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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

I. N. a minor, by and through her mother
and *Guardian ad Litem*, Zarinah F.; J. B.
a minor by and through his mother and
Guardian ad Litem, Alisa B.

Plaintiffs,
v.

JENNIFER KENT, Director of the
Department of Health Care Services;
State of California DEPARTMENT OF
HEALTH CARE SERVICES,
Defendants.

Case No.: 3:18-cv-3099-WHA

CLASS ACTION

**PLAINTIFFS' NOTICE OF MOTION
AND MOTION FOR REASONABLE
ATTORNEYS' FEES, EXPENSES AND
COSTS; MEMORANDUM OF POINTS
AND AUTHORITIES IN SUPPORT**

Date: August 8, 2019

Time: 11:00 a.m.

Place: Courtroom 12, 19th Floor
Hon. William Alsup

Action Filed: May 24, 2018

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NOTICE OF MOTION AND MOTION

PLEASE TAKE NOTICE THAT ON AUGUST 8, 2019 or as soon thereafter as the matter may be heard, Plaintiffs I.N. and J.B. (hereafter “Plaintiffs”) will move the Court for an award of reasonable attorneys’ fees, expenses, and costs totaling \$435,000. Pursuant to the parties’ Settlement Agreement, which was preliminarily approved by this Court on April 7, 2019, Defendants agree not to oppose an award up to this amount. This motion is made on the grounds that: (1) Plaintiffs are entitled to an award of reasonable attorneys’ fees, expenses, and costs pursuant to the claims brought in this case (*see* 42 U.S.C. § 12205 (prevailing party under the Americans with Disabilities Act is entitled to “a reasonable attorney’s fee, including litigation expenses, and costs”); 29 U.S.C. § 794a(b) (Section 504 prevailing party is entitled to “a reasonable attorney’s fee as part of the costs”); 42 U.S.C. §§ 1988) (same for prevailing party in suit brought pursuant to 42 U.S.C. § 1983); and (2) the compensation sought by Plaintiffs is reasonable in light of the benefit conferred on Plaintiffs and the class and the significant discount agreed to by Plaintiffs.

This motion is based on this Notice of Motion and Motion, the following Memorandum of Points and Authorities, the supporting Declarations of William Leiner (“Leiner Decl.”), Sarah Somers (“Somers Decl.”), Richard Schwartz (“Schwartz Decl.”), Robert Newman (“Newman Decl.”), Stuart Seaborn (“Seaborn Decl.”), Richard Pearl (“Pearl Decl.”) the exhibits attached thereto, and the complete files and records in this action. The Settlement Agreement is attached as Exhibit A to the Declaration of William Leiner.

DATED: June 13, 2019

By: /s/ William Leiner
William Leiner
Attorneys for Plaintiffs

I. INTRODUCTION

Having obtained a favorable class action settlement that provides more than 3,600 class members with significant relief, Plaintiffs move for an award of reasonable attorneys' fees, expenses, and costs. Pursuant to the settlement reached by Plaintiffs I.N. and J.B. ("Plaintiffs") with Defendants Jennifer Kent, Director of the California Department of Health Care Services, and California Department of Health Care Services ("Defendants"), Plaintiffs seek a global, and significantly discounted, amount of \$435,000. This amount includes extensive factual investigation and research prior to initiating litigation, successful motion practice to defend against Defendants' Motion to Dismiss and to compel discovery, and protracted settlement negotiations over four months. This amount also includes time spent by Plaintiffs' counsel in securing preliminary and final approval of the settlement and monitoring Defendants' compliance with the settlement after its approval. Defendants have agreed not to oppose the present motion. For these reasons, Plaintiffs respectfully request that the Court grant their application for reasonable attorneys' fees, expenses, and costs in the amount of \$435,000.

II. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs I.N. age 8, and J.B. age 6, are Medi-Cal beneficiaries who are eligible for EPSDT services. EPSDT provides comprehensive, preventative, diagnostic, and treatment services to Medi-Cal eligible children under the age of 21. 42 U.S.C. §§ 1396a(a)(43)(C), 1396d(r). One such treatment available under EPSDT is Private Duty Nursing services — nursing services provided in a child's home by a registered nurse or licensed practical nurse for beneficiaries who require more individual and continuous care than is available from a visiting nurse or routinely provided by the nursing staff of the hospital or skilled nursing facility. 42 U.S.C. § 1396d(a)(8); 42 C.F.R. § 440.80. Both Plaintiffs have significant medical needs and require these services to live safely at home with their families, but have rarely received all of the nursing hours for which they are approved, and have not received the assistance they need from Defendants to secure all of their approved

1 hours. Defendants have placed the burden on them to navigate a complex system with
 2 little to no support to obtain the benefits their children are entitled to receive.

