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**UNITED STATES DISTRICT COURT**  
**NORTHERN DISTRICT OF CALIFORNIA**

ROBERT HEATH, on behalf of himself  
and  
CHERYL FILLEKES, on behalf of herself and  
others similarly situated,

Plaintiffs,

v.

GOOGLE LLC, a Delaware limited liability  
company,

Defendant.

Case No. 5:15-cv-01824-BLF

**JOINT MOTION FOR FINAL APPROVAL  
OF COLLECTIVE ACTION SETTLEMENT  
AGREEMENT**

Date: December 5, 2019  
Time: 9:00 a.m.  
Location: Courtroom 3 – 5th Floor

Hon. Beth Labson Freeman

Complaint Filed: April 22, 2015

**NOTICE OF MOTION AND JOINT MOTION FOR FINAL APPROVAL OF  
COLLECTIVE ACTION SETTLEMENT AGREEMENT**

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Please take notice that Plaintiff Cheryl Fillekes and the Opt-In Plaintiffs (“Plaintiffs”) and Defendant Google LLC hereby move this Court for final approval of the Collective Action Settlement Agreement in this matter.

The Settlement meets the applicable standards for approving a collective action settlement under the Age Discrimination in Employment Act of 1967 (“ADEA”), as it (1) resolves a bona fide dispute between the parties; (2) is fair and equitable to all parties; and (3) the proposed award for attorneys’ fees, expenses, and an incentive award for named Plaintiff Cheryl Fillekes is reasonable. Moreover, as explained in the accompanying memorandum of points and authorities, the parties do not believe a fairness hearing is necessary, and respectfully request that the Court decide this motion without oral argument. If the Court decides to conduct a hearing, the parties have reserved December 5, 2019 at 9:00 a.m., in Courtroom 3, 5th Floor of the above-titled court, located at 280 South 1st Street, San Jose, California 95113 for the hearing.

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## **MEMORANDUM OF POINTS AND AUTHORITIES**

Plaintiff Cheryl Fillekes and the Opt-In Plaintiffs (“Plaintiffs”) and Defendant Google LLC move this Court for approval of the Collective Action Settlement Agreement attached hereto as Exhibit 1. Because this litigation involves a bona fide dispute, and because the proposed settlement is fair, reasonable, and adequate, and contains a reasonable award of attorneys’ fees, the parties respectfully request that the Court enter into the accompanying proposed order approving the Settlement.

### **I. STATEMENT OF ISSUES TO BE DECIDED**

Whether the Court should approve the Collective Action Settlement Agreement, approve an award of attorneys’ fees and expenses, approve an incentive award for named Plaintiff Cheryl Fillekes, and dismiss the action with prejudice.

### **II. INTRODUCTION**

On April 29, 2019, a Settlement Agreement (“Settlement”) was fully executed by Defendant Google LLC, Counsel for Google, Plaintiff Cheryl Fillekes, and Counsel for Fillekes and the Opt-In Plaintiffs. Two hundred and twenty-seven of the 234 members of the Opt-In class (including Plaintiff Fillekes) subsequently signed Acknowledgement and Consent forms, making them parties to the Settlement. The Settlement provides for a total payment of \$11 million from Google, and for programmatic relief. A copy of the parties’ Settlement Agreement is attached as Exhibit 1.

For the reasons set forth below, the Settlement meets the applicable standards for approving a collective action settlement under the Age Discrimination in Employment Act of 1967 (“ADEA”). The parties respectfully request that the Court approve the Settlement, approve an award of attorneys’ fees and expenses, approve an incentive award, and then dismiss the case with prejudice.

### **III. FACTUAL BACKGROUND**

Plaintiffs originally filed this ADEA collective action on April 22, 2015, *see* Compl. (Dkt. #1), and amended the complaint to add Cheryl Fillekes as a named Plaintiff on June 25, 2015. Am.

1 Compl. (Dkt. #18). Plaintiffs allege that Defendant Google LLC engaged in a systematic pattern or  
2 practice of discrimination against applicants age forty and older for three positions across the United  
3 States. 2d Am. Compl. ¶¶ 1, 28, 59-61 (Dkt. #218). Google has denied and continues to deny that it  
4 intentionally discriminated against Plaintiff Fillekes or the Opt-In Plaintiffs, or any other applicant,  
5 because of their age.

6 On October 5, 2016, the Court conditionally certified the following class:

7 All individuals who: interviewed in-person for any Site Reliability Engineer (“SRE”),  
8 Software Engineer (“SWE”), or Systems Engineer (“SysEng”) position with Google,  
9 Inc. (“Google”) in the United States; were age 40 or older at the time of the interview;  
10 and were refused employment by Google; and received notice that they were refused  
employment on August 28, 2014 through [October 5, 2016].

11 Order (Oct. 5, 2016) (Dkt. #119); Order at 6 (Oct. 7, 2016) (Dkt. #121). 262 individuals joined as  
12 Opt-In Plaintiffs. Some Opt-Ins later withdrew or were dismissed. Seven Opt-In Plaintiffs chose not  
13 to accept the Settlement (*see* Ex. 4), and 227 Opt-In Plaintiffs (including Plaintiff Fillekes) signed  
14 onto the Settlement.

15 Discovery in the case stretched from September 4, 2015 to September 21, 2018. Google  
16 deposed Ms. Fillekes and about 35 Opt-In Plaintiffs, and Google took written discovery from Fillekes  
17 and about 75 Opt-Ins. Plaintiffs obtained a variety of discovery from Google, including over 419,000  
18 pages of documents and substantial applicant and employee data. Plaintiffs retained an expert, Dr.  
19 David Neumark, who conducted a variety of analyses in multiple expert reports regarding alleged  
20 statistical disparities of Google on-site interviewees who received offers. Google retained its expert,  
21 Dr. John Johnson, who also conducted a variety of analyses in several expert reports to dispute Dr.  
22 Neumark’s analyses.

23 On August 27, 2018, the Court denied Google’s motion for decertification. Order (Aug. 27,  
24 2018) (Dkt. #337). Google sought reconsideration of the decertification Order, which the Court  
25 denied. Order (Sept. 13, 2018) (Dkt. #367). Google filed a motion for summary judgment on  
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1 September 7, 2018 (Dkt. #352), and Plaintiffs began drafting their response, but did not file it because  
2 the parties reached a settlement in principle.

3 The parties have engaged in extensive settlement discussions. The parties, including Plaintiff  
4 Fillekes, first held an in-person Settlement Conference with Magistrate Judge Ryu on December 19,  
5 2017. The parties had additional settlement discussions during the summer of 2018, including  
6 telephonic conferences with Judge Ryu, and held a second in-person Settlement Conference on  
7 October 2, 2018. The parties continued to discuss settlement after the second Settlement Conference  
8 and reached agreement on the monetary terms of a settlement during a telephonic conference with  
9 Judge Ryu on October 5, 2018, and immediately informed the Court and requested a stay. *See* Stip.  
10 Staying and Vacating Deadlines (Dkt. #394). The parties subsequently negotiated the remaining  
11 terms of the settlement. Plaintiff Fillekes and Plaintiffs' Counsel signed the Settlement Agreement  
12 on April 25, 2019. Google and its Counsel signed the Agreement on April 29, 2019. The Claims  
13 Administrator, Kurzman Carson Consultants, LLC ("KCC"), sent notice to the Opt-Ins on May 14,  
14 2019.  
15

16  
17 227 Opt-Ins (including Plaintiff Fillekes) subsequently signed the Acknowledgement and  
18 Consent form. Six Opt-Ins declined to join the settlement, despite discussions with Plaintiffs'  
19 counsel. Only one Opt-In did not respond after repeated contacts: KCC sent notice to the non-  
20 responsive Opt-In via both e-mail and USPS mail; and Plaintiffs' Counsel attempted to contact him  
21 via multiple phone calls, multiple e-mails, and a message sent via LinkedIn.

22  
23 During the course of the litigation, Plaintiffs' Counsel has spent \$174,348.98 in out-of-pocket  
24 expenses. Through the end of June 2019, Plaintiffs' Counsel has incurred a lodestar of \$2,433,068,  
25 and will incur additional fees in finalizing the Settlement.

#### 26 IV. SUMMARY OF THE SETTLEMENT

27 Plaintiff Fillekes and 226 members of the Opt-In class have executed the Settlement  
28

Agreement, which is subject to Court approval. The total amount of the settlement is \$11 million. Google has also agreed to programmatic relief in the form of: training employees and managers on age-based bias; the creation of a subcommittee within recruiting that will focus on age diversity in SWE, SRE, and SysEng positions; ensuring that Google's marketing collateral reflects age diversity; ensuring that any age bias complaints for the relevant positions are adequately investigated; and conducting surveys of departing employees about potential discrimination. The Settlement provides that Plaintiffs' Counsel will be awarded 25% (\$2,750,000) of the \$11 million settlement amount as attorneys' fees (without anything additional for the value of programmatic relief), and that they will be awarded their out-of-pocket expenses — which amount to \$174,349.

The costs of the Settlement Administrator, estimated to be \$21,390, are to be deducted from the Settlement Amount. In recognition of her service to the collective action, the Settlement provides that the parties will request an Incentive Award of \$10,000 for named plaintiff, Cheryl Fillekes.

In return for the monetary and programmatic relief provided by Google, Plaintiff Fillekes and the 226 Opt-Ins have signed releases of their claims against Google, conditional on the Court's approval of the Settlement.

## V. LEGAL STANDARD

Settlements are in the interests of judicial efficiency and economy. There is a “strong judicial policy that favors settlements, particularly where complex class [or collective] action litigation is concerned,” as the inherent costs, delays, and risks of continued litigation might otherwise overwhelm any potential benefits the class could hope to obtain. *Class Plaintiffs v. Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992); *Lynn's Food Stores, Inc. v. United States*, 679 F.2d 1350, 1354 (11th Cir. 1982) (public policy encourages settlement of FLSA litigation).

Collective age discrimination actions under the ADEA are “enforced using certain of the powers, remedies, and procedures of the FLSA.” *Church v. Consolidated Freightways, Inc.*, 137

1 F.R.D. 294, 298-99 (N.D. Cal 1991). Unlike a Rule 23 opt-out class action, the FLSA’s collective  
2 action provision prohibits employees from becoming “a party plaintiff to any such action unless he  
3 gives his consent in writing to become such a party and such consent is filed in the court in which  
4 such action is brought.” 29 U.S.C. § 216(b); *see also Campbell v. City of L.A.*, 903 F.3d 1090, 1100  
5 (9th Cir. 2018).

