregate of \$30,687.19 in unreimbursed costs and expenses in prosecuting this case
4 (\$23,587.89 for the SDSHHH firm and \$7,099.30 for the Falvey Firm). Seplow Decl., ¶ 45;
5 Falvey Decl., ¶ 78. Over the past seventeen months, Plaintiffs' Counsel have incurred expert
6 costs, mediation costs, travel costs, filing fees, and computer research costs, photocopies, faxes,
7 telephone charges, and postage. Seplow Decl., ¶ 45. All of these costs and expenses were
8 reasonable and necessary to bring this case to closure. Seplow Decl., ¶ 45.

9 As one commentator noted, "the prevailing view is that expenses are awarded in addition
10 to the fee percentage." Conte, Attorney Fee Awards, § 2.8 at pp. 50-51 (2d Ed. 1977) (citing *In*
11 *re Businessland Securities Litigation*, No. C-90-20476-RFP, 1991 WL 427887 (N.D. Cal. 1991).
12 Courts routinely reimburse plaintiff's counsel for the costs incurred in prosecuting cases on a
13 contingent fee basis. See *In re Warner Communications Sec. Litig.*, 618 F.Supp. 735, 754
14 (S.D.N.Y. 1985), *aff'd*, 798 F.2d 35 (2d. Cir. 1986); *In re GNC Shareholder Litig.* 668 F.Supp.
15 450, 452 (W.D. Pa. 1987). The recovery of costs is to include all out of pocket costs not part of
16 overhead which are typically billed to a client. See *Dowdell v. City of Apoka, Florida*, 698 F.2d
17 1181, 1190, fn. 13 (11th Cir. 1983) ([E]xpenses such as supplemental secretarial costs, copying,
18 telephone costs and necessary travel, are integrally related to the work of an attorney and the
19 services for which outlays are made may play a significant role in the ultimate success of
20 litigation . . ."); see also *Henry v. Webermeier*, 738 F.2d 188, 192 (7th Cir. 1984). In this case,
21 all of the categories of costs sought by Plaintiffs are typically billed to a client. Seplow Decl., ¶
22 45.¹¹

23
24 **D. The Class Representative Enhancements Requested Herein Are Reasonable**
25 **and Are Standard in Class Actions.**

26 The Class Representatives seek enhancement awards of \$25,000 each. AT&T does not
27 oppose this request. Class Counsel submit that the enhancement award is reasonable and proper
28

¹¹ Plaintiffs also seek reimbursement of the claims administration expenses incurred by Claims Administrator, CPT Group, in the amount of \$20,000.00. Green Decl. ¶ 16.

1 and supported by the particular circumstances of this case and the applicable case law.

2 Courts have long acknowledged that active litigants are entitled to be compensated for
3 bearing the risk and time to represent others. *See Van Vranken v. Atlantic Richfield Co.*, 901
4 F.Supp.294, 299 (N.D. Cal. 1995). Where class representatives are provided with special
5 compensation as part of a class settlement, the Court should ensure that it is fair and reasonable.
6 Indeed, incentive awards “are not uncommon and can serve an important function in promoting
7 class action settlements.” *Sheppard v. Consol. Edison Co. of N.Y., Inc.*, No. 94-CV-0403, 2002
8 WL 2003206, at *16 (S.D.N.Y. Aug. 1, 2002).

9 Here, the *combined* enhancement awards represent less than one half of one percent of the
10 Maximum Payment amount.¹² The requested enhancement award, in light of the outstanding
11 result obtained for all Class Members, is very fair and equitable.

12 Such awards are justified when the representatives risk retaliation as a result of their
13 participation. *See, e.g., Ingram v. Coca-Cola Co.*, 200 F.R.D. 685, 694 (N.D. Ga. 2001) (“Courts
14 routinely approve incentive awards to compensate named plaintiffs for the services they provided
15 and the risks they incurred during the course of the class action litigation.”) (internal citations
16 omitted). Specifically, in the context of employment-related cases, many courts have recognized
17 that a class representative ““lends his or her name and efforts to the prosecution of litigation at
18 some personal peril.”” *Sheppard*, 2002 WL 2003206, at *17 (citing *Roberts v. Texaco, Inc.*,
19 (S.D.N.Y. 1997) 979 F. Supp. 185, 200). Here, these Plaintiffs stepped forward and initiated this
20 class action lawsuit despite their fears of retaliation and/or endangering future employment. *See*
21 Declaration of Duane Waters (“Waters Decl.”), ¶¶ 9-10; Declaration of Debra Turner (“Turner
22 Decl.”), ¶ 10; Declaration of Rudy Fajardo (“Fajardo Decl.”), ¶ 13.