3 In November 2016, after receiving complaints from families of children with
 4 disabilities about the lack of access to Private Duty Nursing, Disability Rights California
 5 (“DRC”) distributed a flyer to community partners and other organizations. These flyers
 6 included DRC’s contact information and stated that DRC was interested in speaking with
 7 families of Medi-Cal beneficiaries under the age of 21 who were unable to access all of
 8 their approved Private Duty Nursing hours. Leiner Decl., ¶¶ 7, 20-21.

9 From December 2016 through the filing of this lawsuit, DRC attorneys interviewed
 10 more than 100 families who responded to the flyer. Many families explained how they
 11 were unable to obtain all of their approved private duty nursing hours and that there was no
 12 system in place to help them actually secure these services. DRC staff also reviewed tens
 13 of thousands of pages of individual medical records to evaluate and assess complaints
 14 about families’ inability to access their approved private duty nursing hours. Leiner Decl.,
 15 ¶¶ 7, 20-21.

16 In November 2016, DRC submitted a Public Records Act request to Defendants
 17 asking for information access to Private Duty Nursing. In response, DHCS produced, *inter*
 18 *alia*, a study, *Access to Private Duty Nursing*, dated December 2016. The study identified
 19 a 29 percent statewide gap, involving nearly 3,600 Medi-Cal beneficiaries under the age of
 20 21, between the number of Private Duty Nursing hours that have been approved and the
 21 number of hours that were actually filled. Leiner Decl., ¶¶ 7, 22; Exhibit F.

22 After extensive factual and legal investigation, and months of attempts at informal
 23 resolution with DHCS (*see* Somers Decl., ¶ 15), Plaintiffs brought this action on May 24,
 24 2018, alleging that Defendants failed to comply with the Medicaid Act, 42 U.S.C.
 25 §§ 1396a(a)(10)(A), 1396d(a)(4)(B), 1396a(a)(43)(C), and 1396a(a)(8), the Americans
 26 with Disabilities Act, 42 U.S.C. § 12131 *et. seq.* and Section 504 of the Rehabilitation Act,
 27 29 U.S.C. § 794 *et seq.* Plaintiffs sought injunctive relief requiring Defendants to arrange
 28 for their Private Duty Nursing services — either directly, or through referral to appropriate

1 agencies, organizations, or individuals. Plaintiffs did not seek damages. Plaintiffs engaged
 2 in efficient and successful motion practice, overcoming Defendants' Motion to Dismiss;
 3 and propounded and responded to significant discovery, including successfully moving to
 4 compel discovery, resulting in the granting of two additional depositions by this Court.

5 Following several in-person settlement conferences with Magistrate Judge Corley
 6 and exchanges of information and settlement proposals between August 2018 and
 7 February 2019, the parties reached a final Settlement Agreement. Leiner Decl., Exhibit A.
 8 The Agreement provides for significant relief to the proposed settlement class, including:
 9 (1) the designation of a Medi-Cal program or contracted entity as having primary
 10 responsibility to provide case management for approved Private Duty Nursing services; (2)
 11 oversight and monitoring of the Medi-Cal program or contracted organization by
 12 Defendants and Class Counsel; and (3) the ability for class members to contact Defendants
 13 directly with questions or concerns about their Private Duty Nursing or the case
 14 management services they are receiving. In addition, the Agreement provides for
 15 continuing jurisdiction by the Court to oversee enforcement of the Agreement for nine
 16 months after Defendants issue notices to Medi-Cal programs and contracted organizations
 17 requiring them to provide case management services to arrange for all approved Private
 18 Duty Nursing services desired by the class member, and a dispute resolution process
 19 overseen by Magistrate Judge Corley. Leiner Decl., ¶¶ 32, 33; Exhibit A. Attorneys' fees
 20 were negotiated only after the parties reached agreement on the substance of the
 21 settlement, and did so with the assistance of Magistrate Judge Corley. Leiner Decl., ¶ 29.

22 **III. ARGUMENT**

23 **A. Plaintiffs are Entitled to Prevailing Party Status**

24 The settlement achieved by Plaintiffs in this lawsuit confers a significant non-
 25 monetary benefit on the class of all Medi-Cal beneficiaries under the age of 21 who are
 26 eligible for Early and Periodic Screening, Diagnostic and Treatment ("EPSDT")¹ services
 27

28 ¹ EPSDT is a benefit of the State's Medi-Cal program that provides comprehensive, preventative,
 diagnostic, and treatment services to eligible children under the age of 21, as specified in section

1 and for whom Medi-Cal Private Duty Nursing Services have been approved. The
 2 settlement provides for case management services to enable class members to receive *all*
 3 the Private Duty Nursing Hours they have been approved to receive as medically necessary
 4 by the Medi-Cal program.

