The Honorable Benjamin H. Settle

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

TROY SLACK, JACOB GRISMER, RICHARD ERICKSON, SCOTT PRAYE, GARY H. ROBERTS, ROBERT P. ULLRICH, HENRY LEDESMA, TIMOTHY HELMICK, DENNIS STUBER, ERIC DUBLINSKI, SEAN P. FORNEY, individually and as Class Representatives,

Plaintiffs,

v.

SWIFT TRANSPORTATION CO. OF ARIZONA, LLC,

Defendant.

CLASS ACTION

No. 3:11-cv-05843-BHS

**PLAINTIFFS' MOTION FOR ATTORNEYS' FEES, COSTS, EXPENSES, AND SERVICE AWARDS**

NOTE ON MOTION CALENDAR:
January 22, 2019, 10:00 a.m.



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Class Representatives,[1] on behalf of themselves and the certified Class, move for service awards and reasonable attorneys' fees and expenses. Plaintiffs request service awards in the amount of $7,500 per Class Representative and Class Counsel's reasonable attorneys' fees and expenses of $2,050,000, pursuant to the Settlement Agreement.[2] Under the Agreement, Class Counsel's fee and cost award will be paid separately by Swift and will not reduce class damages payable to the Class. Plaintiffs make these requests 14 days in advance of the deadline for objections and exclusions, which is December 3, 2018.

As Class Representatives will demonstrate, these awards are justified under the facts of this case and applicable law.

## I. STATEMENT OF RELEVANT FACTS

### A. Case History

#### 1. Plaintiffs bring lawsuit against Swift

The plaintiffs in this certified class action are Washington-based truck drivers who are or were employed by Swift Transportation Company of Arizona, LLC as "dedicated drivers" and paid by the mile. Plaintiffs brought suit on behalf of themselves and a proposed class of similarly situated drivers on July 18, 2011.[3] Plaintiffs alleged, among other claims, that Swift violated Washington law by: (i) failing to pay overtime, or the reasonable equivalence of overtime (REOT), to the drivers ("Overtime Claim"); (ii) failing to pay certain drivers for attending orientation in the state ("Orientation Claim"); (iii) making unlawful deductions from the wages of drivers who participated in the company's per diem plan ("Per Diem Claim"); and that (iv)

[1] The surviving class representatives are Troy Slack, Jacob Grismer, Richard Erickson, Scott Praye, Gary Roberts, Robert P. Ullrich, Timothy Helmick, Dennis Stuber, and Sean Forney. Each has submitted a declaration in support of this motion. *See infra.* at n.72. Mr. Erickson's signed declaration did not arrive by the time for this motion's filing. Plaintiffs will supplement the record. Class representatives Eric Dublinski and Henry Ledesma passed away during the pendency of this litigation.

[2] This motion seeks attorneys' fees and costs for current Class Counsel only as negotiated with Swift and reflected in the Settlement Agreement. Swift declined to negotiate resolution of any fee claim by Nelson Boyd, PLLC or the Cochran Firm. Class Counsel have an agreement with Nelson Boyd, PLLC regarding fees. Plaintiffs understand that the Cochran Firm will submit its own fee petition. Declaration of Jeniphr A.E. Breckenridge In Support of Plaintiffs' Motion for Attorneys' Fees, Costs, Expenses, and Service Awards ("Breckenridge Decl."), ¶¶ 10-14.

[3] Plaintiffs brought the lawsuit in Pierce County Superior Court. Swift removed the case to this Court. Dkt. No. 1.


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Swift did all of these things willfully. Swift denied, and continues to deny, all of these allegations. Eleven drivers stepped up to represent the Class as named plaintiffs.

**2. The Court certifies the Class**

The Court certified a class on November 20, 2013. The Court defined the Class as:

> All current and former Swift employee [dedicated] drivers who were assigned by Swift to a Washington position and/or terminal after July 18, 2008 and the Preliminary Approval Date; and who were paid by the mile and worked in excess of forty hours in a week; or who participated in and completed Swift's new driver Orientation Program in a Washington location; or who participated in Swift's Per Diem program for mileage-based drivers.[4]

This is the Class on whose behalf the settlement was obtained.

The Court originally appointed the Cochran Firm of Dothan, Alabama as class counsel ("Original Counsel"), with the Seattle firm of Nelson Boyd, PLLC, as local counsel.[5] Although the class was certified in 2013, Class notice was not issued until 2016. The prosecution of the case was delayed.[6] *See infra.* at § I.B.3.

**3. The Court issues Order to Show Cause and appoints new Class Counsel in September 2015**

In July 2015, the Court issued an order to show cause why the class certification order should not be vacated due to Original Counsel's failure to advance the case. Dkt. No. 121. The Court questioned Original Counsel's "competency" and raised "serious concerns on whether the class is adequately served by current counsel." *Id.* at 2-3. The Court found that Original Counsel had "significantly delayed the prosecution of this case," "wasted almost a year" preparing class notice, and "prolonged" the litigation. *Id.* at 3-4. Citing these factors, the Court expressed concern that the action could not continue as a class action and the Class should be decertified. *Id.* at 5.