23 Retaliation extends outside the immediate workplace. It is common knowledge that the
24

25 ¹² Indeed, the individual enhancements being sought in this case represent 0.15% of total
26 recovery – a fair and reasonable amount in light of cases in this circuit where class
27 representatives were awarded equal to or higher than this percentage. *See In re Mego Financial*
28 *Corp. Securities Litigation*, 213 F.3d 454, 463 (9th Cir. 2000) (individual enhancement award
represented 0.29% of total recovery); *see also Singer v. Becton Dickinson and Co.*, No.
08-CV-821-IEG, 2010 WL 2196104, at *3 (S.D. Cal. June 01, 2010) (individual enhancement
represented 2.5% of total recovery); *Vasquez v. Coast Valley Roofing, Inc.*, 266 F.R.D. 482, 491-
93 (E.D. Cal. 2010) (individual enhancement represented 1.6% of total recovery).

1 modern day workforce is quite mobile, with employees holding several jobs in a career during
2 their lifetime. It is also true that prospective employers in this computer age “Google” and/or do
3 extensive background checks and have access to court databases to see if applicants have ever
4 filed a lawsuit or ever have been sued. The Class Representatives’ acts of stepping forward led
5 to AT&T agreeing to pay a substantial sum of money to settle this case. Such conduct will not be
6 lost on a prospective employer who must choose between an applicant who has sued an employer
7 and one who has not. The enhancement requested will help compensate the Class
8 Representatives for the opportunities they may lose in the future.

9 Class representatives also risk having potential judgments entered against them. In fact,
10 several judgments against Class Representatives have been entered. *See e.g. Koehl v. Verio, Inc.*,
11 142 Cal.App.4th 1313, 1328 (2006) (wage and hour class action where Defendant prevailed at
12 trial and the named plaintiffs were held liable, jointly and severally, for the Defendants’
13 attorneys’ fees); *Whiteway v. Fedex Kinkos Office & Print Services, Inc.*, No. 05-2320-SBA,
14 2007 WL 4531783 (N.D. Cal. Dec. 17, 2007) (cost award of \$56,788 was entered against the
15 Named Plaintiff after the Court granted Summary Judgment in a misclassification case).

16 The enhancement awards being sought here are also justified by the level of participation
17 of the Class Representatives. The Class Representatives were active participants in this
18 litigation. They provided Class Counsel with valuable information regarding (1) the job duties at
19 issue in this case necessary in support Plaintiffs’ contention that non-exempt; (2) AT&T’s time
20 keeping practices and policies; and (3) the hours worked by employees, including meal and rest
21 periods. Seplow Decl., ¶ 46; Falvey Decl., ¶ 25, 62; Waters Decl., ¶¶ 5-6; Turner Decl., ¶¶ 5-6;
22 Fajardo Decl., ¶¶ 3-4, 6, 9, 12. Class Counsel would routinely confer with the Class
23 Representatives when evaluating the data and other information obtained during informal
24 discovery. Falvey Decl., ¶ 25, 62; Waters Decl., ¶ 5; Turner Decl., ¶ 5; Fajardo Decl., ¶¶ 4,9.
25 The Class Representatives also spent hours reviewing documents and other information which
26 were pertinent to the lawsuit, as well as responded to inquires from fellow employees and Class
27 Members. Waters Decl., ¶¶ 2, 4-6, 8; Turner Decl., ¶¶ 2, 4-6, 8-9, 12; Fajardo Decl., ¶¶ 3-4, 6, 9,
28 11-12. The Class Representatives’ knowledge of the inner workings of AT&T, stemming from

1 their employment with the company, as well as their outreach to Class Members proved
2 instrumental to reaching a resolution in this case and were a major reason why Class Counsel
3 were so prepared when they participated in the mediation. Falvey Decl., ¶¶ 25, 62.