5 Once approved by the Court, the executed Settlement Agreement becomes a legally
 6 enforceable agreement that alters the legal relationship of the parties, which is sufficient to
 7 establish Plaintiffs' entitlement to fees and costs under federal fee shifting provisions. As
 8 the prevailing parties, Plaintiffs are entitled to an award of reasonable attorneys' fees,
 9 expenses, and costs pursuant to the claims brought in this case: 42 U.S.C. § 12205
 10 (prevailing party under the Americans with Disabilities Act is entitled to "a reasonable
 11 attorney's fee, including litigation expenses, and costs"); 29 U.S.C. § 794a(b) (Section 504
 12 prevailing party is entitled to "a reasonable attorney's fee as part of the costs"); and 42
 13 U.S.C. § 1988 (prevailing party in a suit brought under 42 U.S.C. § 1983 entitled to "a
 14 reasonable attorneys' fee.").

15 Plaintiffs are prevailing parties under the Medicaid Act, the ADA and the
 16 Rehabilitation Act by virtue of the Court's approval of the Settlement Agreement, which
 17 constitutes a "court-ordered 'chang[e] [in] the legal relationship between [the plaintiff] and
 18 the defendant.'" *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human*
 19 *Res.*, 532 U.S. 598, 604 (2001) (alterations in original, citation omitted); *see Barrios v.*
 20 *Cal. Interscholastic Fed'n*, 277 F.3d 1128, 1134 (9th Cir. 2002) ("Under applicable Ninth
 21 Circuit law, a plaintiff 'prevails' when he or she enters into a legally enforceable
 22 settlement agreement against the defendant."); *Richard S. v. Dep't of Developmental Servs.*
 23 *of State of Cal.*, 317 F.3d 1080, 1087-88 (9th Cir. 2003) (holding that a plaintiff "prevails"
 24 within meaning of ADA attorney fee provision by entering into a legally enforceable
 25 settlement agreement with defendant).² Plaintiffs have secured the relief that they sought

26 _____
 27 1905(r) of the Social Security Act. *See* 42 U.S.C. §§ 1396a(a)(10)(A), 1396a(a)(43),
 1396d(a)(4)(B), 1396d(r).

28 ² Plaintiffs' entitlement to attorneys' fees for succeeding on their Medicaid claims is well
 established. *See Labotest, Inc. v. Bonta*, 297 F.3d 892 (9th Cir. 2002) (reversing district
 court and remanding for award of fees pursuant to 42 U.S.C. 1988 for successful claims

in filing this action, far above the legal threshold given that an “extremely small amount of relief is necessary to confer prevailing party status.” *La Asociacion Trabajadores v. City of Lake Forest*, 624 F.3d 1083, 1089-90 (9th Cir. 2010) (reversing denial of fees because plaintiffs received actual relief where, although settlement was couched in terms of existing policies, parties’ relationship was materially altered because city subjected itself to federal jurisdiction to enforce policies and plaintiffs would not have to file new action to enforce them).

For the forgoing reasons, Plaintiffs are entitled to attorneys’ fees and costs not only under the language negotiated by the parties in the Settlement Agreement but also as the prevailing party under federal law.

B. Plaintiffs’ Lodestar Is Reasonable

In civil rights and injunctive relief cases under federal law, courts calculate attorneys’ fees pursuant to the lodestar method. *Hanlon v. Chrysler Corp.* 150 F.3d 1011, 1029 (9th Cir. 1998). To calculate the lodestar, courts multiply the number of hours reasonably expended by counsel’s reasonable hourly rates. *See Hensley v. Eckerhart*, 461 U.S. 424, 433-34 (1983) (“This calculation provides an objective basis on which to make an initial estimate of the value of a lawyer’s services”). Once calculated, “[t]he lodestar amount is presumptively the reasonable fee amount” and may only be adjusted upward or downward by applying a multiplier in “rare” or “exceptional” cases where “the lodestar amount is unreasonably low or unreasonably high.” *Van Gerwen v. Guarantee Mut. Life Co.*, 214 F.3d 1041, 1045 (9th Cir. 2000); *see also Purdue v. Kenny A.* 559 U.S. 542, 553 (2010) (a lodestar fee may be enhanced for superior performance and results obtained).