6 “[W]hile Rule 23 expressly requires that courts review settlement agreements that bind class  
7 members for fairness, reasonableness, and adequacy, there is no such statutory requirement in the  
8 FLSA or the ADEA.” *K.H. v. Sec’y of the Dep’t of Homeland Sec.*, No. 15-cv-2740-JST, 2018 U.S.  
9 Dist. LEXIS 125459, at \*6 (N.D. Cal. July 26, 2018). Similarly, “[t]he FLSA does not require a  
10 fairness hearing like that required for settlements of class actions brought under Fed. R. Civ. P. 23.”  
11 *Koehler v. Freightquote.com, Inc.*, No. 12-2505, 2016 U.S. Dist. LEXIS 48597, at \*57 (D. Kan. Apr.  
12 11, 2016); *accord* 29 U.S.C. § 216(b); *Campbell*, 903 F.3d at 1104 (describing opt-in members of an  
13 FLSA collective action as party plaintiffs). Nonetheless, some courts in this District have followed  
14 the Eleventh Circuit’s holding in *Lynn’s Food Stores, Inc. v. United States*, 679 F.2d 1350, 1352-53  
15 (11th Cir. 1982) that FLSA settlements require supervision of either the district court or the Secretary  
16 of Labor. *E.g., Saleh v. Valbin Corp.*, No. 17-CV-00593-LHK, 2018 U.S. Dist. LEXIS 195348, at  
17 \*2 (N.D. Cal. Nov. 15, 2018). By its terms, the Settlement requires approval of the Court (Ex. 1 §§  
18 I, VII(G)), which the parties are seeking for the sake of certainty. Under *Lynn’s Foods*, FLSA  
19 collective action settlements must “constitute ‘a fair and reasonable resolution of a bona fide dispute  
20 over FLSA provisions.’” *K.H.*, 2018 U.S. Dist. LEXIS 125459, at \*7 (quoting *Lynn’s Foods*, 679  
21 F.2d at 1355). The district court may approve a settlement agreement and dismiss the action upon  
22 finding that: (1) the litigation involves a bona fide dispute; (2) the proposed settlement is fair and  
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equitable to all parties concerned; and (3) the proposed settlement contains a reasonable award of attorneys' fees.<sup>1</sup> *Id.* at \*7-8, 13-14; *Lynn's Foods*, 679 F.2d at 1354.

## VI. ARGUMENT

"This circuit has long deferred to the private consensual decision of the parties. . . . As [this circuit has] emphasized, 'the court's intrusion upon what is otherwise a private consensual agreement negotiated between the parties to a lawsuit must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties[.]' . . . [This circuit puts] a good deal of stock in the product of an arms-length, non-collusive, negotiated resolution . . . and have never prescribed a particular formula by which that outcome must be tested." *Rodriguez v. West Publ'g Co.*, 563 F.3d 948, 965 (9th Cir. 2009) (quoting *Officers for Justice v. Civil Serv. Comm'n of the City & Cnty. of S.F.*, 688 F.2d 615, 625 (9th Cir. 1982)) (Rule 23 settlement); accord *Van Kempen v. Matheson Tri-Gas, Inc.*, No. 15-cv-0066079660-HSG, 2017 U.S. Dist. LEXIS 137182, at \*10 (N.D. Cal. Aug. 25, 2017) (same).

Consistent with the *Lynn's Foods* factors, the Settlement should be approved because: (a) the settlement resolves a bona fide dispute, (b) the proposed settlement is fair and equitable, and (c) the proposed award of attorneys' fees, expenses, and incentive award is reasonable.

### A. The Settlement Resolves a Bona Fide Dispute.

The settlement agreement resolves a bona fide dispute concerning liability under the ADEA. As illustrated in the briefing on the various motions submitted to the Court through the course of this litigation, the case involves genuinely disputed factual and legal issues, including, for example:

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<sup>1</sup> Because this ADEA collective action is not a Rule 23 class action but is instead an opt-in joinder action, the parties agree that the Northern District of California's Procedural Guidance for Class Action Settlements under Rule 23 does not apply to this settlement.

whether Google engaged in a pattern or practice of intentional age discrimination; whether this case could be maintained as a collective action through trial; whether a pattern-or-practice case may be brought under the ADEA; whether the statistical evidence Plaintiffs' expert presented is admissible, persuasive, and sufficient to establish intentional discrimination because of age; whether Google's interview processes are designed to disfavor older applicants or are based on legitimate, nondiscriminatory hiring criteria and practices; whether in onsite, in-person interviews Plaintiff Fillekes and the Opt-Ins performed well in response to technical interview questions posed by Google; whether Plaintiff Fillekes and the Opt-Ins were qualified for the positions for which they interviewed; whether "Googleness" or "cultural fit" is a euphemism for youth or a legitimate, nondiscriminatory hiring criterion; whether Google estimates applicants' age based on their appearance or age-related data collected from applicants to discriminate against older applicants; whether Google interviewers have access to any age-related data or information related to interviewees; whether Google discounts experience to the detriment of older applicants; whether Google holds older applicants to a higher or to the same qualification standards as younger applicants; whether each Plaintiff is required to demonstrate that age discrimination was the "but for" cause of Google's failure to hire him or her; whether Google rejected each individual Plaintiff's applications for legitimate, non-discriminatory reasons; whether individual Plaintiffs failed to mitigate their damages; and the amount of damages, if any, that each Plaintiff suffered. *See, e.g.*, 2d Am. Compl. (Dkt. #218); Answer to 2d Am. Compl. (Dkt. #237); Mot. for Decertification (Dkt. #260); Mot. for Summ. J. (Dkt. #352).

**B. The Settlement Is Fair and Equitable to All Parties.**

Courts evaluating the reasonableness of a collective action settlement often consider the factors used to evaluate the reasonableness of a Rule 23 class action settlement. *K.H.*, 2018 U.S. Dist. LEXIS 125459, at \*8-9. Under Rule 23, courts may consider some or all of the following factors:



(1) the strength of plaintiff's case; (2) the risk, expense, complexity, and likely duration of further litigation; (3) the risk of maintaining class action status throughout the trial; (4) the amount offered in settlement; (5) the extent of discovery completed, and the stage of the proceedings; (6) the experience and views of counsel; (7) the presence of a governmental participant; and (8) the reaction of the class members to the proposed settlement.

*Van Kempen*, 2017 U.S. Dist. LEXIS 137182, at \*11. “Not all of these factors will apply to every class action settlement, and in certain circumstances, ‘one factor alone may prove determinative in finding sufficient grounds for court approval.’” *Ching v. Siemens Indus.*, No. 11-cv-04838-MEJ, 2014 U.S. Dist. LEXIS 89002, at \*9 (N.D. Cal. June 27, 2014) (quoting *Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 525 (C.D. Cal. 2004)). “It is the settlement taken as a whole, rather than the individual component parts, that must be examined for overall fairness.” *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998).

These factors support approval of the settlement. First, “the Court must balance against the risks of continued litigation, including the strengths and weaknesses of Plaintiff’s case, the benefits afforded to class members, and the immediacy and certainty of a recovery.” *Ching*, 2014 U.S. Dist. LEXIS 89002, at \*10. Plaintiffs’ case faces a number of risks in litigation. For example, Plaintiffs are facing a summary judgment motion from Google laying out potential weaknesses in Plaintiffs’ case (Dkt. #352), and will face risks not only in the initial pattern-or-practice phase of the case, but in proving liability and damages in subsequent individual trials. Plaintiffs also face the risk of renewed efforts by Google to decertify the collective action before, during, or after trial. Yet another risk is the likelihood of appeals of both factual determinations as well as of legal issues that are unsettled in this Circuit and under federal law. When considering the considerable risks of litigation, conferring an immediate and certain benefit on class members is preferable.

Second, the “the risk, expense, complexity, and likely duration of further litigation” favors settlement. *Van Kempen*, 2017 U.S. Dist. LEXIS 137182, at \*11. “Generally, ‘unless the settlement

1 is clearly inadequate, its acceptance and approval are preferable to lengthy and expensive litigation  
2 with uncertain results.” *Ching*, 2014 U.S. Dist. LEXIS 89002, at \*13 (quoting *Nat’l Rural*  
3 *Telecomms. Coop.*, 221 F.R.D. at 526). Settlement is favored where, as here, “significant procedural  
4 hurdles remain,” such as summary judgment, trials, and appeals, as “[a]voiding such . . . expenditure  
5 of resources and time would benefit all parties, as well as the court.” *Id.* This collective action case  
6 is risky, expensive, and complex, and would take years to resolve. As a collective action, this case  
7 would be tried under the two-phase *Teamsters* pattern-or-practice framework, the second phase of  
8 which would require over two-hundred individual trials, after which appeals are almost certain. Trial  
9 would require substantial resources and multiple witnesses for each Plaintiff, including considerable  
10 expert testimony on statistical analyses. This factor strongly supports settlement.

12 Third, “the risk of maintaining class action status throughout the trial” favors settlement. *Van*  
13 *Kempen*, 2017 U.S. Dist. LEXIS 137182, at \*11. In denying Google’s motion for decertification, the  
14 Court explicitly “reserve[d] the right to reconsider its decision if Plaintiffs’ trial plan becomes  
15 unmanageable,” and stated that “[i]f Plaintiffs prevail on the liability phase, the Court can also revisit  
16 the issue of ‘whether the action should be dismantled for the remedial phase.’” Order at 28-29 (Aug.  
17 27, 2018) (Dkt. #337). Further, even if the action were not decertified, Plaintiffs would likely face an  
18 appeal of the Court’s orders denying decertification by Google.

20 Fourth, the amount offered in settlement, \$11 million, is substantial, and will result in an  
21 average gross recovery for each of the 227 Opt-Ins (including Plaintiff Fillekes) of approximately  
22 [REDACTED]. Although total exposure estimates are uncertain and Google disputes that Plaintiffs were the  
23 victims of intentional age discrimination and are entitled to any damages at all, Plaintiffs contend that  
24 the average gross recovery represents over 80% of the estimated actual damages suffered by Opt-Ins  
25 during the time period from August 28, 2014 to December 31, 2017 (not including any potential  
26 liquidated damages). Such a significant recovery favors approval. *See Bellinghausen v. Tractor*  
27  
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1 *Supply Co.*, 306 F.R.D. 245, 256 (N.D. Cal. 2015) (approving “\$1,000,000 settlement fund  
2 represent[ing] between 25.4 percent and 8.5 percent of Defendant’s total potential liability  
3 exposure.”).

4 Fifth, “the extent of discovery completed, and the stage of the proceedings” favors settlement.  
5 *Van Kempen*, 2017 U.S. Dist. LEXIS 137182, at \*11. The parties reached a settlement only after over  
6 three years of discovery were completed, which included production of over 419,000 pages of  
7 discovery by Google, the completion of written discovery and document production from Plaintiff  
8 Fillekes and about 75 Opt-Ins, the deposition of multiple parties and witnesses (including the  
9 deposition of Plaintiff Fillekes and 35 Opt-Ins), the preparation of extensive expert statistical  
10 analyses, and multiple discovery disputes. Thus, the parties had sufficient information to make an  
11 informed decision about the merits of the case, supporting approval. *Ching*, 2014 U.S. Dist. LEXIS  
12 89002, at \*16-17.

14 Sixth, counsel for the parties, who are experienced in class litigation, reached the settlement  
15 as a result of arms-length, non-collusive negotiations over a period of almost one-and-a-half years  
16 with the assistance of Magistrate Judge Ryu. Counsel believe that the Settlement is fair and  
17 reasonable. The opinions of counsel “should be given considerable weight both because of counsel’s  
18 familiarity with this litigation and previous experience with cases” of similar nature. *West v. Circle*  
19 *K Stores, Inc.*, No. CIV S-04-0438, 2006 U.S. Dist. LEXIS 76558, at \*17-18 (E.D. Cal. Oct. 19,  
20 2006). As noted above, this Circuit defers to the private, arms-length negotiated settlements of parties  
21 when reviewing Rule 23 settlements as long as there is no evidence of fraud, overreaching, or  
22 collusion, none of which exist here. *See Rodriguez*, 563 F.3d at 965.