Original Counsel contacted Hagens Berman after the Court's order to show cause because of Hagens Berman's reputation and extraordinary results in complex class actions,

[4] Dkt. No. 83. The Court erroneously stated "designated" when it meant dedicated in its original certification order. This was later rectified. Dkt. No. 99.

[5] Breckenridge Decl., ¶ 25.

[6] Dkt. Nos. 92, 103; *see also* Dkt. No. 121 at 3 (In the Court's words, Original Counsel had "wasted" nearly a year in preparing the notice.) (Order to Show Cause).


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including employment cases, and because they understood that withdrawal and substitution of counsel was the only way to protect the certified Class's interests. Hagens Berman agreed to assume the role of class counsel, subject to Class Representative and Court approval. Original Counsel obtained client approval, and moved the Court for the substitution.[7] The Court appointed Steve Berman, Jeniphr Breckenridge, and Hagens Berman as sole Class Counsel over Swift's objections. Dkt. No. 139 (Sept. 2, 2015). There was no agreement of any kind between Original Counsel and Hagens Berman with respect to any ongoing work by Original Counsel or any fee arrangement. Following substitution, Original Counsel did no further authorized work on the behalf of the Class other than steps to transition the case. Nelson Boyd also assisted Hagens Berman with the transition and performed certain other liaison work after Hagens Berman was appointed.[8]

**4. Work Undertaken by Class Counsel after September 2015**

This case was hard-fought over the next three years, and the work Hagens Berman invested in it has been extensive. Hagens Berman quickly transitioned into the Class Counsel role, which was a monumental task due to the case and file status after four years. As noted, class notice had not been issued. No protective order and no ESI protocol had been entered in the case. Discovery was incomplete and documents were missing and untracked. Expert deadlines were imminent, yet no expert analysis had been conducted.[9]

The Parties engaged in extensive fact discovery after the Hagens Berman appointment. Class Counsel learned that although Original Counsel had served stacks of written discovery, there had been no follow-through and the parties were deadlocked over Swift's substantial and overlapping objections. Without a protective order, and no ESI protocol, no electronic discovery (including the payroll data which became the key to the case) had been initiated. The first tasks

[7] Breckenridge Decl., ¶¶ 28-29.

[8] *Id.*, ¶ 31.

[9] *Id.*, ¶¶ 32-33.



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Hagens Berman tackled focused the outstanding discovery on categories of information directly relevant to proving Class claims and resolving Swift's objections.[10]

Hagens Berman prepared a class notice and a class notice plan, and obtained Court approval over Swift's objections on April 1, 2016, despite reasonable delays due to Swift changing outside counsel *twice.* Class Notice was issued in June 2016, just nine months after Hagens Berman took over, but almost three years after the case was certified.

All Class Representatives and more than one dozen Swift employees were eventually deposed.[11] Swift alone produced more than 200,000 documents in electronic form after the Court appointed Hagens Berman, including payroll and pay-related databases, Department of Transportation log records, and other employment data for the Class. Hagens Berman loaded the electronic documents and data on a document platform and analyzed them. Hagens Berman also served public records requests on the Washington Department of Labor and Industries related to REOT.[12]

The dissection and analysis of Swift's complicated accounting system became the key to unlocking case. The work to do this began soon after Hagens Berman's appointment. Swift had repeatedly objected that it could not identify its Washington-based dedicated drivers and could not provide discovery on how it had allegedly incorporate REOT into driver pay because there was no formula, its pay matrices "incorporated" overtime, and its payroll system was complicated.[13] Class Counsel moved to compel this and other information in May, 2016. Dkt. No. 169. The Court heard the motion and ordered Swift to provide a live tutorial on its payroll accounting system for Plaintiffs' counsel and allowed Plaintiffs to take an early deposition of Swift expert, Angela Sabbe, as a means to develop overtime evidence.

The Parties engaged in extensive expert discovery too. Plaintiffs designated one liability and damages expert (Dwight Steward, Ph.D.,) and Swift designated two experts (Angela Sabbe

[10] *Id.*, ¶ 34.

[11] The Class Representatives were deposed before Hagens Berman became involved in the case. Breckenridge Decl., ¶ 37.

[12] *Id.*, ¶ 37.

[13] *Id.*, ¶ 36.


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and Robert Crandall). The experts submitted reports detailing their respective analyses of Plaintiffs' claims and damages. Plaintiffs deposed Ms. Sabbe twice. Swift deposed Dr. Steward once. Plaintiffs and Swift each filed motions to exclude the other party's experts' opinions as inadmissible under Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993).[14] The Court held a one-and-one-half day evidentiary hearing in connection with the motions, with the experts testifying live, on July 18 and 19, 2017 ("*Daubert* Hearing"), and then ordered supplemental briefing on the issues.[15]

Plaintiffs moved for partial summary judgment, asking the Court to rule as a matter of law in favor of Plaintiffs and the Class on Swift's liability for the Overtime Claim and the Orientation Claim, on April 3, 2017. The motion was fully briefed.[16]

After the *Daubert* Hearing, the Court ruled on the Parties' motions to exclude and Plaintiffs' motion for partial summary judgment. The Court ruled that the testimony of all three experts would be admitted, subject to certain limitations on the scope of the Sabbe and Crandall testimony. The Court granted summary judgment as to Swift's liability for the Orientation Claim, and denied summary judgment as to the Overtime and Per Diem Claims.[17]

A jury trial was set for September 19, 2017. The Parties prepared for trial, including exchanging LCR 16(h) pretrial statements; deposition designations and counter-designations and related objections; jury instructions; and motions *in limine* – as well as in-person and telephonic conferral on these matters. The Parties held their pretrial LR 16 conference of attorneys. The Parties stipulated to several orders *in limine*, and filed motions *in limine* for the evidentiary issues on which they could not agree.[18]

[14] Dkt. Nos. 217, 245, 246.