“[T]o determine whether attorneys for the prevailing party could have reasonably billed the hours they claim to their private clients, the district court should begin with the

_____ brought pursuant to 42 U.S.C. 1983); *Rose v. Heintz*, 806 F.2d 389 (2d Cir. 1986) (reversing district court and directing it to award attorneys’ fees to parties prevailing on Medicaid claim pursuant to section 1988); *Ramey v. Rizzuto*, 72 F. Supp. 2d 1202 (D. Colo. 1999) (accepting recommendation of magistrate judge and awarding attorneys’ fees for successful Medicaid claims brought pursuant to Section 1983).

1 billing records the prevailing party has submitted.” *Gonzalez v. City of Maywood*, 729
 2 F.3d 1196, 1202 (9th Cir. 2013). “It must also be kept in mind that lawyers are not likely
 3 to spend unnecessary time on contingency fee cases in the hope of inflating their fees. The
 4 payoff is too uncertain, as to both the result and the amount of the fee.” *Moreno v. City of*
 5 *Sacramento*, 534 F.3d 1106, 1112 (9th Cir. 2008).

6 Here, the amount requested by Plaintiffs represents a significant discount from the
 7 full amount to which Plaintiffs might otherwise be entitled. First the lodestar of
 8 \$753,157.50 for time expended on this case by Class Counsel from 2016 to the present far
 9 exceeds the fixed sum of \$435,000 to which the parties agreed in the Settlement
 10 Agreement and does not include most of the time and expenses incurred in preparing this
 11 Motion, or much of the time expended by other attorneys who materially contributed to the
 12 success of the litigation. Leiner Decl., ¶¶ 15-18; Somers Decl., ¶ 17; Newman Decl., ¶ 15;
 13 Schwartz Decl., ¶ 14. Additionally, Plaintiffs estimate that they will spend an additional
 14 50 to 100 hours of work reviewing and responding to any objections to the Settlement
 15 Agreement, preparing Plaintiffs’ reply in support of the parties’ Motion for Final Approval
 16 addressing any objections, attending the Final Approval hearing, and monitoring the
 17 settlement for the duration of the Agreement. Leiner Decl., ¶ 17.

18 **1. The Number of Hours Claimed by Class Counsel Is Reasonable**

19 Prevailing plaintiffs are entitled to be compensated for “every item of service
 20 which, at the time rendered, would have been undertaken by a reasonable and prudent
 21 lawyer to advance or protect his client’s interest[.]” *Moore v. James H. Matthews & Co.*,
 22 682 F.2d 830, 839 (9th Cir. 1982) “By and large, the court should defer to the winning
 23 lawyer’s professional judgment as to how much time he was required to spend on the
 24 case[.]” *Moreno*, 534 F.3d at 1112. Counsel’s “sworn testimony that, in fact, it took the
 25 time claimed is evidence of considerable weight on the issue of the time required in the
 26 usual case.” *Perkins v. Mobile Housing Bd.*, 847 F.2d 735, 738 (11th Cir. 1988).
 27 Therefore, to deny compensation, “it must appear that the time claimed is obviously and
 28 convincingly excessive under the circumstances.” *Id.* In addition, “the verified time

statements of the attorneys, as officers of the court, are entitled to credence in the absence of a clear indication the records are erroneous.” *Horsford v. Board of Trustees of California State University*, 132 Cal. App. 4th 359, 396 (2005).

a. Class Counsel’s Claimed Hours Are Proportionate to the Case

Class Counsel seek compensation for a total of 1054 hours reasonably spent on this litigation through May, 2019. Leiner Decl., ¶ 19; Exhibit E. Plaintiffs seek to be compensated only for time expended by the six attorneys who were appointed by this Court as Class Counsel. Leiner Decl., ¶ 16; Somers Decl., ¶ 17; Newman Decl., ¶ 15; Schwartz Decl., ¶ 14. Yet the number of Plaintiffs’ attorneys and the time they spent on litigation-related matters leading to the successful settlement was far greater. *Id.*

The time Plaintiffs’ counsel expended on this case, and for which they seek to be compensated, is appropriate given the intensity and nature of the litigation and settlement negotiations and for a case of this scope. The work included extensive pre-filing factual investigation and negotiations, preparation and filing of the complaint, successfully defending against Defendants’ Motion to Dismiss, initiation and completion of important and time-sensitive discovery in preparation for class certification including production and review of more than 15,000 pages of documents and propounding and responding to dozens of discovery requests, a successful effort to compel discovery resulting in the granting of two additional depositions, four in-person settlement conferences with Magistrate Judge Corley and additional telephonic conferences with and without Judge Corley, drafting many versions of settlement agreements, and independent research for the purposes of litigation and settlement. Leiner Decl., ¶¶ 20-31; Somers Decl., ¶¶ 14-16; Schwartz Decl., ¶¶ 7-12.