25 Seventh, because there are no governmental parties, the “governmental participant” factor is  
26 irrelevant.

27 Finally, “[t]he absence of a large number of objections to a proposed class action settlement  
28

1 raises a strong presumption that the terms of a proposed class settlement action are favorable to the  
 2 class members.” *Ching*, 2014 U.S. Dist. LEXIS 89002, at \*18 (quoting *Nat'l Rural Telecomms.*  
 3 *Coop.*, 221 F.R.D. at 529). Here, no objections were filed. 227 Opt-Ins (including Plaintiff Fillekes)  
 4 have opted in to the Settlement, while only 7 have chosen not to participate in the Settlement. This  
 5 positive participation rate – over 97% – weighs in favor of settlement.

6 Thus, these factors demonstrate that the Settlement is fair and reasonable, and should be  
 7 approved.  
 8

9 **C. The Proposed Award of Attorneys’ Fees, Expenses, and Incentive Award Is Reasonable.**

10 In opting-in to the settlement, each of the Opt-Ins expressly agreed that Plaintiffs’ counsel  
 11 would seek fees of 25% of the gross settlement amount, *i.e.*, \$2.75 million, that Plaintiffs’ Counsel  
 12 would be reimbursed out-of-pocket expenses, and that Plaintiff Fillekes would seek a \$10,000  
 13 incentive award. *See* Settlement Agreement §III(B)-(C); Notice of Collective Action Settlement ¶ 5  
 14 (Ex. 1). The Opt-Ins’ affirmative approval of these amounts weighs in favor of approving these  
 15 amounts. *See Ching*, 2104 U.S. Dist. LEXIS 89002, at \*27 (citing *In re Heritage Bond Litig. v. U.S.*  
 16 *Trust Co. of Tex., N.A.*, No. 02-ML-1475, 2005 U.S. Dist. LEXIS 13627, at \*48 (C.D. Cal. June 10,  
 17 2005)).  
 18

19 Moreover, the amounts requested in fees, expenses, and as an incentive award are reasonable  
 20 and proper.

21 1. The 25% Benchmark Is Presumed Reasonable.

22 Under the ADEA, Plaintiffs are entitled to reasonable attorneys’ fees and costs. *Richardson*  
 23 *v. Alaska Airlines, Inc.*, 750 F.2d 763, 765-66 (9th Cir. 1984). The Ninth Circuit has established 25%  
 24 of the common fund as a benchmark award for attorney fees. *In re Bluetooth Headset Prods. Liability*  
 25 *Litig.*, 654 F.3d 935, 942 (9th Cir. 2011) (noting that “courts typically calculate 25% of the fund as  
 26 the ‘benchmark’ for a reasonable fee award”); *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1048 (9th  
 27  
 28

1 Cir. 2002); *Hanlon* 150 F.3d at 1029. Courts may only deviate from the 25% benchmark if they  
 2 provide “a reasonable explanation of why the benchmark is unreasonable under the circumstances.”  
 3 *Paul, Johnson, Alston & Hunt v. Graulity*, 886 F.2d 268, 273 (9th Cir. 1989). The court’s award of  
 4 attorneys’ fees should be supported by findings that take into account: (1) the results achieved; (2)  
 5 the risk involved; (3) the skill required and the quality of work by counsel; (4) the contingent nature  
 6 of the fee; and (5) awards made in similar cases. *Ching*, 2014 U.S. Dist. LEXIS 89002, at \*23 (citing  
 7 *Vizcaino*, 290 F.3d at 1048-50). Courts will sometimes undertake a lodestar cross-check, comparing  
 8 the percentage award to the time counsel expended on the case at the prevailing hourly rates, to  
 9 further ensure the fee’s reasonableness. *Vizcaino*, 290 F.3d at 1050. The lodestar cross-check  
 10 calculation may be based on ““summaries submitted by the attorneys and [the court] need not review  
 11 actual billing records.”” *Ching*, 2014 U.S. Dist. LEXIS 89002, at \*23-24 (quoting *Covillo v.*  
 12 *Specialty’s Café*, No. C-11-00594 DMR, 2014 U.S. Dist. LEXIS 29837, at \*21 (N.D. Cal. Mar. 6,  
 13 2014)).  
 14

15 Here, Plaintiffs have requested attorneys’ fees in the amount of \$2.75 million, or 25% of the  
 16 common fund. Several factors underscore the reasonableness of Plaintiffs’ request. First, the results  
 17 obtained by Plaintiffs’ Counsel are very favorable considering the significant challenges faced by  
 18 Plaintiffs if the case were to proceed beyond summary judgment to a *Teamsters* trial and on to  
 19 appeals. Claims of age discrimination are difficult to prove and rarely asserted on a collective action  
 20 basis. Collective action members will recover a significant percentage of their damages, and Google  
 21 is also providing programmatic relief. Plaintiffs’ Counsel do not seek any compensation based on  
 22 the value of the programmatic relief that they obtained on behalf of the class. *Cf. Vizcaino*, 290 F.3d  
 23 at 1049 (in approving fee award above 25%, Ninth Circuit noted that “[i]ncidental or nonmonetary  
 24 benefits conferred by the litigation are a relevant circumstance”).  
 25  
 26

27 Second, Plaintiffs’ Counsel undertook their representation at substantial risk. They have  
 28

1 invested a substantial amount of time and money despite a substantial risk of losing on decertification  
2 or on the merits.

3 Third, the litigation required substantial skill, including an ability to properly define and  
4 certify a class, the ability to marshal fact and expert evidence to support the claims, and a familiarity  
5 with the *Teamsters* pattern-or-practice framework.

6 Fourth, Plaintiffs' Counsel undertook the case on a contingency basis, and advanced case  
7 expenses. As a result of their representation in this case, Counsel were precluded from other  
8 employment that may have offered a more immediate and more certain payout. In common fund  
9 cases, courts routinely enhance fees for attorneys who assume representation on a contingent basis  
10 to compensate them for the risk that they might be paid nothing at all. *In re Wash. Pub. Power Supply*  
11 *Sys. Sec. Litig.*, 19 F.3d 1291, 1299 (9th Cir. 1994). Such a practice encourages the legal profession  
12 to assume such a risk and promotes competent representation for plaintiffs who could not otherwise  
13 hire an attorney. *Id.*

14  
15 Fifth, Plaintiffs' request for a 25% fee is in line with the established benchmark that the Ninth  
16 Circuit considers presumptively reasonable. *In re Bluetooth*, 654 F.3d at 942.

17  
18 A lodestar cross-check further supports Plaintiffs' fee request. As reflected in Exhibit 2, based  
19 on current hourly rates, the lodestar of Plaintiffs' counsel in this case through the end of June 2019  
20 is \$2,433,068, and Plaintiffs' counsel will need to perform additional work to finalize the settlement.  
21 This would result in a multiplier of 1.13. The Ninth Circuit has approved multipliers as high as 3.65  
22 when completing a lodestar cross-check. *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 69-70 (9th  
23 Cir. 1975). From 2005-2011, the mean multiplier in the Ninth Circuit was 1.43. *See WILLIAM B.*  
24 *RUBENSTEIN, NEWBERG ON CLASS ACTIONS* § 15:89 (5th ed.). Based on the lodestar cross-check, the  
25 requested fees are reasonable.  
26  
27  
28

2. Plaintiffs' Expenses Are Reasonable

Plaintiffs' counsel is entitled to recover "those out-of-pocket expenses that 'would normally be charged to a fee paying client.'" *Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994) (quoting *Chalmers v. City of L.A.*, 796 F.2d 1205, 1216 n.7 (9th Cir. 1986)); *see also Custom LED, LLC v. eBay, Inc.*, No. 12-cv-00350-JST, 2014 U.S. Dist. LEXIS 87180, at \*28 (N.D. Cal. June 24, 2014) (applying this standard in approving common fund reimbursement for expenses "incurred in connection with computer research, travel to hearings, telephone charges, and costs for copying and printing" because "these expenses are of the type normally charged to a paying client"); *Sorenson v. Mink*, 239 F.3d 1140, 1143–44 (9th Cir. 2001).

A summary of Plaintiffs' expenses is attached as Exhibit 3. Plaintiffs' Counsel have incurred out-of-pocket expenses of \$174,349. The bulk of these expenses fall within two categories: \$147,980 in professional fees, including expert fees and court reporting fees; and \$20,182 for travel expenses related to court appearances, depositions, and Settlement Conferences. These expenses are of the type normally charged to a paying client, and should be approved as reasonable and appropriate.

3. The Proposed Incentive Award for the Named Plaintiff Is Reasonable.

Plaintiffs seek an incentive award of \$10,000 to the named plaintiff, Cheryl Fillekes. "[N]amed plaintiffs, as opposed to designated class members who are not named plaintiffs, are eligible for reasonable incentive payments." *Staton v. Boeing Co.*, 327 F.3d 938, 977 (9th Cir. 2003). "The district court must evaluate their awards individually, using 'relevant factors includ[ing] the actions the plaintiff has taken to protect the interests of the class, the degree to which the class has benefitted from those actions, . . . the amount of time and effort the plaintiff expended in pursuing the litigation . . . and reasonabl[e] fear[s of] workplace retaliation.'" *Id.* (quoting *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998)).

Incentive awards of over \$10,000 are common in cases of this magnitude. In *Cook*, where the



total recovery was just over \$13 million, the court upheld a \$25,000 incentive award in 1998. 142 F.3d at 1016. Similarly, in *Buckingham v. Bank of America*, this district approved a \$10,000 incentive award where the class representative sat for a full-day deposition and attended a mediation, and the total settlement was \$6.6 million. No. 3:15-cv-6344-RS, 2017 U.S. Dist. LEXIS 107243, at \*15-16 (N.D. Cal. July 11, 2017).

Here, the named Plaintiff who filed this collective action, Cheryl Fillekes, expended considerable time and effort to ensure the success of this case. She has filed a declaration describing her efforts in pursuing the litigation. *See* Fillekes Decl. ¶¶ 1-2. Ms. Fillekes was added as a plaintiff in the First Amended Complaint (Dkt. #18) on June 25, 2015, and has been actively involved in the litigation since then. Her efforts have included, *inter alia*: (1) stepping forward and offering to serve as a named plaintiff; (2) assisting with the preparation of the Amended Complaint and other filings; (3) traveling from upstate New York to California to prepare for and sit for a full-day deposition (and continuing the deposition by telephone at a later date); (4) reviewing the transcript of her deposition for any inaccuracies; (5) responding to written discovery requests; (6) gathering and producing documents for use in connection with the case; (7) regularly reviewing pleadings, correspondence and other documentation received from counsel in order to stay apprised of the progress of the litigation; (8) traveling from upstate New York to California for an in-person Settlement Conference; and (9) being actively involved in subsequent settlement discussions, including reviewing and approving the settlement agreement. In all, Ms. Fillekes estimates that she has spent approximately 250 hours in pursuit of this litigation. Her efforts have helped achieve a settlement of \$11 million, and a \$10,000 incentive award is reasonable and appropriate. *See Buckingham*, 2017 U.S. Dist. LEXIS 107243, at \*15-16.

**D. A Fairness Hearing Is Not Required.**

“The FLSA does not require a fairness hearing like that required for settlements of class



1 actions brought under Fed. R. Civ. P. 23.” *Koehler*, 2016 U.S. Dist. LEXIS 48597, at \*57. When  
2 collective action opt-ins have notice of the settlement and an opportunity to object, courts find that  
3 fairness hearings are unnecessary. *Id.*; *Moore v. Ackerman Inv. Co.*, No. C 07-3058, 2009 U.S. Dist.  
4 LEXIS 78725, at \*6-7 (N.D. Iowa Sept. 1, 2009). Here, all of the Opt-Ins received notice of the  
5 settlement and an opportunity to object. No objections to the settlement were filed, and only 7 Opt-  
6 Ins chose not to join the settlement. Thus, a fairness hearing is not necessary, *Koehler*, 2016 U.S.  
7 Dist. LEXIS 48597, at \*57, and the settlement should be approved without a hearing.  
8

## 9 **VII. CONCLUSION**

10 For the foregoing reasons, the parties jointly request that the Settlement be approved.  
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28

1 DATED: July 19, 2019

OGLETREE, DEAKINS, NASH, SMOAK &  
STEWART, P.C.