[15] Dkt. Nos. 264, 265, 266.

[16] Dkt. Nos. 215, 237, 240.

[17] Dkt. No. 267.

[18] Dkt. Nos. 268, 269, 270.



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**B. The Settlement of Class Claims and Attorneys' Fees and Additional Litigation**

**1. Settlement of Class claims and service awards**

Three months before trial was scheduled to begin the Parties participated in a mediation before Judge Charles S. Burdell, Jr. (Ret'd). The mediation was unsuccessful and the Parties diligently pursued preparation for trial. Just three weeks before trial – and having completed nearly all of their trial preparations, the parties agreed to a second day with Judge Burdell. At this second mediation, the parties reached an agreement to settle class-wide damages for all claims and prepared a settlement term sheet, which the Parties and Judge Burdell signed.[19] The terms in the initial settlement term sheet were later incorporated into the Settlement Agreement. The Settlement creates a Settlement Fund of $5,050,000 in non-reversionary relief. Importantly, the terms included agreement that the Settlement Fund would only be reduced to pay service fees not to exceed $7,500 for each Class Representative and any necessary taxes. Any attorneys' fees awarded in the case would be paid in addition to and separately from the Settlement Fund.

The Settlement offers the following additional benefits to the Class:

- Swift will pay all costs necessary for settlement notice and administration separate from the Settlement Fund;[20]
- Class Members have a second opportunity to opt out of the Class;[21]
- No portion of the Settlement Fund shall revert to Swift. Any funds remaining after the first distribution will be distributed through a second distribution to the Class or paid to a *cy pres* charity approved by the Court.[22]
- The proposed settlement is claims-paid for the Overtime and Per Diem claims. Payments will be made directly to participating Class Members, with no additional action necessary to recover for the Overtime or Per Diem Claims, a minimal submission required to make a request for Orientation Claims.[23]

[19] *See* Dkt. No. 277 (¶¶ 3-7) Declaration of Charles S. Burdell, Jr. in Support of Plaintiffs' Motion for Preliminary Approval of Class Action Settlement ("Burdell Decl.").

[20] Dkt. No. 309-1 at § II.E.2.

[21] *Id.* at § IV.A.2.

[22] *Id.* at § IV.C.3.

[23] *Id.* at § IV.B.6.



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The parties did not discuss attorneys' fees at the mediation, other than to agree that any attorneys' fees and costs would be separate and independent from the Settlement Fund – no attorneys' fees or costs would be deducted from the Class recovery.[24]

**2. Negotiation of attorneys' fees**

After the mediation, the parties began negotiating Class Counsel's fees and expenses only.[25] The negotiations did not include time and expenses for Original Counsel. In fact, Class Counsel could not in good faith negotiate for time and expenses before they became involved in the case. The negotiations took place through multiple emails, phone calls, and one face-to-face meeting over the course of three weeks. Class Counsel allowed Swift counsel to review their contemporaneously maintained time records and expenses for the case. As a result of the negotiations, Swift agreed to pay Class Counsel's attorneys' fees and costs of $2,050,000, and Class Counsel agreed not to seek an award of Attorneys' Fees and Costs in excess of that amount. Class Counsel expressly raised the possibility that Nelson Boyd and/or Original Counsel might seek fees, but Swift declined to negotiate the resolution of any additional fee petitions. Class counsel informed Original Counsel that it would have to separately seek its fees from Swift. [26]

**3. Initial preliminary approval, post-approval issues, and withdrawal of preliminary approval**

Plaintiffs promptly moved the Court for preliminary approval of the Settlement. The Court granted preliminary approval, ordered Plaintiffs to issue class notice, and set a schedule for final approval.[27] Swift deposited $5,050,000 (the settlement funds) into an escrow account, and supplied claims data to the Settlement Administrator per the Settlement Agreement.[28] Before the approved settlement notice could be issued, however, a disagreement arose between the Parties

[24] Breckenridge Decl., ¶¶ 42-43.

[25] *Id.*

[26] *Id.*, ¶ 43.

[27] Dkt. No. 278.

[28] Breckenridge Decl., ¶ 44.