b. Class Counsel’s Lodestar Is Supported by Accurate and Contemporaneous Billing Records

Class Counsel’s declarations describe each firm’s billing procedures, how counsel allocated projects between and within the co-counsel firms to minimize duplication and

maximize efficiencies, and the work performed that was necessary to prosecute this case effectively. Leiner Decl., ¶¶ 15-17; Somers Decl., ¶ 17; Newman Decl., ¶ 15; Schwartz Decl., ¶¶ 13-15. Class Counsel's hours are documented by contemporaneous time records showing discrete entries describing each item of work performed and recorded by tenths of an hour. Leiner Decl., ¶ 15, Exhibit D; Somers Decl., ¶ 17, Exhibit C; Newman Decl., ¶ 15, Exhibit A; Schwartz Decl., ¶ 13, Exhibit B. These time records are *prima facie* evidence that Class Counsel's hours were reasonable. *See, e.g. Hensley*, 461 U.S. at 437 n.12 (adequate time records must "identify the general subject matter of . . . time expenditures"); *see also Lytle v. Carl*, 382 F.3d 978, 989 (9th Cir. 2004) ("minimal" descriptions sufficient to support an award of attorneys' fees so long as "they establish that the time was spent on the matters for which" the party seeks fees).

c. Class Counsel Have Exercised Significant Billing Judgment

Class Counsel have reviewed their billing records on an entry-by-entry basis to exercise billing judgment and excise inefficient or duplicative work, clerical entries, and other billing entries that are otherwise inadequate or non-compensable. Leiner Decl., ¶ 15; Somers Decl., ¶ 17; Newman Decl., ¶ 15; Schwartz Decl., ¶¶ 13-14. Additionally, where more than one attorney attended a particular case-related event (besides settlement), Class Counsel only billed, including partially or at all, for the second attorney's presence if doing so was warranted based the second attorney's participation and contribution. Leiner Decl., ¶ 15; Somers Decl., ¶ 17. In total, Class Counsel excised 24 percent of their hours worked in the exercise of billing judgment. Leiner Decl., ¶ 19; Exhibit E. These reductions resulted in a decrease of 23 percent of Class Counsel's total lodestar. *Id.*

These reductions are sufficient to address unnecessary duplication, clerical time and other billing errors. By comparison, the Ninth Circuit in *Davis v. City & Cnty. of S.F.*, 976 F.2d 1536, 1543 (9th Cir. 1992), *vacated in part on other grounds*, 984 F.2d 345 (9th Cir. 1993), held that a 5% billing reduction by counsel sufficient to address clerical time and other billing errors. Moreover, Plaintiffs do not include here itemized time for litigation counsel who were not appointed Class Counsel, but whose contributions to the case

materially impacted the successful outcome. Leiner Decl., ¶ 16; Somers Decl., ¶ 17; Newman Decl., ¶¶ 14-15; Schwartz Decl., ¶ 14. In total, Plaintiffs have not claimed time for 694 non-Class Counsel hours, valued at \$317,003.50. *Id.*

Any remaining concerns about duplication must be considered in light of the nature of this litigation, which involved working with class members' families statewide for more than one and one-half years, researching and understanding a complex system of Medi-Cal programs, and working on multiple fronts simultaneously to litigate the case efficiently while also engaging in fruitful settlement negotiations. Leiner Decl., ¶¶ 20-31. "Broad-based class litigation often requires the participation of multiple attorneys." *Davis*, 976 F.2d at 1544; *Probe v. State Teachers' Ret. Sys.*, 780 F.2d 776, 785 (9th Cir. 1986). A reduction for duplication is "warranted only if the attorneys are unreasonably doing the same work." *Johnson v. Univ. Coll. of Univ. of Ala. in Birmingham*, 706 F.2d 1205, 1208 (11th Cir. 1983) (emphasis in original), holding modified on other grounds by, *Gaines v. Dougherty Cnty. Bd. of Educ.*, 775 F.2d 1565 (11th Cir. 1985); *Serrano v. Unruh*, 32 Cal. 3d 621, 624 (1982) (attorney's "fee should ordinarily include compensation for all hours reasonably spent"). Moreover, under Ninth Circuit precedent, the amount of time required for a task is generally left to the "winning lawyer's professional judgment." *Moreno*, 534 F.3d at 1112. The Ninth Circuit has also recognized that plaintiffs' contingent fee lawyers have little to gain from "churning" a case. *Id.*

