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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

LOZARO BOR, as an individual and on behalf
of all others similarly situated,

Plaintiff,

vs.

ALEXANDER ANDREW, INC. dba
FALLTECH., a California corporation; and
DOES 1 through 100,

Defendants.

Case No.: 19STCV26589

*[Assigned for All Purposes to Hon. William F.
Highberger, SSC-10]*

**PLAINTIFF'S NOTICE OF MOTION AND
MOTION FOR FINAL APPROVAL OF
CLASS ACTION SETTLEMENT, CLASS
REPRESENTATIVE ENHANCEMENT
PAYMENT, AND ATTORNEYS' FEES
AND COSTS; MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT THEREOF**

Date: November 4, 2020
Time: 11:00 a.m.
Dept.: SSC-10

Complaint Filed: July 31, 2019
Trial Date: None Set

1 **TO THE COURT, ALL PARTIES, AND THEIR ATTORNEYS OF RECORD:**

2 PLEASE TAKE NOTICE that pursuant to Rule 3.769 of the California Rules of Court, on
3 November 4, 2020 at 11:00 a.m. in Department 10 of the above entitled Court, located at 312 N. Spring
4 Street, Los Angeles, California 90012, Plaintiff Lazaro Bor (“Plaintiff”), individually and on behalf of
5 a class of similarly situated individuals, will and hereby does move this Court for:

- 6 1. Confirming the certification of the Settlement Class for settlement purposes under Section
7 382 of the California Code of Civil Procedure;
- 8 2. Confirming the appointment of Plaintiff Lazaro Bor as Class Representative for settlement
9 purposes;
- 10 3. Confirming the appointment of Scott M. Lidman, Elizabeth Nguyen, and Milan Moore of
11 Lidman Law, APC and Paul Haines of Haines Law Group, APC, as Class Counsel for
12 settlement purposes;
- 13 4. Granting final approval of the Stipulation of Settlement of Class and Representative Action
14 and Joint Stipulation Re Parties’ Stipulation and Settlement of Class and Representation
15 Action (collectively “Settlement”);
- 16 5. Approving an award of \$216,666.67 in attorneys’ fees to Class Counsel;
- 17 6. Approving an award of \$20,369.69 in costs to Class Counsel;
- 18 7. Approving an award of \$12,500.00 in costs to CPT Group, Inc. for its settlement
19 administration services;
- 20 8. Approving an enhancement payment of \$5,000.00 to Plaintiff Lazaro Bor for his services as
21 Class Representative;
- 22 9. Approving an award of \$15,000.00 to the Labor & Workforce Development Agency
23 (“LWDA”); and
- 24 10. Entering final judgment in the form of the [Proposed] Order Granting Plaintiff’s Motion for
25 Final Approval of Class Action Settlement and Final Judgment filed concurrently herewith.

26 This Motion is made on the following grounds: (1) the Settlement Class continues to meet the
27 requirements for class certification for settlement purposes only under Code of Civil Procedure § 382;
28 (2) Plaintiff and Class Counsel continue to be adequate representatives of the Settlement Class; (3) the

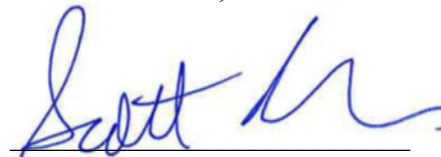
1 Settlement is a fair, adequate, and reasonable compromise of disputed wage and hour claims; (4) the
2 requested awards of attorneys' fees and costs, enhancement payment, LWDA payment, and settlement
3 administration costs are all fair, adequate, and reasonable; and (5) in light of the foregoing, the
4 [Proposed] Order Granting Plaintiff's Motion for Final Approval of Class Action Settlement and Final
5 Judgment submitted concurrently herewith should be entered so as to give finality to, and allow for
6 disbursements from, the Settlement.

7 This Motion is based on this Notice; the attached Memorandum of Points and Authorities; the
8 supporting declarations of Scott M. Lidman, Elizabeth Nguyen, Milan Moore, Paul K. Haines, Lazaro
9 Bor¹, Emilio Cofinco of CPT Group, Inc., and the exhibits attached thereto; the Settlement; all other
10 pleadings and papers on file in this action; and on any further oral or documentary evidence or argument
11 presented at the time of hearing.

12
13 Dated: October 7, 2020

Respectfully Submitted,
LIDMAN LAW, APC

14
15 By:



16 Scott M. Lidman
17 Attorney for Plaintiff
18 LAZARO BOR
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27 ¹ The declaration of Plaintiff Lazaro Bor was originally filed with this Court on June 4, 2020 in
28 connection with the Motion for Preliminary Approval. For the convenience of the Court, Plaintiff has
re-filed his declaration with the instant Motion.