2  
3 By: /s/ Brian D. Berry

4 Brian D. Berry  
A. Craig Cleland  
Thomas M. McInerney  
5 Elizabeth A. Falcone

6 Attorneys for Defendant  
GOOGLE LLC

7 DATED: July 19, 2019

KOTCHEN & LOW LLP

8  
9 By: /s/ Daniel Low

10 Daniel Low  
Daniel Kotchen  
Michael von Klemperer  
11 Lindsey Grunert  
Amy Roller

12 Attorneys for Plaintiff  
13 CHERYL FILLEKES and OPT-IN PLAINTIFFS

14 **SIGNATURE ATTESTATION**

15 Pursuant to Civil Local Rule 5-1(i)(3), I attest that concurrence in the filing of this document  
16 has been obtained from the other signatories.

17  
18 DATED: July 19, 2019

By: /s/ Daniel Low  
Daniel Low

19  
20 **CERTIFICATE OF SERVICE**

21 I hereby certify that a true and correct copy of the foregoing was served on all counsel of  
22 record by electronic service through the Clerk of the Court's CM/ECF filing system.

23 DATED: July 19, 2019

By: /s/ Daniel Low  
Daniel Low

3/31/19  
*[Signature]*

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CHERYL FILLEKES &  
OPT-IN PLAINTIFFS

**UNITED STATES DISTRICT COURT**  
**NORTHERN DISTRICT OF CALIFORNIA**

ROBERT HEATH, on behalf of himself  
and

CHERYL FILLEKES, on behalf of herself and  
others similarly situated,

Plaintiffs,

v.

GOOGLE LLC, a Delaware limited liability  
company,

Defendant.

Case No. 5:15-cv-01824-BLF

**DECLARATION OF PLAINTIFF CHERYL  
FILLEKES IN SUPPORT OF JOINT  
MOTION FOR FINAL APPROVAL OF  
COLLECTIVE ACTION SETTLEMENT  
AGREEMENT**

Complaint Filed: April 22, 2015

**DECLARATION OF PLAINTIFF CHERYL FILLEKES IN SUPPORT OF  
JOINT MOTION FOR FINAL APPROVAL OF COLLECTIVE ACTION  
SETTLEMENT AGREEMENT**

Cheryl Filleskes deposes and states as follows:

1. I am the Named Plaintiff in the above-captioned lawsuit and have served as the class representative since being added as a plaintiff in the First Amended Complaint on June 25, 2015. *See* Am. Compl. (Dkt. #18). I am over the age of eighteen and have personal knowledge of the matters stated herein.
2. Since June 2015, I have been actively involved in the litigation, and estimate that I have spent approximately 250 hours in pursuit of this litigation. My efforts have included the following:
  - Assisting with the preparation of the Amended Complaint and other filings, including, for example, Plaintiffs' Motion for Conditional Certification of Collective Action (Dkt. #75);
  - Traveling from St. Johnsville, New York to San Francisco, California to prepare for and sit for a full-day deposition on December 17, 2015 and continuing the deposition by telephone on February 12, 2016;
  - Reviewing the transcripts of my deposition testimony for any inaccuracies and correcting such inaccuracies;
  - Responding to written discovery requests from Defendant, which included one set of document requests (consisting of 44 requests) and two sets of interrogatories (consisting of 15 total interrogatories);
  - Gathering and producing documents and ESI for use in connection with the case;
  - Regularly reviewing pleadings, correspondence and other documentation received from counsel in order to stay apprised of the progress of the litigation;
  - Traveling from St. Johnsville, New York to San Francisco, California for an in-person mediation on December 19, 2017 and being actively involved in subsequent settlement discussions; and
  - Reviewing and approving the terms of the collective action settlement agreement.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Dated: May 31, 2019

  
Cheryl Filleskes

# Exhibit 1

REDACTED VERSION OF DOCUMENT SOUGHT TO BE SEALED

**UNITED STATES DISTRICT COURT**  
**NORTHERN DISTRICT OF CALIFORNIA**

ROBERT HEATH, on behalf of  
himself, and CHERYL FILLEKES,  
on behalf of herself and others  
similarly situated,

Plaintiffs,

v.

GOOGLE LLC, a Delaware limited  
liability company,

Defendant.

Case No. 5:15-cv-01824-BLF

**SETTLEMENT AGREEMENT**

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## **I. INTRODUCTION**

Subject to approval by the United States District Court for the Northern District of California, this Settlement Agreement sets forth the full and final terms by which Named Plaintiff Cheryl Fillekes, Settlement Collective Members, and Defendant Google LLC have settled and resolved as fully as possible all claims that have or could have been raised based on the facts alleged in this Action in the Second Amended Complaint, as well as in the earlier-filed complaints. This Settlement Agreement applies to all Settlement Collective Members who filed consent-to-join forms in this Action and have not voluntarily withdrawn or been dismissed from this Action by the Court.

## **II. DEFINITIONS**

In addition to terms identified or defined elsewhere in or as used in this Settlement Agreement, the terms below have the following meanings:

1. “Action” means this lawsuit, Robert Heath, on behalf of himself, and Cheryl Fillekes, on behalf of herself and others similarly situated, v. Google LLC, No. 5:15-cv-01824-BLF (N.D. Cal. filed Apr. 22, 2015).
2. “Approval Hearing” means the hearing the Court may choose to hold when it approves the Settlement and makes such other final rulings as are contemplated by this Settlement Agreement or as modified by subsequent mutual agreement of the Parties in writing and approved by the Court.
3. “Approval Order” means the last of the Court’s Orders: (i) granting approval of the Settlement Agreement on the terms provided in this Agreement or as modified by subsequent mutual agreement of Defendant, Plaintiff Fillekes, and Collective Counsel in writing and approved by the Court; (ii) dismissing this Action on the merits

and with prejudice as to the claims of Plaintiff Fillekes and Settlement Collective Members who have agreed to participate in the settlement by signing the release; or (iii) entering final judgment as to Plaintiff Fillekes and as to Settlement Collective Members who have agreed to participate in the settlement by signing the release.

4. “CAFA Notice” means the notice requirements imposed by the Class Action Fairness Act, 28 U.S.C. § 1715(b).

5. “Claims Administrator” Kurzman Carson Consultants, LLC (“KCC”), which has been jointly agreed upon by the Parties to administer the Settlement Fund pursuant to this Agreement and to Orders of the Court.

6. “Collective Counsel” or “Counsel” means the law firm of Kotchen & Low LLP and DVG Law Partner LLC.

7. “Complaint” means the Second Amended Complaint filed on September 11, 2017, which is the operative Complaint in this Action. Prior versions of the Complaint include the original Complaint, filed on April 22, 2015, and the First Amended Complaint, filed on June 25, 2015.

8. “Court” refers to the federal court having jurisdiction over this Action at any stage, currently the United States District Court for the Northern District of California (San Jose Division).

9. “Defendant” or the “Company” means Google LLC.

10. “Defendant’s Counsel” or “Defense Counsel” or “Counsel” means the law firm of Ogletree, Deakins, Nash, Smoak & Stewart, P.C.

11. “Effective Date” means the date on which all of the following have occurred: (i) the Court has finally approved this Settlement Agreement and has signed

and entered an Order so indicating; (ii) the Court has entered an Approval Order dismissing the claims on the merits and with prejudice of Plaintiff Fillekes and all Settlement Collective Members who have agreed to participate in the settlement by signing the release; and (iii) the time for appeal of the Approval Order has either run without an appeal being filed or any appeal filed (including any requests for rehearing en banc, petitions for certiorari, or appellate review) has been finally resolved and the Court's Approval has been upheld.

12. "Named Plaintiff" or "Plaintiff" means only Cheryl Fillekes, and does not include Robert Heath, whose remaining individual discrimination and other claims are not resolved in or settled as part of this Settlement.

13. "Notice of Settlement form" means the notice of this Settlement that will be emailed or mailed directly to Named Plaintiff and to each Settlement Collective Member along with the Acknowledgement and Consent, a copy of which is attached hereto as Exhibit B.

14. "Party" or "Parties" means Named Plaintiff Cheryl Fillekes, the Settlement Collective Members who agreed to participate in the settlement by signing the release, and Defendant, all of whom are entering into and are bound by this Settlement. "Party" or "Parties" does not include Named Plaintiff Robert Heath, whose individual discrimination and other claims are not resolved in or settled as part of this Settlement.

15. "Service Payment" means the additional amount paid to Named Plaintiff Cheryl Fillekes, subject to the Court's approval, for her participation in this Action and for her general release and waiver of employment-related claims described herein.

16. “Settlement Agreement,” “Settlement,” or “Agreement” each mean the settlement agreed to by the Parties as reflected in this Agreement and as approved by the Court.

17. “Settlement Collective” or “Settlement Collective Members” or “Collective Members” means those individuals who: (i) previously filed a consent-to-join form in this Action and became a “party plaintiff” under 29 U.S.C. § 216(b); and (ii) who, as of the date this Settlement Agreement is executed, have neither voluntarily withdrawn nor been dismissed from this Action by the Court. A list of all Settlement Collective Members is attached as Exhibit C.

18. “Settlement Sum” means the monies that Defendant will pay to the Claims Administrator in settlement of this Action.

### **III. MONETARY CONSIDERATION**

#### **A. Settlement Sum**

In exchange for the release and waiver of Named Plaintiff’s and Settlement Collective Members’ claims and for their other promises in this Agreement, Defendant shall pay the sum of Eleven Million U.S. Dollars (\$11,000,000) (the “Settlement Sum”). The Settlement Sum includes payment for: (i) all amounts to be paid to Named Plaintiff and Settlement Collective Members; (ii) all amounts to be paid to Named Plaintiff as a Service Payment; (iii) all attorneys’ fees and costs awarded by the Court, including those in connection with securing court approval of the Settlement and the notice and claims process; (iv) all costs or expenses incurred in administering the Settlement and the Settlement Fund (as defined below), including but not limited to those related to notice, claims processing, or independent legal advice obtained by the Claims Administrator for the Qualified Settlement Fund, tax treatment, tax reporting, or the

Fund's tax returns (and to taxes associated with any tax returns); and (vi) all payroll withholding taxes, which means Named Plaintiff's, Settlement Collective Members', and Defendant's respective portions of payroll taxes (including but not limited to FICA, FUTA, and all other federal, state, or local payroll taxes) on amounts to be paid to the Settlement Collective Members treated as wages. This Agreement does not require Defendant to pay more than the Settlement Sum.

**1. Tax Liability**

Other than the allocations for individual payments and the Service Payment set forth below, the Parties make no representations about the tax treatment or legal effect of any payments under this Agreement. Named Plaintiff and Settlement Collective Members agree that, should any taxing authority assess any taxes, penalties, or interest against them as a result of the individual payments or the Service Payment, they will be solely responsible for the taxes, penalties, or interest, if any, that may be owed to any governmental agency as a result of the settlement payments.