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regarding the scope of the Settlement release.[29] The parties engaged in multiple rounds of briefing on the issue,[30] one hearing before the Court, and continued negotiations, as described below. *See infra.* at § II.B.4. After the hearing, the Court vacated its preliminary approval of the settlement.[31]

**4. The parties' accord, Settlement Agreement amendment, and preliminary approval**

The parties continued to confer in good faith regarding the outstanding issues and how those issues could be resolved and kept the Court apprised of the status through multiple status reports. Counsel for the parties discussed the issues and exchanged data and other information regarding their positions. As a result of the discussions, the parties reached an agreement to resolve their differences: Swift and the Class agreed to amend the Settlement agreement. The agreement is memorialized in Amendment No. 1 to the Class Action Settlement Agreement and Release.[32] Details of the Amendment were previously set forth in the Motion for Preliminary Approval.[33] The amendment clarified the Settlement, but did not change the Class recovery, or individual class members' recoveries. In fact, the amendment essentially removed the ambiguity that Swift had perceived and established that Plaintiff's interpretation of the original version of the Settlement Agreement was correct.

The Court granted preliminary approval to the proposed settlement, with amendment, on October 9, 2018. Dkt. No. 311.

**C. Class Representatives' Support of the Case**

The Class Representatives in this case committed exceptional time to the case, even as most feared retaliation by bringing legal claims against their employer, a trucking industry giant.[34] Each Class Representative prepared for and sat for a deposition, with the drivers still employed taking time off from work to do so. Class Representatives have also provided

[29] The settlement of the Orientation and Per Diem claims were unaffected by the disagreements, and the Settlement Fund remained in place accruing interest to the benefit of the Class. *Id*.

[30] Dkt. Nos. 282, 284, 286, 288.

[31] Dkt. No. 292.

[32] Dkt. No. 309-2.

[33] Dkt. No. 309 at 7-8.

[34] *See generally* Class Representative Declarations.


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substantial information regarding their Swift employment; gathered, reviewed, and produced their personal employment-related documents; worked with counsel on investigation and fact development; reviewed and approved the 2017 Settlement Agreement and the 2018 Amendment; and monitored the litigation over the course of seven years. *See infra.* at § II.C. The long, protracted history of this case (caused largely by the failures of Original Counsel, as noted by the Court) further supports the modest awards sought here. This is underscored by the fact that two Class Representatives passed away during the seven years this case has taken to get to this stage. Finally, each Class Representative will be entitled to the same Settlement benefits, subject to the same conditions, as any other Class Member.

The Parties have agreed that Class Representatives may apply for Service Awards of no more than $7,500 for each of the Class Representatives.[35]

**D. Attorneys' Fees and Expenses Incurred and Sought**

Class Counsel seeks $2,050,000 in attorneys' fees and expenses for their work in this case. This represents a negative multiplier of Class Counsel's revised lodestar. It is a fraction of the total amount of time and expenses Hagens Berman has invested in the case. Class Counsel carefully reviewed the firm's time and expenses, and excluded time that might be considered "excessive, redundant, or otherwise unnecessary" (as courts considering the reasonableness of attorneys' fees expect),[36] and excluded time for lawyers and staff who had *de minimus* time in the case.[37] This internal review eliminated approximately 20% of the firm's total gross time, for total time invested of 6300 hours. Costs were an additional $240,000.[38] But even beyond that substantial write-down, to facilitate the resolution of the case and to maximize the benefit to the Class, Class Counsel further agreed to cap their fee and costs request at $2,050,000, which is

[35] Dkt. No. 309-1, § III.D.

[36] *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983) (counsel "should make a good faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary").

[37] Breckenridge Decl., ¶ 15.

[38] *Id.*, ¶¶ 21-23. $140,000 of the costs incurred were for the work of Dr. Steward and his firm, Employstats. Class Counsel reviewed their costs and reduced them by $13,000, the amount billed by an expert who did not contribute to the Class recovery.


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under 60% of even the reduced fee and cost bill. When the reduced costs ($240,000) are deducted from the fees and costs Class Counsel seek, Class Counsel's fee request is $1,810,000.

Class Counsel has agreed to pay Nelson Boyd 6% of any attorneys' fees and reimburse Nelson Boyd's actual costs from the amount the Court awards to Class Counsel, and Nelson Boyd will not seek to recover its fees and expenses separately. By agreeing to take a set percentage, Nelson Boyd has agreed to an attorneys' fees and costs recovery that represents a reduced rate, consistent with the fractional multiplier that Hagens Berman has agreed to take, to maximize the benefit and recovery to the Class. Importantly, should the Court award any fees or reimbursement of costs to Original Counsel, such fees and costs would be separately paid by Swift, as ordered by the Court, as the Settlement Agreement sets forth that the amount to be paid to Class members survives independent of the fees and costs ultimately awarded in the case and Swift knew and knows well that the $2,050,000 cap agreed to by Hagens Berman was for its fees and costs only.[39]

## II. ARGUMENT

Attorneys' fees may be awarded in a certified class action where authorized by law or the parties' agreement. Fed. R. Civ. P. 23(h).[40] "[A]wards of attorneys' fees serve the dual purpose of encouraging persons to seek redress for damages caused to an entire class of persons and discouraging future misconduct."[41] Here, attorneys' fees are authorized by both law,[42] and the Settlement Agreement. Ideally, where an award of attorneys' fees is warranted, the parties will settle the fee, as was the case with Class Counsel's fee here.[43] It is then the Court's role to evaluate the reasonableness of the fees sought.[44]

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[39] As further described herein, to avoid burdening the Court with a separate motion by Nelson Boyd, Hagens Berman agreed to further reduce its net recovery by paying to Nelson Boyd 6% of its awarded fees and reimbursing Nelson Boyd's actual expenses. *See infra.* at § II.A.