As discussed above, Class Counsel have already exercised significant billing judgment to reduce duplication and inefficiencies. No further reduction is warranted.

d. The Efficiency with which Class Counsel Litigated this Broad-based Class Action Case Demonstrates the Reasonableness of the Time Expended

Class Counsel expended only as much time as was needed to fully protect the interests of the Class and to successfully litigate and settle this matter. Class Counsel are experienced attorneys working in highly specialized areas of law, and as a result, were able to prosecute and quickly settle, a complicated and technical case requiring substantive as well as legal knowledge. As discussed above *supra* Section II, Plaintiffs engaged in

extensive pre-litigation settlement discussions, moved efficiently once the case was filed to propound discovery and proceed to class certification, and engaged in substantial settlement negotiations. As a result, the parties were able to reach a settlement within eight months of initiation of the lawsuit.

e. Class Counsel Achieved an Outstanding Result for the Class

Here, Plaintiffs have achieved an outstanding, if not exceptional, result for the class.

The settlement obtained by Plaintiffs provides for significant relief to the settlement class, including:

- a. the designation of a Medi-Cal program or contracted organization to provide case management to arrange for class members' approved Private Duty Nursing services;
- b. oversight and monitoring of the Medi-Cal program or contracted organization by Defendants and Class Counsel; and
- c. the ability for class members to contact DHCS directly with questions or concerns about their Private Duty Nursing or the case management services they are receiving.

The Agreement also provides for continuing jurisdiction by the Court to oversee enforcement of the Agreement for nine months after DHCS sends notices to the Medi-Cal programs and contracted organizations requiring them to provide enhanced case management services to class members who need help obtaining approved Private Duty Nursing, and a dispute resolution process overseen by Magistrate Judge Corley. In addition, until the Agreement is implemented, Defendant DHCS has agreed to appoint a point of contact for Plaintiffs, who will be responsible for working with Plaintiffs to resolve issues and questions related to the authorization and/or staffing of their Private Duty Nursing services. Leiner Decl., ¶¶ 32-33. The Parties did not begin negotiating attorneys' fees and costs until there was substantial agreement as to the relief for the benefit of the proposed class. Leiner Decl., ¶ 29. Attorneys' fees and costs were resolved with the assistance of Judge Corley only after the Parties finalized class relief. *Id.*

Class Counsel were careful and thorough in this case, and staffed and prosecuted this action in the manner that best protected the class' interests. This outstanding result underscores the reasonableness of Plaintiffs' requested lodestar. *See Hensley*, 461 U.S. at 436.

f. The Scope, Complexity, and Novelty of this Matter Supports the Reasonableness of the Requested Lodestar

The successful settlement of this class action lawsuit will benefit more than 3,600 medically fragile children statewide who have been struggling to remain healthy without necessary care and at great cost to their families. Leiner Decl., ¶ 22; Exhibit F. Initiating and prosecuting this case required the varied expertise and experience of Class Counsel, all of whom bring particular skills to the case and enabled the parties to reach a resolution within eight months of the filing of the complaint. Plaintiffs are aware of only two other cases raising similar issues. *See O.B. v. Norwood*, 838 F.3d 837 (7th Cir. 2016), *aff'g*, 170 F. Supp. 3d 1186 (N.D. Ill. 2016) (requiring state Medicaid agency to arrange for services agency has found to be needed by children with medically complex conditions); *A.H.R. v. Wash. State Health Care Auth.*, No. C15-5701JLR, 2016 WL 98513 (W.D. Wash. Jan. 7, 2016) (same). Moreover, the complexity and breadth of California's system required extensive factual investigation to fully understand the systems through which children receive in-home nursing, as well as extensive outreach, interviews, and advocacy with more than 100 families over the course of the investigation and lawsuit. *See* Leiner Decl., ¶¶ 16, 20-23.