**2. No Other Payment**

The Settlement Sum constitutes the total cash outlay by Defendant in connection with the resolution and settlement of this Action. Defendant shall pay no other money separately in connection with this Settlement, including without limitation for any taxes, attorneys' fees or costs, or expenses. Defendant shall be solely responsible for fees, costs, and expenses of Defense Counsel, Defendant's accountants or tax attorneys, or other consultants or vendors independently retained by Defendant solely for Defendant's benefit.

**3. Settlement Fund and Administrator as Trustee**

The Settlement Sum will be placed into an interest-bearing escrow account established by the Claims Administrator (the “Settlement Fund”). The Claims Administrator will serve as trustee of the Settlement Fund and will act as a fiduciary with respect to the handling, management, and distribution of amounts from the Fund, including the handling of tax-related issues and payments. The Claims Administrator will also act in a manner necessary to qualify the Settlement Fund as a “Qualified Settlement Fund” under Section 468B of the Internal Revenue Code of 1986, as amended, and Treas. Reg. Section 1.468B-1 et seq., and to maintain that qualification. All costs and expenses of the Claims Administrator in administering this Settlement will be exclusively taken from and will serve to reduce the Settlement Sum.

**B. Service Payment to Named Plaintiff**

Collective Counsel will seek Court approval for a reasonable Service Payment from the Settlement Sum to Named Plaintiff Cheryl Fillekes in the amount of ten thousand dollars (\$10,000) for her participation in prosecuting and settling this Action and for her general release and waiver of employment-related claims as described herein. Subject to Court approval, this proposed Service Payment will be in addition to any Settlement Collective payment that she may be eligible to receive under the Settlement Agreement. There was no trade-off of relief for the Settlement Collective in order to pay this Service Payment. This Service Payment will come exclusively from and will serve to reduce the Settlement Sum, and Named Plaintiff will be required to execute this settlement agreement and thereby generally release all employment-related claims described herein, known and unknown, against Defendant and the Released Parties in exchange for this Service Payment.

**C. Attorneys' Fees and Costs**

Collective Counsel will apply to the Court for an award of attorneys' fees in a total amount of twenty-five percent (25%) of the Settlement Sum, *i.e.*, \$2,750,000, plus their litigation costs and expenses. Payment of these attorneys' fees and costs will be made exclusively from and will serve to reduce the Settlement Sum. Defendant's payment of Plaintiffs' attorneys' fees, costs, and expenses from the Settlement Sum shall constitute full satisfaction of any obligation it may have to pay any person, attorney, or law firm for attorneys' fees, costs, or expenses incurred on behalf of the Named Plaintiff and Settlement Collective and shall relieve Defendant from any other claims or liability to any other attorney or law firm or person for any attorneys' fees, costs, or expenses to which any of them may claim to be entitled on behalf of Named Plaintiff or the Settlement Collective or that are in any way related to this Settlement or to the Released Claims.

**IV. PROGRAMMATIC RELIEF**

**A. Consideration and Duration**

In exchange for the release and waiver of Named Plaintiff's and Settlement Collective Members' claims and for their other promises in this Agreement, Defendant also agrees to the programmatic relief described below. This programmatic relief will be binding on the Parties and their agents and successors for a 4-year period following its implementation. Defendant agrees to bear any costs of programmatic relief directly, and the Settlement Sum does not include costs of this relief.

**B. Policies and Training**

Defendant agrees to post existing policies prohibiting discrimination, harassment, and retaliation, as they may be updated from time to time, externally so that they are

accessible to all applicants and internally so that they are accessible to all employees and managers for the 4-year period. Defendant also agrees to provide newly hired employees access to or copies of these policies for the 4-year period. Defendant also agrees to continue to train its employees and managers, including all recruiters, sourcers, interviewers, hiring committee members, and others who participate in the hiring process, about its policies against discrimination, harassment, and retaliation and about implicit bias, and agrees specifically to train employees and managers on bias on the basis of age, including but not limited to age bias in hiring. Google agrees to form and maintain a subcommittee within Recruiting for 4 years that will focus on age diversity in Software Engineering, Site Reliability Engineering, and Systems Engineering positions. The subcommittee will be empowered to implement changes to recruiting practices intended to better attract candidates who have substantial industry experience. In creating the subcommittee, Google will communicate Plaintiffs' allegations regarding age discrimination in this action and the types of alleged evidence that Plaintiffs offered in support of their allegations. Google will also ensure that its marketing collateral, including the Google career website, reflects age diversity.

### **C. Complaints**

For the 4-year period, Defendant agrees to annually provide to its Legal Department information about the processes by which applicants for, or employees who work in, Software Engineering, Site Reliability Engineering, and Systems Engineering positions may make formal or informal complaints of age discrimination. The complaint procedure will provide different means by which an applicant or employee may make a complaint (e.g., telephone or anonymous email) of age discrimination. Defendant also agrees to promptly investigate, based on all the circumstances, all complaints of age



discrimination, harassment, or retaliation made by applicants for, or employees who work in, Software Engineering, Site Reliability Engineering, and Systems Engineering positions and to take appropriate remedial action based on all the circumstances and as it deems appropriate in its sole discretion. Defendant will semi-annually apprise its Legal Department on a strictly confidential basis of any complaints, formal or informal, of age discrimination (including harassment or retaliation) made by applicants for, or employees who work in, Software Engineering, Site Reliability Engineering, and Systems Engineering positions.

**D. Voluntary Exit Surveys**

For the 4-year period, Defendant agrees to conduct exit surveys with departing employees who are age 40 or older if the employee voluntarily agrees to participate in this survey. The survey shall ask if the departing employee has experienced any form of discrimination at Google, and to describe any such discrimination. To the extent an interviewee or departing employee shares information or concerns about any potential age discrimination matter, Defendant will share such information on a strictly confidential basis with its Legal Department, which will investigate as appropriate and address concerns about age discrimination as appropriate.

**E. No Interference with Business**

This Settlement Agreement does not impose any obligations on the Parties beyond the terms and conditions stated in this Agreement. Accordingly, this Agreement shall not prevent or preclude Defendant from revising its employment practices and policies or taking other personnel actions during the term of this Settlement Agreement so long as they are not inconsistent with this Agreement. Further, nothing in this Settlement will be construed as interfering with Defendant's rights to determine the

nature, conduct, organization, or structure of its businesses as it deems appropriate or as may be required by law. This Settlement Agreement and its terms are subject to Defendant's other legal obligations, and nothing in this Agreement shall obligate Defendant to take any action that is contrary to those obligations.

## **V. RELEASE AND BAR**

### **A. Release, Waiver, and Bar**

In exchange for the consideration received under this Settlement Agreement, upon the date of the Court's Approval Order, except as to such rights or claims as may be created by this Settlement Agreement, Named Plaintiff and all Settlement Collective Members irrevocably and unconditionally release and waive all the claims described below that they may now have against Defendant and the Released Parties, as defined below. The claims they are releasing include all known and unknown claims, promises, causes of action, or similar rights of any kind that they may presently have for discrimination because of age based on claims or allegations that were raised or could have been raised in this Action, in the Second Amended Complaint, or in any Complaint filed in this Action, including, without limitation, claims under the Age Discrimination in Employment Act of 1967 ("ADEA") or parallel state or local laws ("Released Claims"). Named Plaintiff and Settlement Collective Members understand that the claims they are releasing may arise under many different foreign, domestic, federal, state, or local laws (including statutes, regulations, other administrative guidance, and common law doctrines) such as all common law contract, tort, or other claims they may have. Named Plaintiff and Settlement Collective Members are not releasing or waiving any claims that applicable law does not permit them to release or waive. The terms of Named Plaintiff's

and Settlement Collective Member's releases and waivers are a material part of this Settlement Agreement.

The "Released Parties" are Defendant, its current and former, direct and indirect owners, parents, subsidiaries, brother-sister companies, and all other affiliates and related entities, and their current and former partners, employees, officers, directors, stockholders, owners, representatives, assigns, attorneys, agents, insurers, employee benefit programs (and the trustees, administrators, fiduciaries, and insurers of those programs), and other related parties or persons acting by, through, under, or on behalf of any of the above persons or entities, and their successors.

Except for a proceeding brought to enforce the terms of the Settlement Agreement, Named Plaintiff and Settlement Collective Members who have agreed to participate in the settlement by signing the release shall, as of the date of the Court's Approval Order, be barred from commencing, maintaining, prosecuting, participating in, or permitting to be filed by any other person on their behalf, any action, suit, or proceeding of any kind against Defendant or the Released Parties with respect to the Released Claims and will be deemed to have agreed to the same by participating in this Settlement.

**B. Reasonable Time to Consider Agreement**

To be eligible to receive a monetary payment pursuant to this Settlement Agreement, each Settlement Collective Member must sign an Acknowledgement and Consent, a copy of which is attached as Exhibit B. The Parties agree that, under 29 U.S.C. § 626(f)(2) and § (f)(1), Named Plaintiff and Settlement Collective Members are entitled to a reasonable period of time within which to consider the Acknowledgement and Consent and that no revocation period is required.

**C. Named Plaintiff's General Release and Waiver**

Subject to Court approval and in addition to the above release and waiver of claims, Named Plaintiff, by executing this Agreement, will generally release and waive any and all employment-related claims, known and unknown, against Defendant and the Released Parties with the exception of any claims for which she may be an absent class member in a class action lawsuit. The general release and waiver is in exchange for her Service Payment, which will exclusively come from, and serve to reduce, the Settlement Sum.

**D. California Civil Code Section 1542**

Named Plaintiff (including their heirs, administrators, representatives, executors, successors, and assigns) expressly waives any and all provisions, rights and benefits conferred under (or by any law of any state or territory of the United States, or principle of common law, which is similar, comparable, or equivalent to) California Civil Code § 1542, which states as follows:

“A general release does not extend to claims which the creditor or releasing party does not know or suspect to exist in his or her favor at the time of executing the release and that, if known by him or her, would have materially affected his or her settlement with the debtor or released party.”

**E. Termination of Releases**

If the Settlement does not become effective for any reason or the Settlement set forth in this Settlement Agreement terminates as provided below, then the releases will terminate nunc pro tunc and be of no force and effect as will any obligations Defendant has under this Agreement.

**F. No Bar to Future Claims**

Subject to the no reapplication provision below, nothing in this Settlement Agreement shall be construed to bar any claims of Named Plaintiff, Settlement Collective Members, or Defendant that may arise from conduct occurring after the date of the Court's Approval Order.

**G. No Assignment**

Named Plaintiff and Settlement Collective Members may not assign or transfer their rights to participate in this Settlement and represent that they have not done so.

**VI. NO REAPPLICATION**

In exchange for the consideration received under this Settlement Agreement, Named Plaintiff and the Settlement Collective Members agree, for a period of 3 years after the Effective Date of this Agreement, that they are not entitled to re-apply for employment with Defendant. If Named Plaintiff or a Settlement Collective Member does apply during the 3-year period after the Effective Date of this Agreement, she agrees upon request to withdraw her application for employment. If Defendant hires Named Plaintiff or a Settlement Collective Member within 3 years after the Effective Date of this Agreement, the hiring decision will not constitute Defendant's waiver of this provision. In that event, any hired Named Plaintiff or Settlement Collective Member agrees to resign upon request and agree that this Agreement constitutes lawful cause to terminate any future employment. The Parties agree that this provision does not constitute unlawful retaliation in violation of any federal, state, or local law. If, however, any entity that Named Plaintiff or Settlement Collective Member is or may be working for were to be acquired by or merged into Defendant, or acquires Defendant, this provision will not

require Named Plaintiff or any Settlement Collective Member to resign or mandate termination of her employment.