[40] *See also In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 941 (9th Cir. 2011).

[41] *In re Apollo Grp. Inc. Secs. Litig.*, 2012 WL 1378677, at *6 (D. Ariz. Apr. 20, 2012).

[42] Under Washington wage and hour statutes, "[i]n any action in which any person is successful in recovering judgment for wages or salary owed to him or her, reasonable attorney's fees, in an amount to be determined by the court, shall be assessed against said employer or former employer." RCW § 49.48.030.

[43] *Hensley v. Eckerhart*, 461 U.S. at 437.

[44] *In re Bluetooth,* 654 F.3d at 941 (the court has "an independent obligation to ensure that the [attorney fee award] . . . is reasonable, even if the parties have already agreed to an amount"); *see also Zucker v. Occidental*

**A. Plaintiffs' Fee Request is Reasonable Under a Lodestar Analysis**

The Ninth Circuit approves two methods for calculating reasonable attorneys' fees in a class action: the "lodestar method" and the "percentage-of-the-fund" method.[45] Courts usually employ the lodestar method in cases brought under fee-shifting statutes, or where attorneys' fees are negotiated and paid separately.[46] In common fund cases, courts prefer the percentage-of-fund method.[47] Under either approach, the goal is reasonableness.[48] The lodestar method is appropriate here.

The lodestar is calculated by multiplying the number of hours reasonably expended by a reasonable hourly rate.[49] Although the lodestar figure is "presumptively reasonable," courts consider whether to adjust the figure up or down by a positive or negative multiplier, based on reasonableness factors outside of the lodestar, including the quality of representation, the benefit obtained for the class, the complexity and novelty of the issues presented, and the risk of nonpayment.[50]

The fact that Class Counsel seeks substantially less recovery than the firm's reviewed lodestar is an indication that the fee amount requested is reasonable. Plaintiffs seek $2,050,000 in attorneys' fees and expenses. This represents a request for $1,810,000 in fees and $240,000 in expenses, or a negative multiplier of revised lodestar of 0.5. In other words, this amount is a mere fraction the total amount of time and expenses Class Counsel invested in the case, even after Class Counsel carefully reviewed their records and eliminated time and expenses that might be considered redundant or unnecessary or did not otherwise contribute meaningful to the Class

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*Petroleum Corp.*, 192 F.3d 1323, 1328-29 (9th Cir. 1999) (court must exercise its authority to assure that attorney fee award is "fair and proper").

[45] *In re Bluetooth,* 654 F.3d at 941-942; *see also Vizcaino v. Microsoft Corp.,* 290 F.3d 1043, 1047 (9th Cir. 2002).

[46] *In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 921 (3d Cir. 1995) ("Courts generally regard the lodestar method . . . as the appropriate method in statutory fee shifting cases).

[47] *Vizcaino v. Microsoft Corp.*, 142 F. Supp. 2d 1299, 1305 (W.D. Wash. 2001); *see also In re Bluetooth,* 654 F.3d at 942 (percentage method is better suited for settlements where a common fund is created and easily quantified).

[48] *Fischel v. Equitable Life Assurance Soc'y of the U.S.*, 307 F.3d 997, 1007 (9th Cir. 2002).

[49] *Hensley,* 461 U.S. at 433.

[50] *In re Bluetooth*, 654 F.3d at 941-42 (citations omitted); *see also Kerr v. Screen Extras Guild, Inc.,* 526 F.2d 67, 69-70 (9th Cir. 1975), *cert denied,* 425 U.S. 951 (1976) (setting reasonableness guidelines for attorneys' fees award).


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recovery.[51] As noted, this equaled approximately 20% of the firm's total gross time. Class Counsel did not, however, leave it at that. To facilitate the resolution of the case and maximize the Class's benefit, Class Counsel further agreed to cap their fee *and* costs request at 2,050,000, which is under 60% of even the reduced fee bills. On top of this, as explained, Class Counsel has agreed to reduce its recovery further by paying Nelson Boyd 6% of any fee the Court approves. This has not been taken into account by the calculations described and would reduce Hagens Berman's percentage of recovery further.[52]

As discussed below, other reasonableness factors also weigh heavily in favor of granting the total fee requested.

**1. Results achieved**

The results achieved for the class are the most significant factor to be considered as the Court evaluates whether a fee request is reasonable.[53] Here, Plaintiffs obtained excellent results: they faced a determined opponent and obtained a $5.05 million, non-reversionary, claims-paid cash settlement for the Class, with negotiated attorneys' fees to be paid separately. The proposed settlement recovers an estimated more than 65% of the Class's Overtime Claims (as calculated by Plaintiffs' economist), 66% of the Class's Per Diem Claims, and 100% of the Class's Orientation Claims.[54] This hard-won settlement, if approved, will result in the distribution of millions of dollars to class members who otherwise would not have had the might to wage a case against their employer – and nearly lost the opportunity when the potential for decertification was real and imminent, which would have made it unlikely that most Class Members would never have recovered a dime.