2. Defendants' Defense Strategies Necessitated the Expenditure of Substantial Additional Time by Class Counsel

It is well settled that a reasonable fee award must take into account the nature of the defendant's defense strategy. *See, e.g., Frank Music Corp. v. MGM, Inc.*, 886 F.2d 1545, 1557 (9th Cir. 1989); *Peak-Las Positas Partners v. Bollag*, 172 Cal. App. 4th 101, 114 (2009). Here, Defendants' defense strategies greatly increased the attorneys' fees, expenses, and costs that Plaintiffs incurred. Plaintiffs sent an initial demand letter on November 9, 2017 and engaged with Defendants on five occasions for more than six

months, but were unable to avert litigation. Leiner Decl., ¶ 24; Somers Decl., ¶ 15. Once the lawsuit commenced, Defendants filed a Motion to Dismiss after refusing to substantively meet and confer with Plaintiff regarding their Motion. Leiner Decl., ¶ 24. As a result, it was only after the Motion was filed that Plaintiffs had an opportunity to review Defendants' arguments in support of their opposition to Plaintiffs' Government Code section 11135 claim, which Plaintiffs then voluntarily dismissed. *Id.* Defendants then refiled their Motion, which Plaintiffs successfully opposed. *Id.* Moreover, Defendants took a number of unreasonable positions in discovery, requiring Plaintiffs to engage in exhaustive meet and confer efforts and seek this Court's intervention, resulting in the granting and taking of two additional depositions. Leiner Decl., ¶ 26; Schwartz Decl., ¶¶ 7-12.

3. Plaintiffs' Billing Rates Are in Line with Market Rates for Attorneys with Commensurate Skill, Experience, and Reputation in the San Francisco Bay Area

The rates claimed by plaintiffs' attorneys are reasonable if they are within the market range of hourly rates charged by attorneys of comparable experience, reputation and ability for similar litigation. The United States Supreme Court has held that fee awards to public interest attorneys who do not charge their clients — such as in the instant matter — are “calculated according to the prevailing market rates in the relevant community, regardless of whether plaintiff is represented by private or nonprofit counsel.” *Blum v. Stenson*, 465 U.S. 886, 895 (1984) (*quoted in Van Skike v. Dir. Office of Workers' Comp. Programs*, 557 F.3d 1041, 1046 (9th Cir. 2009)). “The proper reference point in determining an appropriate fee award is the rates charged by private attorneys in the same legal market as prevailing counsel.” *Trevino v. Gates*, 99 F.3d 911, 925 (9th Cir. 1996); *Blum*, 465 U.S. at 895, fn. 11 (“[R]ates charged in private representations may afford relevant comparisons.”). The Ninth Circuit determines the reasonable hourly rate by looking at the prevailing market rate “for similar work performed by attorneys of comparable skill, experience, and reputation.” *Chalmers v. City of Los Angeles*, 796 F.2d 1205, 1210-11 (9th Cir. 1986); *Children's Hosp. & Med. Ctr. v. Bonta*, 97 Cal. App. 4th

740, 783 (2002). Moreover, attorneys’ rates in civil rights class actions are “governed by the same standards which prevail in other types of equally complex Federal litigation” *Hensley*, 461 U.S. at 430 n. 4; *Prison Legal News v. Schwarzenegger*, 608 F.3d 446, 455 (9th Cir. 2010) (reasonable rates for civil rights class actions are based on a comparison extending “to all attorneys in the relevant community engaged in ‘equally complex Federal litigation,’ no matter the subject matter”).

“Generally, the relevant community” for the purpose of determining the prevailing market rate “is the forum in which the district court sits.” *Barjon v. Dalton*, 132 F.3d 496, 500 (9th Cir. 1997); *Gates v. Deukmejian*, 987 F.2d 1392, 1405 (9th Cir. 1992). “[T]he proper scope of comparison . . . extends to all attorneys in the relevant community engaged in equally complex Federal litigation, no matter the subject matter.” *Prison Legal News*, 608 F.3d at 455 (internal quotes omitted). Courts determine the reasonableness of a rate based upon “the rates prevailing in that district for similar services by lawyers of reasonably comparable skill, experience and reputation,” irrespective of practice area. *Id.*, quoting *Blum v. Stenson*, 465 U.S. at 895 n. 11.

Therefore, to determine applicable rates, the relevant inquiry is whether attorneys in the San Francisco Bay Area with commensurate skill, experience, and reputation in handling complex litigation charge rates comparable to those sought by Plaintiffs in this civil rights class action. Recent orders in the Northern District demonstrate that the rates sought by Class Counsel here meet this requirement. In a recent complex disability rights case, *Cole v. County of Santa Clara*, Case No. 16-CV-06594-LHK, the Court approved a 2018 rate of \$775 per hour for a 1998 law school graduate and \$655 per hour for a 2005 law school graduate. Seaborn Decl., ¶ 15, Exhibit B. Previously, in *G.F. v. Contra Costa County*, Case No. 13-cv-03667-MEJ, the Court approved 2014 rates of \$845 per hour for a 1985 law school graduate and \$690 per hour for a 1999 law school graduate. Seaborn Decl., ¶ 16, Exhibit C. In this case, Plaintiffs’ counsel, for example, at Disability Rights California are seeking \$785 for a 1993 law school graduate (Elissa Gershon) and \$640 per hour for a 2007 law school graduate (Will Leiner). Leiner Decl., ¶ 14.