4 The enhancement awards sought by Plaintiffs are supported by numerous cases where the
5 court did not hesitate to award enhancement payments for class representative participation. For
6 example, in *Ingram v. The Coca-Cola Co.*, 200 F.R.D. at 694, the Court approved incentive
7 awards of \$300,000 to each named plaintiff in recognition of the services they provided to the
8 class by responding to discovery, participating in the mediation process and taking the risk of
9 stepping forward on behalf of the class. The *Ingram* Court noted that the “Class Representatives
10 have fulfilled . . . the class's interest. . . in receiving fair amends for injuries allegedly suffered
11 while working for the Company.” *Id.* at 694; *see also Enterprise Energy Corp. v. Columbia Gas*
12 *Transmission Corp.*, 137 F.R.D. 240, 250-251 (S.D. Ohio 1991) (approving incentive payments
13 of \$50,000 to *each* class representative); *In re Dunn & Bradstreet Credit Services Consumer*
14 *Litigation*, 130 F.R.D. 366, 373-374 (S.D. Ohio 1990) (approving incentive payments amounting
15 to \$35,000 to \$55,000 for *each* class representative); *Van Vranken v. Atlantic Richfield Co.*,
16 901 F.Supp. 294 (N.D. Cal. 1995) (approving \$50,000 participation award); *Shoff, et al. v. AT&T*
17 *et. al., supra*, (C.D. Cal. Nov. 28, 2008) (approving enhancement award of \$45,000 for each class
18 representative); *Doyle et. al. v. AT&T et. al., supra* (S.D. Cal. Mar. 1, 2010) (approving
19 enhancement award of \$25,000 for each class representative).

20 In sum, the Class Representatives took risks, bore hardships, and made sacrifices that
21 absent Class Members did not.¹³ Rewarding their efforts is a proper incentive for individuals to
22 come forward to challenge wage and hour violations on a class-wide level, thus fulfilling the
23 policies and purposes underlying the California Labor Code. *See* Labor Code § 90.5(a) (stating
24 that it is the policy of this State to vigorously enforce minimum labor standards, to ensure that
25 employees are not required or permitted to work under substandard and unlawful conditions, and
26

27 ¹³ In exchange for the enhancement awards, the Class Representatives have agreed to
28 release all known and unknown claims against AT&T “of every nature or description
whatsoever.” *See* Settlement Agreement, ¶ 51. In contrast, other Class Members are only
releasing the wage and hour related claims that are alleged in this lawsuit. *See* Settlement
Agreement, ¶49.

1 to protect law-abiding employers and their employees from competitors who lower their costs by
2 failing to comply with minimum labor standards). Accordingly, given the potential risk inherent
3 in any employment case and the time involved in actively participating in the litigation, the
4 proposed enhancements to the Class Representatives are fair and reasonable.
5

6 **III. CONCLUSION**

7 Plaintiffs' Counsel submit that they achieved a truly excellent result for the Class,
8 including an outstanding participation rate, in pursuit of complex, risky, expensive and time-
9 consuming litigation. In light of this, Class Counsel and the Class Representatives should be
10 fairly compensated for their efforts and their success. Accordingly, for all of the foregoing
11 reasons, Plaintiffs' Motion should be granted in its entirety.
12

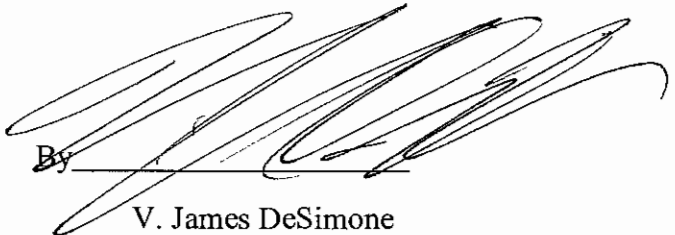
13 DATED: December 22, 2010

Respectfully submitted,

14
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18
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