This result was only achieved after extensive investigation, research, and legal and economist analysis; deep discovery; motions practice; a full evidentiary hearing on experts; thorough trial preparation; two mediation sessions with an experienced mediator; negotiations

[51] *Hensley*, 461 U.S. at 434 (counsel "should make a good faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary").

[52] Breckenridge Decl., ¶¶ 3, 14.

[53] *Hensley*, 461 U.S. at 440 (Plaintiffs' success is the "crucial factor" in determining the proper attorneys' fees award).

[54] *See* Dkt. No. 309 at 16-20.


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between Swift counsel and Class Counsel; and post-preliminary approval issues that nearly derailed the settlement and took one year to resolve, with the Court's assistance.

**2. The risks of litigation**

The risk that further litigation might result in Plaintiffs not recovering at all, particularly in a case involving complicated legal issues, is a significant factor in the award of fees.[55] This case was not simple. Plaintiffs faced significant legal hurdles, including novel issues related to the calculation of overtime, or REOT, under a unique Washington statute that applies almost exclusively to the trucking industry. Plaintiffs also faced significant factual challenges, especially Swift's complicated accounting system. There were other complicating variables, such as multiple Swift terminals and Swift dedicated accounts, and varying pay rates depending on the driver, the route, and the year. And the fact that Swift compensated Class drivers by the mile, rather than by the hour, further complicated the issues. The Court recognized some of these challenges, including the difficulties that the parties – Plaintiffs *and* Swift – had dissecting Swift's complicated accounting system.[56] The complexities required extensive work with experts on both sides which, even after an evidentiary hearing on the issue, the Court determined that the question of the proper REOT methodology would be submitted to the jury.[57]

Swift, represented by formidable and experienced counsel, was prepared to continue to contest this case vigorously – a consideration not to be taken lightly given its resources and the caliber of its attorneys. "Plaintiffs did not face an easy path if they continued to trial."[58] The trial promised to be a "battle of the experts." It was only after the Court ruled on the *Daubert* motions, and reserved for the jury the question of the overtime methodology to be used; extensive trial preparation, including the exchange of Rule 16 submissions; and a second mediation session with Judge Burdell that Plaintiffs could agree to a settlement they considered reasonable under all the circumstances.

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[55] *In re Omnivision Tech.*, 559 F. Supp. 2d 1036, 1046-47 (N.D. Cal. 2007). *See also Vizcaino*, 290 F.3d at 1048.

[56] Dkt. No. 303 ("[N]ow that experts have dissected Swift's complicated accounting system, there may exist a clearer definition of Swift's Washington-based drivers.").

[57] Dkt. No. 267.

[58] *In re Omnivision*, 559 F. Supp. 2d at 1047.


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This case was risky for other reasons. It was at a precarious point when the Court appointed Class Counsel. There was a real danger that the case would be decertified and the Class's claims would not be pursued. *See supra.* at § I.A.3. Hagens Berman devoted significant resources to the case in order to prevent that outcome, despite the risk that the Class – and the firm – would recover nothing. And, in fact, Hagens Berman committed far more time and expense to the case than it seeks to recover because it was the right thing to do.

**3. Skill and experience of Class Counsel and quality of representation**

In evaluating the reasonableness of attorneys' fees, courts consider counsel's skill alongside the quality of work performed by counsel.[59] The "prosecution and management of a complex national class action requires unique legal skills and abilities."[60] In this case, the settlement *required* experience and skilled class-action attorneys like Hagens Berman.

Since their appointment, Class Counsel have litigated vigorously against a well-financed opponent determined to defend its pay practices, in a case involving a complex accounting system and a myriad of pay factors for each Class Member: pay rates, pay periods, terminal assignment, mileage, and hours, as well the statutory concept of REOT, which had never been fully litigated in Washington or elsewhere.

The qualifications of Class Counsel are set forth in the Breckenridge Declaration.[61] Where, as here, counsel are highly experienced in class action litigation, aggressively shepherded the case to a successful resolution, have a record of success in this type of litigation, and faced high-caliber opposing counsel, this factor too, "supports the fee award sought."[62]

The quality of Class Counsel's work in this case is further demonstrated by accomplishments that drove this case to a successful conclusion, among them: successful motions to compel discovery; development of a liability and damages model that withstood a *Daubert* challenge and would have been presented to a jury; a limitation on Swift's expert

[59] *See, e.g.*, *In re Omnivision*, 559 F. Supp. 2d at 1046.

[60] *In re Heritage Bond Litig.*, 2005 WL 1594403, at *19 (C.D. Cal. June 10, 2005) (citation omitted).

[61] Breckenridge Decl., ¶¶ 4-8; Ex. C (Hagens Berman firm resume); *see also* https:hbsslaw.com.

[62] *Destefano v. Zynga, Inc.*, 2016 WL 537946, at *17 (N.D. Cal. Feb. 11, 2016).

testimony at trial; summary judgment on the Orientation Claim; and being fully prepared to go to trial.