## **VII. SETTLEMENT PROCEDURES**

### **A. Determination of Payments to Settlement Collective Members**

\$2.683 million of the Settlement Funds, which is approximately one-third of the amount anticipated to be available for distribution to Collective Members, will be distributed equally to each Collective Member (including Plaintiff Fillekes) who agree to participate in the settlement by signing the release resulting in a minimum payment to each of approximately \$11,465. In addition, Settlement Collective Members who previously provided information to Collective Counsel indicating that they may have suffered lost wages damages will divide the amount remaining in the Settlement Sum after all other payments required by this Agreement have been made on a pro rata basis based on the amount of their lost wages damages calculated by Collective Counsel in good faith based on the information made available to Collective Counsel by Defendant and Collective Members, as reflected in Exhibit D. The Claims Administrator shall calculate these additional payments to Collective Members, if any, based on the formulas in Exhibit D. Determination of Settlement Collective Members' exact payments shall be made by the Claims Administrator, in consultation with Collective Counsel, and will be final and not subject to review by, or appeal to, any court, mediator, arbitrator, or other judicial body, including without limitation this Court. Defendant, Defendant's Counsel, Collective Counsel, and the Claims Administrator shall not be held liable for, and shall not be responsible for, any inaccuracies in the information they relied on, or in the determination of a Settlement Collective Member's monetary payment.

**B. Providing Information about Settlement Collective Members to Claims Administrator**

Within five (5) days of the full execution of this Agreement, Collective Counsel will provide to the Claims Administrator the name, email address, last known address, phone number, application work State, and other identifying information for Named Plaintiff and each Settlement Collective Member, if known. Any information provided to the Claims Administrator by Settlement Collective Members will be confidential and not shared with anyone other than Collective Counsel, Defendant's Counsel, or Defendant.

Within five (5) days of the full execution of this Agreement, Collective Counsel will also provide to the Claims Administrator an excel version of Exhibit D that includes the Collective Member names corresponding to the Candidate ID number, and the formulas for calculating their distributions from the Settlement Sum as described in Paragraph VII.A.

**C. Notice of Settlement**

Within twenty-one (21) days of the full execution of this Agreement, the Claims Administrator will distribute the Notice of Settlement form to each Settlement Collective Member by e-mail. If an e-mail address is not available, or is returned as undeliverable, the Notice shall be mailed. The Notice of Settlement form (a copy of which is attached hereto as Exhibit A) will include (i) a summary notice, (ii) the Acknowledgement and Consent (a copy of which is attached as Exhibit B), and (iii) either a copy of this Settlement Agreement or a conspicuous electronic link to this Settlement Agreement. The Notice will include language stating that the Settlement Collective Member understands and agrees that she is releasing and waiving all Released Claims against Defendant and the Released Parties and does so knowingly and voluntarily. The

Claims Administrator shall request that each Settlement Collective Member: submit the Acknowledgement and Consent form; provide their preferred payment method and information; and provide any necessary tax information or forms, such as W-9 forms.

The Notice of Settlement form provided to the Claims Administrator will be used only in connection with administering this Settlement and shall not be admissible in this Action or any other subsequent proceeding against Defendant or the Released Parties for any purpose.

**D. Eligibility for Monetary Payment**

To be eligible to receive a monetary payment pursuant to this Settlement Agreement, Settlement Collective Members must submit the signed Acknowledgement and Consent, as described in the form attached hereto as Exhibit B, within sixty (60) days from the date that the settlement administrator first distributes the Notice of Settlement form to the Settlement Collective members. Settlement Collective Members may sign the Acknowledgement and Consent electronically or in hard copy. Any Settlement Collective Member who previously released claims that would otherwise be covered by this Settlement Agreement, or who obtained a final judicial determination on claims that would otherwise be covered by this Settlement Agreement, is not eligible to receive a monetary payment for those claims.

Collective Counsel will notify Defendant's Counsel as soon as reasonably possible, but in any event not later than five (5) business days before the Parties file their Court approval papers, of the number of Settlement Collective Members who have submitted the above Acknowledgement and Consent.



**E. Withdrawal and Dismissal**

Settlement Collective members who affirmatively request to withdraw from the settlement and Settlement Collective members who do not respond to the Settlement Notice form or who cannot be contacted by the Claims Administrator or Collective Counsel will have their claims dismissed without prejudice. The statute of limitations on their claims for individual relief will resume running on the date of their dismissal.

The Settlement Notice form will advise Settlement Collective Members that they can request to withdraw from the Settlement by mailing or emailing a signed statement to Collective Counsel stating that the Collective Member understands she will not receive any monetary benefits from the Settlement, and that the statute of limitations on their claims for individual relief will resume running on the date of their dismissal. Collective Counsel will provide Defendant's Counsel with a copy of all withdrawal statements received, whether timely or not, except that attorney-client communications in any withdrawal statements sent to Collective Counsel may be redacted.

**F. Defendant's Right to Rescind**

Collective Counsel will recommend and endorse the settlement to Settlement Collective Members. If more than ten percent (10%) of Settlement Collective Members will have their claims dismissed without prejudice, including those who affirmatively request to withdraw, those who do not respond to the Settlement Notice form, and those who cannot be contacted by the Claims Administrator or Collective Counsel, then Defendant may in its sole discretion withdraw from and rescind this Agreement. Settlement Collective Members who previously released claims covered by this Agreement or who obtained a final judicial determination of claims covered by this Agreement will not be counted toward the above percentage rate. Within eighty (80) days

of the Claims Administrator issuing notice to all Collective Members, Collective Counsel shall provide Defendant and its Counsel with: (i) notice of all eligible Settlement Collective Members who have returned executed Acknowledgement and Consent forms; and (ii) a declaration identifying Settlement Collective Members who affirmatively requested to withdraw, did not respond to Counsel, or who could not be reached and describing Counsel's reasonable efforts to contact them, after which Defendant and its Counsel will have five (5) business days to give notice to Collective Counsel of Defendant's intent to withdraw and rescind.

**G. Court Approval**

Within the sooner of ninety (90) days of the Claims Administrator issuing notice to all Collective Members or ten (10) days after the expiration of the time period for Defendant to give notice of its intent to withdraw and rescind (as described in paragraph VII.F above), and as long as Defendant does not rescind the Agreement pursuant to Paragraph VII.F above, the Parties will jointly petition the Court for an Order: (i) approving this Settlement as fair, reasonable, and adequate and approving the terms of this Settlement Agreement; (ii) excluding from the Settlement and dismissing without prejudice any Settlement Collective Members who timely requested to withdraw from the Action, did not respond to the Notice Settlement form, or could not be contacted by the Claims Administrator or Collective Counsel; (iii) requesting that the Court rule that the statute of limitations for Settlement Collective Members who timely requested to withdraw from the Action, did not respond to the Notice Settlement form, or could not be contacted by the Claims Administrator or Collective Counsel, will resume running for their individual claims from the date of their dismissal; (iv) enjoining and permanently barring all Settlement Collective Members who have not requested to withdraw from

commencing, prosecuting, or maintaining, either directly, representatively, or in any other capacity, any claim that is released and barred by or subsumed within the Settlement Agreement; (v) dismissing this Action on the merits and with prejudice; and (vi) providing that the Court shall have continuing jurisdiction to enforce the Settlement Agreement.

### **1. Jurisdiction and Venue**

The Parties agree that the Court has jurisdiction over the Parties and the subject matter of this Action and that venue is proper. The Court shall retain jurisdiction of this Action for at least two (2) years from the Effective Date of the Settlement Agreement solely for the purpose of entering all orders and judgments authorized that may be necessary to implement and enforce the Settlement.

### **2. Duty to Cooperate**

The Parties and their Counsel agree to use their best efforts to obtain prompt entry of the Approval Order and to recommend to the Court that the Settlement Agreement is reasonable and appropriate and in the best interests of justice, they have bargained for the terms in the Agreement at arms' length, and no portion of this Agreement should be modified or struck. The parties agree that, although an Approval Hearing is not required by § 216(b), they will cooperate in any such hearing the Court may notice.

### **3. Stipulation to Final Certification**

Solely for purposes of settlement and judicial approval of this Settlement, pursuant to 289 U.S.C. § 216(b), the Parties stipulate to the final certification of the Settlement Collective as defined above. Defendant does not waive, but instead expressly reserves, its right to challenge the propriety of certification and the Court's denial of decertification for any purpose as if this Settlement Agreement had not been entered into

by the Parties, should the Court not approve the Settlement Agreement, should the Effective Date not occur, should Defendant exercise its right to withdraw from and rescind this Agreement, or should the Settlement otherwise fail. Other than to effectuate this Settlement Agreement, Defendant does not agree to final certification of the Settlement Collective.

#### **4. Procedural Guidance for Class Settlements and Standing Order**

The Parties agree and will recommend to the Court that the Northern District of California's Procedural Guidance for Class Action Settlements does not apply to this action because this is a collective action under 29 U.S.C. § 216(b) and is not a Rule 23 class action.

#### **H. Distributions from the Settlement Sum**

Within twenty (20) business days of the Court's approval of this Settlement Agreement, Defendant shall pay, by wire transfer to the Claims Administrator, the Settlement Sum of eleven million dollars (\$11,000,000). At its sole discretion, Defendant may pay the Settlement Sum before the Effective Date.

Within twenty (20) business days after the Effective Date, the Claims Administrator will make payment by mailing a check or making electronic payment to Named Plaintiff and each Settlement Collective Member who is identified in the Parties' Court approval papers as a Settlement Collective member who has agreed to participate in the settlement by signing the release, with their respective portions of the Settlement Sum. The total amount of monetary payments to Named Plaintiff and Settlement Collective Members shall not exceed the net amount of the Settlement Sum after considering interest earned and all costs related to the Settlement, Collective Counsel's

attorney's fees and costs, payroll withholding taxes, the Claims Administrator's fees and costs of administration, and other appropriate costs. Further, Named Plaintiff's or a Settlement Collective Member's receipt of a monetary payment does not require any additional contributions by Defendant to the Settlement Sum. The payments to Named Plaintiff and each Settlement Collective member, if issued by check, will be issued with ninety (90) day void dates. Requests for re-issued checks will only be accepted by the Claims Administrator within that ninety (90) day period.

Within five (5) business days after the receipt of the Settlement Sum from Defendant, the Claims Administrator will wire the total amount of Court-approved attorneys' fees and costs to Collective Counsel. In the event that fees or costs have been paid to Collective Counsel, and the Settlement does not become effective for any reason, or if the Judgment or order granting the fee and cost award is reversed or modified on appeal, then Collective Counsel shall within seven (7) business days of a request from Defendant or the Settlement Administrator, refund to the Settlement Fund any affected amounts paid to them. Each Collective Counsel or firm receiving a fee shall be liable for repayment in the amount it received. Each Collective Counsel's law firm, as a condition of receiving the fee or cost award in advance of the Effective Date, on behalf of itself and each partner, agrees that the law firm and its partners are subject to the jurisdiction of the Court for the purposes of enforcing this paragraph. Each such law firm and its partners agree that the Court may, upon application of Defendant and notice to Collective Counsel, summarily issue orders, including, but not limited to, judgments and attachment orders, and may make appropriate findings of or sanctions for contempt against any of them should such law firm or partner fail timely to repay the fee or cost award.

Defendant will have no liability or other responsibility for the allocation of attorneys' fees or costs, which decision shall be made solely by Collective Counsel.