Indeed, in 2018, this Court approved rates that are comparable to the rates sought by Class Counsel here, finding that “the billing rates for lead counsel are high but within the range of reasonable.” *In Re Lending Club Sec. Lit.*, Case No. C-16-02627 (WHA) (Sept. 24, 2018). There, this Court approved the following comparable or higher rates: \$775-1030 for partners; \$850 for a 1993 graduate; and \$750 for a 2009 graduate. *Id.* at 3: 7-14; *In Re Lending Club Sec. Lit.* Supplemental Declaration of Mark C. Molumphy, ECF No. 363 ¶¶ 42, 43 (June 29, 2018). Plaintiffs submit that Class Counsel’s skill, knowledge, experience, and reputation in disability access class action litigation is so exemplary that their rates should be viewed in comparison to those of prestigious large firms. *See Charlebois v. Angels Baseball LP*, 993 F. Supp. 2d 1109, 1120 (C.D. Cal. 2012) (concluding that the rates of “large, prestigious firms are valid comparators” to those of successful plaintiffs’ firms practicing civil rights law).

Similarly, in *Lewis v. Silvertree Mohave Homeowners’ Assoc. Inc.*, Case No. C-16-03581, 2017 WL 5495816 *4, this Court awarded a rate of \$880 for a firm partner who graduated in 1999; rates of \$660 and \$755 for 2001 graduates; and \$545 and \$725 for 2007 graduates. While this Court ultimately reduced attorney rates by 10 percent, rejecting the plaintiffs’ argument that the case was a “complex, class-action civil rights case” (*id.*), such concerns are not applicable here, where the complexity and impact of the case, and the amount of fees sought, are not in dispute.

Plaintiffs’ request for fees is based on Class Counsel’s historic billing rates adjusted upward for inflation and lost interest. Leiner Decl., ¶ 14; Somers Decl., ¶ 19; Newman Decl., ¶ 16; Schwartz Decl., ¶ 13 (noting that his normal billing rate is \$975-800 per hour but offers a discounted rate commensurate with DRC rates in 2018). Class Counsel request the following rates for their work on this matter:

Name	Graduation Year	Rate
William Leiner	2007	\$640
Elissa Gershon	1993	\$785
Sarah Somers	1992	\$795

Name	Graduation Year	Rate
Martha Jane Perkins	1981	\$900
Robert Newman	1977	\$950
Richard Schwartz	2009	\$550

A detailed discussion of Class Counsel's qualifications are set forth in Class Counsel's supporting declarations. Leiner Decl., ¶¶ 4-9; Somers Decl., ¶¶ 3-13; Newman Decl., ¶¶ 4-12; Schwartz Decl., ¶¶ 2-6; *see also* Seaborn Decl., ¶¶ 7-8; *see generally* Declaration of Richard Pearl. The success achieved by Class Counsel in this case and others demonstrates that Class Counsel provide a high level of representation that is comparable to the best lawyers at national law firms, despite any disparity in firm size.

In short, based on Plaintiffs' evidentiary showing, the Court should find that Class Counsel's rates are reasonable.

C. Plaintiffs' Costs and Expenses Are Recoverable and Reasonable

The total award of \$435,000 sought by Plaintiffs includes \$14,046 in costs and expenses. Leiner Decl., ¶ 18. Nontaxable costs and out-of-pocket expenses are recoverable under the ADA. *See* 42 U.S.C. § 12205. The vast majority of costs incurred by Plaintiffs are related to expert work, which are recoverable under the ADA. 42 U.S.C. § 12205; *Lovell v. Chandler*, 303 F.3d 1039, 1058-59 (9th Cir. 2002). All expenses and costs incurred were necessary for the prosecution of this litigation, and are consistent with a matter of this scope and complexity. Leiner Decl., ¶ 18.

IV. CONCLUSION

For the reasons stated herein, Plaintiffs respectfully request that this Court enter an award of attorneys' fees, expenses, and costs for \$435,000.

DATED: June 13, 2019

Respectfully submitted,

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FILER'S ATTESTATION

I hereby attest, pursuant to Local Rule 5-1(i)(3), that concurrence in the filing of
this document has been obtained from each of its signatories.

By: /s/ William Leiner
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