**4. The number of hours that counsel has worked, and will need to work, is reasonable**

The number of hours worked by Class Counsel to-date also is reasonable. Class Counsel has categorized the time lawyers and professional staff have expended since the firm's appointment. *See* Breckenridge Decl., ¶ 18 (summarizing firm time by category). In addition, Class Counsel carefully reviewed all time in the case and eliminated any duplication, excessive, or unnecessary time, and all time spent by lawyers and staff who had a *de minimus* role in the case. [63] The Breckenridge Declaration and Ex. A thereto describe the categories of work on this matter.

Further, additional work remains to be performed. The final approval hearing is scheduled for January 22, 2019, and Class Counsel presently estimates that before then, they will need to work approximately 40 additional hours to answer questions posed by Class Members or the settlement administrator, to draft and file final approval papers, to review and analyze any objections and to draft responses to those objections as appropriate, and to prepare for argument. Beyond the final approval hearing, assuming final approval is granted, Class Counsel presently estimates an additional 30-40 hours of work will be necessary to attend to issues that will arise during the settlement administration, and to respond to Class Member inquiries regarding the settlement and their claims and benefits. These are conservative projections; counsel could be required to spend much more time on any or all of these tasks, as matters develop.[64]

**5. Class Counsel's hourly rates are reasonable**

Class Counsel's hourly rates are reasonable for counsel experienced in complex, class action litigation. This Court, and other courts in the Ninth Circuit, have considered and approved Hagens Berman's rates.[65] Class Counsel's rates are particularly reasonable here, where as a

[63] Breckenridge Decl., ¶¶ 15-17.

[64] *Id.*, ¶ 46.

[65] *See, e.g., Rajagopalan v. Fidelity & Dep. Co. of Maryland,* Case No. 3:16-cv-05147-BHS, Dkt. No. 83 (Final Approval Order) (approving fees on the basis that "29.5% of the recovery obtained is within the usual range of


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result of Class Counsel voluntarily reducing their lodestar *and* agreeing to cap their fees and expenses at $2,050,000, the average hourly rate for each Hagens Berman professional is less than $300.

In addition, the Ninth Circuit has expressly declined to adopt an exclusively market-based approach in the context of class action litigation because "it may in many cases be illusory," because in employment class actions, "no ascertainable 'market' exists. The 'market' is simply counsel's expectation of court-awarded fees." *Vizcaino,* 290 F.3d at 1049 (citations omitted).

**6. The parties negotiated the fee and costs**

The fact that the parties negotiated attorneys' fees and costs over the course of three weeks after they reached agreement on the settlement of the Class claims is an additional factor supporting the reasonableness of the fee and costs request. Plaintiffs gave Swift the opportunity to review Hagens Berman's billing records. After the negotiation and review, Swift agreed not to oppose Class Counsel's request of attorneys' fees and expenses of $2,050,000.[66]

**B. Plaintiffs' Fee Request Is Reasonable Under A Percentage-of-the-Fund Cross-Check**

If the Court chooses to perform a percentage-of-the-fund cross-check, which is discretionary, Plaintiffs submit that it will confirm that the instant attorneys' fee, costs, and expenses request is fair and reasonable. To perform the cross-check in a case where there is no true common fund, courts create a "constructive common fund," by adding the Class's recovery and the requested attorneys' fees, and any other aspect of the settlement that can be monetized because this is what is in "economic reality" the equivalent of a common fund.[67] In other words, the award to the class and the agreement on attorney fees represent a "package deal" for the Class.[68]

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awards in the Ninth Circuit" and approving the rates of Steve W. Berman, Thomas E. Loeser, Chris O'Hara and Robert Haegele).

[66] Dkt. No. 309-1, § III.C.

[67] *See In re Bluetooth,* 654 F.3d at 943 (quoting *In re Gen. Motors*, 55 F.3d at 821).

[68] *Johnston v. Comerica Mortg. Corp.*, 83 F.3d 241, 246 (8th Cir. 1996); *see also Manual for Complex Litig.* § 21.75 (4th ed. 2008) ("If an agreement is reached on the amount of a settlement fund and a separate amount for attorney fees . . . the sum of the two amounts ordinarily should be treated as a settlement fund for the benefit of the class.").


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Here, the sum of the cash Settlement Fund ($5,050,00) and agreed attorneys' fees and costs ($2,050,000) is $7,100,000. The value of the settlement administration fees Swift agreed to pay is estimated to be $40,000. Thus, the total benefit to the class, or "constructive common fund," is $7,140,000. The attorneys' fees sought (net of expenses) are $1,810,000, which is 25% of this amount. This is within the usual range for attorneys' fee awards in the Ninth Circuit, where "the "benchmark "award is 25 percent of the recovery obtained, with 20 to 30 percent as the usual range.[69] The fact that the attorneys' fees sought is far less than the amount of time Hagens Berman committed to the case also weighs in favor of an award on this level.