**I. Remaining Funds**

If funds exceeding twenty-five thousand dollars (\$25,000) remain in the Settlement Fund ninety (90) days after the settlement payments are made to Named Plaintiff and Settlement Collective Members or after all re-issued payments have been deposited or voided, those funds (less reasonable administration costs for the Claims Administrator to issue the payments) will be distributed equally among the Named Plaintiff and the Settlement Collective Members who deposited their initial settlement payments. If less than twenty-five thousand dollars (\$25,000) remains in the Settlement Fund or if any funds remain in the Settlement Fund ninety (90) days after the second round of disbursements described earlier in this paragraph, the remaining funds will be donated to the AARP Foundation and the Claims Administrator shall request that the donation be used to promote the employment of individuals over 40 years of age in technology jobs.

**J. Confidentiality**

The Claims Administrator will provide Collective Counsel and Defendant's Counsel and Defendant's payroll department with the names of all Settlement Collective Members who are eligible to receive a monetary payment. The Claims Administrator will maintain the confidentiality of all Social Security numbers or other personal identifying information or data, which Collective Counsel will provide to the Administrator in accordance with applicable law and will enter into an appropriate form of agreement with the Parties for the protection of this information. To the extent there is any disagreement about the accuracy of the information provided to the Settlement Collective Members, the

disagreement will be resolved by the Claims Administrator in consultation with the Parties and their counsel.

**K. Records and Reports**

The Claims Administrator will, among other things: (i) maintain a record of its activities, including the dates of mailing of the Notice of Settlement forms and settlement checks, returned mail and other communications, and attempted communications with Settlement Collective Members; (ii) provide from time to time to counsel for the Parties in writing a summary of its activities and completion of the administration of the settlement; (iii) timely respond to communications from the Parties or their respective counsel; and (iv) perform any other tasks as the Parties mutually agree. The Claims Administrator will maintain all records of the Settlement and its administration for a period of seven (7) years.

**L. Non-Admissibility of Fact of Payment or Non-Payment**

Except to the extent it would constitute a setoff in an action for damages claimed for any period covered by this Settlement, neither the fact nor the amount of a monetary payment, nor the fact of any non-payment, from the Settlement Fund to a Settlement Collective Member shall be admissible in any proceeding for any purpose other than to enforce Named Plaintiff's or a Settlement Collective Member's release and waiver ordered or executed in connection with this Settlement, nor shall such a fact be deemed to be a finding on the merits of any claim.

**VIII. TAXES**

**A. Qualified Tax Status and Tax Responsibilities**

The Settlement Fund will be established as a Qualified Settlement Fund within the meaning of Section 468B of the Internal Revenue Code of 1986, as amended, and Treas.

Reg. Section 1.468B-1, et seq. The Fund will be administered by the Claims Administrator under the Court's supervision. Defendant will be deemed to have made an election under Section 468B of the Revenue Code to have the Fund treated as a "Qualified Settlement Fund." Defendant will timely furnish a statement to the Claims Administrator that complies with Treasury Regulation § 1.468B-3(e) and attach a copy of the statement to its federal income tax return that is filed for the taxable year in which Defendant makes the required payment to the Settlement Fund. The Parties agree to cooperate to ensure such treatment and agree not to take a position in any filing or before any tax authority inconsistent with this treatment.

**B. Claims Administrator's Duties**

As noted above, the Claims Administrator will serve as trustee of the Settlement Fund and will act as a fiduciary with respect to the handling, management, and distribution of amounts from the Fund, including the handling of tax-related issues and payments. Specifically, the Claims Administrator will be responsible for withholding, remitting and reporting Named Plaintiff's, Settlement Collective Members', and Defendant's share of payroll taxes.

**C. Allocation of Payments and Service Payment**

The Parties recognize that the monetary payments to Settlement Collective Members from the Settlement Fund will be subject to applicable taxes, withholding, and reporting, which will be handled as follows. The Parties agree that fifty-percent (50%) of all payments to Named Plaintiff and Settlement Collective Members will be allocated as wages, and normal payroll taxes and withholdings will be deducted from this portion of Named Plaintiff's and each Settlement Collective Member's monetary payments pursuant to applicable law, except that any Service Payment to the Named Plaintiff will be paid as



non-wage income. This portion of monetary payments will be reported on an IRS Form W-2. The remaining fifty-percent (50%) will be allocated as liquidated damages and interest and will be reported on an IRS Form 1099. Named Plaintiff and Settlement Collective Members will be responsible for correctly reporting this for tax purposes and for paying any taxes on the amounts received.

Each Party's tax obligations, if any, and the determination thereof, are the sole responsibility of the Party, and the tax consequences, if any, depend on the particular circumstances of each party. Each Party agrees that, should any taxing authority assess any taxes, penalties, or interest against them as a result of the settlement, they will be solely responsible for the taxes, penalties, or interest, if any, which may be owed to any governmental agency as a result of the settlement payments.

Should the IRS determine that there has been an overpayment of withholding taxes on behalf of Defendant paid from the Settlement Fund, any such overpayment shall be credited or paid to the relevant Named Plaintiff or Collective Member and not to Defendant.

**D. No Admission and Inadmissible**

The Parties agree that Named Plaintiff's and the Settlement Collective's claims under the ADEA include a claim for liquidated damages and interest, but further agree that the above allocation of Settlement Collective Members' payments is solely for the purpose of settlement. This allocation does not constitute an admission that Defendant or the Released Parties are liable for damages of any kind, including but not limited to liquidated damages and interest, and this allocation may not be used in any proceeding as evidence that Defendant or the Released Parties are liable for damages of any kind or that

their acts or omissions were willful or were with malice or reckless disregard for any rights under applicable law.

**E. Payment of Taxes, Expenses, and Costs**

The Claims Administrator will be responsible to satisfy from the Settlement Fund any and all federal, state, and local employment and withholding taxes, including, without limitation, federal and state income tax withholding and employment taxes. The following will also be exclusively paid out of and will serve to reduce the Settlement Fund: (i) all taxes (including any estimated taxes, interest, or penalties) arising with respect to the income earned by the Settlement Fund, including any taxes or tax detriments that may be imposed on Defendant with respect to income earned by the Settlement Fund for any period during which the Settlement Fund does not qualify as a “Qualified Settlement Fund” for federal and state income tax purposes (“Settlement Fund Taxes”); and (ii) all expenses and costs incurred by the Claims Administrator in connection with operating and implementing this paragraph (including, without limitation, expenses of tax attorneys or accountants and mailing and distribution costs and expenses relating to filing or failing to file any returns described in this Agreement or otherwise required to be filed pursuant to applicable authorities) (“Settlement Fund Tax Expenses”). Further, Settlement Fund Taxes and Settlement Fund Tax Expenses will be treated as costs of the administration of the Settlement Fund. The Parties agree to cooperate with the Claims Administrator and with each other and their tax attorneys and accountants to the extent reasonably necessary to carry out the provisions set forth in this paragraph.

**F. Tax Forms and Tax Reporting**

The Claims Administrator will be responsible for procuring any required tax forms from Named Plaintiff and Settlement Collective Members. The Claims Administrator will timely report and remit Defendant's share of payroll taxes relative to the settlement payments to the appropriate taxing authorities and will be responsible for the timely reporting and remitting of that payment to the appropriate taxing authorities. The Claims Administrator will satisfy all federal, state, local, and other reporting requirements (including any applicable reporting with respect to attorneys' fees and other costs subject to reporting) and any and all taxes, penalties, and other obligations with respect to the payments or distributions from the Settlement Fund not otherwise addressed in this Agreement.

**IX. TERMINATION OF AGREEMENT**

**A. No Final or Binding Settlement**

If the Court does not approve any material condition of the Parties' Settlement Agreement (unless the Parties then agree to modify this Agreement), if the Effective Date does not occur, if as provided for above Defendant withdraws from the Settlement and rescinds this Agreement, or if the Settlement otherwise fails for any reason, the entire Settlement Agreement will be void and unenforceable. In that event: (i) the Parties shall be restored to the status quo ante, that is, their respective positions that existed in this Action prior to entering into this Settlement Agreement; (ii) the terms and provisions of this Settlement Agreement shall have no force or effect; (iii) neither this Settlement Agreement nor any statements, discussions, or materials prepared, exchanged, issued, or used during the negotiation of this Settlement Agreement shall be used in this Action or in any proceeding for any purpose; (iv) to the extent paid, the Settlement Sum, including

attorneys' fees and costs, shall be returned to Defendant, including the interest earned (or that would have been earned at same interest rate as the escrow account in which the Settlement Fund is held) through the date of termination, after deducting costs paid or incurred by the Claims Administrator as of the date of termination; (v) any judgment entered by the Court in accordance with the terms of this Settlement Agreement shall be treated as vacated, nunc pro tunc; and (vi) the litigation of the Action will resume as if there had been no Settlement Agreement, with no stipulated Collective. In this event, the Parties will retain all rights, claims, objections, defenses, and affirmative defenses as to certification and decertification and otherwise as to the merits, allegations, and claims asserted in and defenses to this Action. Also, the Settlement and all negotiations and proceedings related to it will be without prejudice to the rights of the Parties, and evidence of the Settlement and all negotiations and proceedings about it will be inadmissible and will not be discoverable.

**B. No Waiver and No Admissions**

If this Settlement does not become final and binding, neither Party will be deemed to have waived any claims, objections, rights, defenses or affirmative defenses, or factual or legal arguments or positions, including but not limited to those related to the merits or to certification or decertification, and each Party reserves the right to prosecute or defend this Action. In that event, Named Plaintiff and Settlement Collective Members will continue to assert the merits and validity of their claims for age discrimination, and Defendant will continue to assert the merits and validity of, and does not waive, its defenses and affirmative defenses to Named Plaintiff's and Settlement Collective Members' claims and allegations and to certification and decertification. Likewise, if this Settlement does not become final and binding, this Agreement also does not, and is not

intended to constitute, nor shall it be deemed to constitute, an admission by any Party on the merits, validity, or accuracy of any of the allegations, claims, defenses, or affirmative defenses of any party in this case or on certification or decertification. This provision survives the termination of this Agreement.

## **X. OTHER SETTLEMENT TERMS**

### **A. Duty of Cooperation and Best Efforts**

The Parties agree that they will fully cooperate to effectuate and implement, and will exercise good faith efforts to accomplish, all terms and conditions of this Settlement Agreement. The Parties agree to accept non-material and procedural changes to this Agreement if so required by the Court in connection with approval of the Settlement. But under no circumstances are the Parties obligated to accept any changes to the amount of the Settlement Sum, the scope of the releases, or any other material change to the Settlement, including but not limited to the programmatic relief provided for above.

### **B. Entire Agreement**

This Settlement Agreement contains the entire agreement between the Parties relating to any and all matters addressed in the Settlement Agreement, and all prior or contemporaneous agreements, understandings, representations and statements, whether oral or written and whether by a Party or such Party's legal counsel, with respect to these matters are extinguished or merged into this Agreement. No rights under this agreement may be waived or modified except in a writing signed by all Parties.

### **C. No Admission and No Determination**

By entering into this Agreement, Defendant and the Released Parties do not admit or concede, expressly or impliedly, but rather deny that they have violated in any way the ADEA or any parallel state and local laws prohibiting age discrimination, the common

law of any jurisdiction, or any other federal, state or local law, statute, ordinance, regulation, rule, or executive order, or any obligation or duty at law or in equity. Neither the Court nor any other court has made any findings or expressed any opinion about the merits, validity, or accuracy of any of the allegations, claims, defenses, or affirmative defenses in this case. To the contrary, Defendant and the Released Parties deny that they engaged in any form of discrimination on the basis of age or any other basis with respect to any applicant for employment.

**D. Inadmissibility**

Except for the purpose of enforcing this Settlement Agreement, nothing in this Agreement, nor the Court's Approval Order, nor any action taken in implementation of it, nor any statements, discussions, or communications, nor any materials prepared, exchanged, issued, or used during the course of any negotiations leading to this Settlement Agreement, is intended by the Parties to, nor shall any of the above constitute, be introduced, be used, or be admissible in any way in this Action or any other judicial, arbitral, administrative, investigative, or other proceeding of any kind or nature (including, without limitation, the results of the claims process established under this Settlement Agreement or in any proceeding related to Robert Heath's claims), as evidence on the merits, on the propriety of certification or decertification, or on any other issue or subject of this Action or any other action. For example, the above does not constitute and may not be used as evidence of age discrimination or as evidence of any violation of the ADEA or parallel state and local laws prohibiting age discrimination, the common law of any jurisdiction, or any other federal, state or local law, statute, ordinance, regulation, rule, or executive order, or any obligation or duty at law or in

equity. Neither shall this Settlement Agreement be admissible on the propriety of certification or decertification.

**E. No Interference with Defendant's Business**

This Settlement Agreement does not impose any obligations on the Parties beyond the terms and conditions stated in this Agreement. Accordingly, this Agreement shall not prevent or preclude Defendant from revising its employment practices and policies or taking other personnel actions during the term of this Settlement Agreement so long as those actions are not inconsistent with this Settlement Agreement. Further, nothing in this Settlement will be construed as interfering with Defendant's rights to determine the nature, conduct, organization, or structure of its businesses as it deems appropriate or as may be required by law. This Settlement Agreement and its terms are subject to Defendant's other legal obligations, and nothing in this Agreement shall obligate Defendant to take any action that is contrary to said obligations.

**F. Non-Precedential**

This Settlement Agreement is non-precedential and shall not be deemed to constitute an admission that certification or decertification is appropriate in this Action or any other action that might be brought against Defendant. Notwithstanding this, this Settlement Agreement may be used in any proceeding to enforce or implement any provision of this Settlement Agreement or implement any orders or judgments of the Court entered into in connection with this Settlement.

**G. Public Statements**

Before the Parties seek the Court's approval of the Settlement, Collective Counsel and Named Plaintiff agree to keep the terms of the Settlement confidential and the notice distributed by the Settlement Administrator will instruct Settlement Collective Members

also to do so. This includes, but is not limited to, not making any public statements in any form about the Settlement or any Party and not responding to any inquiries about the Settlement.

For 3 years following the Effective Date, Named Plaintiff agrees not to make any critical, negative, or disparaging remarks about Defendant related to any alleged discrimination, including, without limitation, about Defendant's current and former affiliates, subsidiaries, and its employees or Defendant's Counsel, or about the Action or the Settlement in any public press notices or in responding to press inquiries about the Action or the Settlement. Named Plaintiff may, however, generally describe the allegations asserted in the Action. Defendant, including Defendant's Counsel, agrees not to make critical, negative, or disparaging remarks about Named Plaintiff or Collective Counsel, or about the Action or the Settlement in any public press notices or in responding to press inquiries about the Action or Settlement Agreement. Defendant and Defendant's counsel may, however, state that Defendant vigorously denied and continues to deny the allegations in the Action, and Plaintiff and Collective Counsel may state that Plaintiff continues to believe in the merits of the allegations in the Action.

The Parties agree to support the Settlement, including in any public statements, and will not characterize the Settlement as a victory or a loss on the merits by either Party, but rather as a fair settlement from both Parties' perspectives. Before issuing any press release, the Parties and their Counsel will share drafts to ensure that they are consistent with this paragraph.

#### **H. Documents and Electronically Stored Information**

All documents or electronically stored information ("ESI") that were provided or produced to Collective Counsel or Defendant in this Action, or which are produced by



Collective Counsel or Defendant pursuant to any provision of this Settlement Agreement, unless otherwise agreed, shall as of the date this Agreement is executed, be treated as and thereafter remain confidential to the extent required by the Protective Order previously entered in this Action on November 13, 2015 (ECF 38). With respect to handling, disposal, and return of documents and ESI, the Parties will abide by the terms and conditions of the Protective Order previously entered in this Action on November 13, 2015 (ECF 38).

**I. Governing Law**

The Parties agree that federal law shall govern the validity, construction, and enforcement of this Settlement Agreement. To the extent that state law is determined to govern the validity, construction, or enforcement of this Settlement Agreement, the law of the State of California will apply.

**J. CAFA Notice**

To the extent required, Defendant will be responsible for timely compliance with all CAFA notice requirements and will serve notices consistent with 28 U.S.C. § 1715(b) and the timing set forth in 28 U.S.C. § 1715(d).

**K. Waiver of Appeals**

The Parties agree to waive all appeals and to stipulate to final certification of this Action as a collective action solely for purposes of implementing this Settlement.

**L. Exhibits**

The Exhibits to this Settlement Agreement are material and integral parts of the Settlement and are fully incorporated here by reference.

**M. No Waiver**

No rights or obligations under this Agreement may be waived except in writing. The failure of any Party to insist in any one or more instances on strict compliance with the terms and conditions of this Settlement Agreement may not be construed as a waiver of any other term or condition or any remedies available with respect to any prior or subsequent breach.

**N. Modifications**

No material modifications to this Settlement Agreement may be made without written agreement of all Parties and prior Court approval. The Parties will have the right to seek modification of the Agreement by the Court to ensure that its purposes are fully effectuated. The Parties may also jointly agree to modify the Settlement Agreement with the approval of the Court. Upon application for a modification of the Settlement Agreement, the movant shall bear the burden of proving by a preponderance of the evidence that circumstances make such modification necessary.

**O. Extensions**

Named Plaintiff and Defendant and their Counsel recognize that from time to time unforeseen events may cause delays in the accomplishment of objectives, no matter how well-intentioned and diligent the Parties may be. Accordingly, as to the provisions of this Settlement Agreement that require the Parties to take certain actions within specified time periods, except for deadlines set forth by the Court in its Approval Order or any other Order of the Court, the Parties agree that Court approval will not be required for reasonable extensions of deadlines. If any Party determines in good faith that an action required by this Agreement cannot be taken within the specified time period, Counsel for

that Party shall promptly notify Counsel for the other Party that it anticipates a delay, the reasons for the delay, and a proposed alternative deadline.

**P. Construction and Interpretation of Agreement**

The Parties agree that the terms of this Settlement Agreement are the result of extensive, arms-length negotiations between the Parties. Therefore, the terms of this Settlement Agreement shall not be construed more strictly against one party than another. Whenever possible, each provision and term of this Settlement Agreement shall be interpreted in such a manner as to be valid and enforceable. Paragraph and section headings are for convenience and for reference only, are not intended to create substantive rights or obligations, and in no way define, limit, extend, or describe the scope of this Agreement or any provision of it. Each term of this Agreement is contractual and is not merely a recital, except for those in Section I.

**Q. Severability**

If any portion of this Settlement Agreement is judged to be unenforceable, the remainder of this Agreement will continue to be valid and enforceable.

**R. Agreement Binding**

As of the date on which the Parties and their Counsel execute this Settlement Agreement, this Agreement will be binding in all respects, unless it is terminated as provided for elsewhere in this Agreement.

**S. Successors and Assigns**

This Settlement Agreement will inure to the benefit of, and be binding upon, the Parties and their respective heirs, dependents, executors, administrators, trustees, legal representatives, personal representatives, agents, successors and assigns, except that this Settlement Agreement shall not inure to the benefit of any third party.

**T. Disputes and Enforcement**

If any dispute or disagreement with respect to the meaning, effect, or interpretation of this Settlement Agreement or any of its Exhibits, or if there is a claimed breach of the Agreement, the Parties agree that this dispute will be resolved and adjudicated only in accordance with the following provisions. Enforcement of this Settlement Agreement may be prosecuted only by Collective Counsel or Defendant's Counsel, not by any third parties. The Parties agree to work diligently and in good faith to resolve all disputes that may arise during the term of this Settlement Agreement about the rights, obligations, and duties of the Parties to the Agreement. Collective Counsel and Defendant's Counsel agree first to meet and confer before commencing any enforcement proceedings. If the Parties cannot agree, they agree to attempt to resolve the dispute with a telephone conference with The Honorable Donna M. Ryu of the U.S. District Court for the Northern District of California. If the disagreement persists, the Parties agree to conduct an in-person session with Magistrate Judge Ryu. The Parties reserve their rights to seek recourse with the Court, but may do so only after first complying with the preceding provisions. Any enforcement proceedings related to or arising out of this Settlement Agreement will be resolved and adjudicated only by The Honorable Beth Labson Freeman of the U.S. District Court for the Northern District of California, or by any other federal judge to whom this case subsequently may be assigned, unless otherwise provided in this Settlement Agreement.

**U. Counterparts**

This Settlement Agreement may be executed in counterparts. Each signed counterpart together with the others shall constitute the full Settlement Agreement.

**V. Notices to Counsel**

All notices to counsel required or necessary to be given under this Agreement will be in writing and by e-mail to lead counsel for the respective Parties. Specifically, such notices shall be emailed to Daniel Kotchen and Daniel Low of Kotchen & Low LLP, for the Named Plaintiff and Settlement Collective, and Thomas McInerney and Craig Cleland of Ogletree Deakins, P.C., for Defendant, at their respective email addresses set forth below or to such other address as any such Party or Counsel may designate in a notice.

**IT IS SO AGREED:**

Dated: 25 April 2019

**NAMED PLAINTIFF**

Cheryl A. Filles  
Cheryl Filles

**DEFENDANT GOOGLE LLC**

Dated: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

Signature: \_\_\_\_\_

**APPROVED AS TO FORM:**

Dated: \_\_\_\_\_

OGLETREE, DEAKINS, NASH, SMOAK  
& STEWART, P.C.

\_\_\_\_\_  
A. Craig Cleland  
Thomas M. McInerney  
Brian D. Berry  
Counsel for Defendant Google LLC

**V. Notices to Counsel**

All notices to counsel required or necessary to be given under this Agreement will be in writing and by e-mail to lead counsel for the respective Parties. Specifically, such notices shall be emailed to Daniel Kotchen and Daniel Low of Kotchen & Low LLP, for the Named Plaintiff and Settlement Collective, and Thomas McInerney and Craig Cleland of Ogletree Deakins, P.C., for Defendant, at their respective email addresses set forth below or to such other address as any such Party or Counsel may designate in a notice.

**IT IS SO AGREED:**

**NAMED PLAINTIFF**

Dated: \_\_\_\_\_

\_\_\_\_\_  
Cheryl Fillekes

**DEFENDANT GOOGLE LLC**

Dated: 4/29/19

Name: Amy J. Lambert

Title: Vice President, Legal

Signature: Amy J. Lambert

**APPROVED AS TO FORM:**

Dated: 4/27/17

OGLETREE, DEAKINS, NASH, SMOAK  
& STEWART, P.C.

\_\_\_\_\_  
A. Craig Cleland  
Thomas M. McInerney  
Brian D. Berry  
Counsel for Defendant Google LLC

Dated: 4-25-19

KOTCHEN & LOW LLP



Daniel L. Low

Daniel Kotchen

Michael von Klemperer

Counsel for Plaintiff Cheryl Fillekes and

Opt-In Plaintiffs

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