**C. The Class Representatives each deserve $7,500 incentive awards**

Finally, Plaintiffs seek service awards of $7,500 to each of the eleven Class Representatives, as contemplated by the settlement agreement. Dkt. No. 309-1, § III.D. "Incentive awards are fairly typical in class action cases," to compensate "class representatives for work done on behalf of the class, to make up for financial or reputational risk and, sometimes, to recognize their willingness to act as a private attorney general."[70] Courts may approve incentive awards based on, *inter alia*, the risks of bringing the suit, the notoriety and personal difficulties encountered, the amount of time and effort spent, and the duration of the litigation.[71]

The Class Representatives in this case have shown an uncommonly strong and longstanding commitment. Broadly speaking, they have been actively involved in the litigation since the beginning, investing significant time assisting Class Counsel in all phases of the case, including evidence to file pleadings, providing Class Counsel with details of their Swift careers and pay, reviewing and approving pleadings, providing responses to discovery, and reviewing and approving the settlement. Each of the Class Representatives gave a deposition, and those

[69] *See, e.g., Vizcaino*, 290 F.3d 1047; *Paul, Johnson, Alson & Hunt v. Graulty,* 886 F.2d 268, 272 (9th Cir. 1989); *In re Omnivision,* 559 F. Supp. 2d at 1047 (citing with approval attorneys' fees awards in the 25 to 30% range); *see also Rajagopalan v. Fidelity & Dep. Co. of Maryland,* Case No. 3:16-cv-05147-BHS, Dkt. No. 83 (Final Approval Order) (approving fees on the basis that "29.5% of the recovery obtained is within the usual range of awards in the Ninth Circuit").

[70] *Rodriquez v. West Publ'g Corp.*, 563 F.3d 948, 958-59 (2009) (citing 4 Alba Conte et al. Newberg on Class Actions § 11.38 (4th ed. 2008)).

[71] *See Van Vraken v. Atl. Richfield Co.*, 901 F. Supp. 294, 299 (N.D. Cal. 1995); *see also Pelletz v. Weyerhaeuser Co.*, 592 F. Supp. 2d 1322, 1329 (W.D. Wash. 2009) (discussing incentive award factors).


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who were employed had to take time off the road to do so.[72] The Class Representatives also faced unnecessarily prolonged litigation followed by the threat of decertification and post-settlement issues that took an additional year to resolve. And, throughout it all, there was always the uncertainty of ever recovering anything for themselves or fellow Class Members.

In addition to these challenges, the risks inherent in bringing claims against an employer in any case are acute and personal. Those risks are heightened where, as here, employees seek to bring the claims on behalf of a class that could potentially affect hundreds, or even thousands, of workers. At the time the case was brought, all but two of the Class Representative were still employed by Swift. The class representatives who were Swift employees or working within the trucking industry, reasonably feared repercussions.[73] In fact, many were pressured by Swift, after the case was filed, to sign an acknowledgement that their mileage rate of pay included overtime.[74]

When compared to service awards in other cases, the $7,500 service awards here are justified by the efforts and risks undertaken to obtain the settlement for the Class.[75] Courts routinely award class representatives $5,000 or more, even in cases where – unlike here – the individual class member recoveries are relatively small, which is not the case here where Class Members will receive substantial recoveries based on their mileage rates and the number of hours of overtime they drove.[76] Moreover, the incentive awards are reasonable in that together they equal $82,500 – just 1.6 % of the overall class recovery (exclusive of attorneys' fees and settlement administration expenses).

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[72] Breckenridge Decl., ¶¶ 47-49. Each of the surviving class representatives supports Class Counsel's motion for service awards and attorneys' fees and costs. All but Mr. Erickson have submitted a declaration describing his service as a class representative and his impression of the risks faced by bringing claims against Swift. Mr. Erickson's signed declaration did not arrive by the time for this motion's filing. Plaintiffs will supplement the record.

[73] *See* Declarations of Troy Slack, ¶¶ 1, 6; Jacob Grismer, ¶¶ 1, 3, 4; Scott Praye, ¶¶ 3-5; Gary H. Roberts, ¶¶ 4, 6; Robert P. Ullrich, ¶¶ 4-5; Timothy Helmick, ¶¶ 1,6; Dennis Stuber, ¶¶ 3, 5; and Sean P. Forney, ¶¶4-7. (Filed herewith.)

[74] *See* Forney Decl., ¶ 8; Grismer Decl., ¶ 5; Praye Decl., ¶ 6; Stuber Decl., ¶ 6.

[75] *Pelletz*, 592 F. Supp. 2d at 1330 (justifying $7500 incentive award by comparison to other cases).

[76] *See, e.g., In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934 947-48 (9th Cir. 2015) (approving $5,000 incentive awards where class members would receive $12); *Lennartson v. Papa Murphys's Int'l LLC*, 2018 WL 4252039, at *2 (W.D. Wash. Sept. 6, 2018) ($15,000 incentive awards approved for class representatives where each class member received two $5.00 pizza coupons).


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## III. CONCLUSION

For the foregoing reasons, Plaintiffs request an award of $2,050,000.00, inclusive of attorneys' fees and expenses, and incentive awards in the amount of $7,500 for each Class Representative.

DATED: November 19, 2018

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

On November 19, 2018, I caused to be electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following attorneys of record:

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