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff Lazaro Bor (“Plaintiff”) submits this memorandum of points and authorities in support
4 of his motion for final approval of the class action settlement (the “Settlement”) with Defendant
5 Alexander Andrew, Inc. dba FallTech (hereinafter “FallTech” or “Defendant”) on behalf of the
6 Settlement Class defined as: “all current and former non-exempt employees employed by Defendant
7 Alexander Andrew, Inc. dba FallTech in the State of California during the period of July 31, 2015
8 through June 26, 2020.” In this non-reversionary Settlement, all participating Settlement Class
9 members will receive **automatic** payments without the need to submit a claim form, resulting in an
10 average settlement payment of approximately \$1,398.76 to each participating Settlement Class
11 member. This is a favorable resolution of the highly disputed wage and hour claims in this case and
12 the significant litigation risks that Plaintiffs faced.

13 Since this Court granted preliminary approval on July 6, 2020, nothing has changed to impact
14 the propriety, fairness, adequacy and reasonableness of the Settlement. In addition, after receiving
15 notice of the Settlement and of their projected Settlement payments, only one (1) Settlement Class
16 member has opted out of the Settlement and not a single Settlement Class member filed an objection
17 to any portion of the Settlement.

18 As explained below, the Court should grant Plaintiff’s motion in its entirety because: (1) the
19 Settlement Class continues to meet the requirements for class certification for settlement purposes
20 under Code of Civil Procedure § 382; (2) the Settlement warrants final approval because it is a fair,
21 adequate, and reasonable compromise of the disputed claims in this case; and (3) the amounts requested
22 for Class Counsel’s attorneys’ fees and costs, Plaintiff’s Class Representative Enhancement Payment,
23 payment to the Labor Workforce Development Agency (“LWDA”), and settlement administration costs
24 are all fair, adequate, and reasonable.

25 In light of the foregoing, Plaintiff respectfully requests that this Court enter the [Proposed]
26 Order Granting Plaintiff’s Motion for Final Approval of Class Action Settlement and Final Judgment
27 submitted concurrently herewith.

28 //

II. FACTUAL AND PROCEDURAL BACKGROUND

On July 31, 2019, Plaintiff filed a putative class action complaint against FallTech in Los Angeles County Superior Court. *See* Declaration of Scott M. Lidman (“Lidman Decl.”), ¶ 10. As part of the Settlement, the Parties agreed that Plaintiff would file a First Amended Complaint which would add claims for failure to provide accurate, itemized wage statements and liability for civil penalties under PAGA. *Id.* On June 29, 2020, pursuant to the Court’s directive during the Motion for Preliminary Approval hearing, Plaintiff served a First Amended Class and Representative Action Complaint via Case Anywhere which the Court then had filed. Plaintiff’s primary allegations are that FallTech: (1) failed to provide all legally required meal periods; (2) failed to authorize and permit all legally required rest periods; (3) failed to pay all final wages upon separation of employment; (4) failed to provide accurate, itemized wage statements; (5) engaged in unlawful business practices, and (6) is liable for civil penalties under the Labor Code Private Attorneys General Act of 2004 (“PAGA”). *Id.*

A. Plaintiff’s Claims

As explained in detail in the Motion for Preliminary Approval, Plaintiff’s primary theories of liability are related to FallTech’s alleged failure to provide Settlement Class members all legally compliant duty-free meal and rest periods. Lidman Decl., ¶¶ 11-20. Specifically, Plaintiff alleges that he and Settlement Class members were not provided with all legally-compliant first meal periods beginning before the end of the fifth hour of work. Lidman Decl., ¶ 11. Specifically, Plaintiff alleges that due to FallTech’s bell signal system related to its meal periods, there was a corresponding result of late, short and otherwise unlawful meal periods. *Id.*

Plaintiff also alleges that he and Settlement Class members were not authorized and permitted to take all required rest periods due to FallTech’s rest period policies and practices that fail to authorize and permit all rest periods for every four hours worked, *or major fraction thereof*. Lidman Decl., ¶ 13. Specifically, Plaintiff alleges that due to FallTech’s bell signal system, the second rest period was only 8 minutes rather than the requisite 10 minutes. *Id.*

As a result of the alleged unpaid meal and rest period premium wages described above, Plaintiff alleges that FallTech issued inaccurate wage statements in violation of Labor Code § 226, failed to pay all wages to Settlement Class members upon their separation of employment, and is thus liable for civil

penalties under the Labor Code Private Attorney General Act (“PAGA”). Lidman Decl., ¶¶ 15-20.

As explained *infra* and in Plaintiff’s Motion for Preliminary Approval, FallTech denies Plaintiff’s claims and asserts several affirmative defenses, both on the merits and with respect to class certification.

B. Mediation and Settlement

After agreeing to participate in an early mediation, FallTech informally produced a sampling of time records and payroll data for the putative class, as well as its wage and hour policies and other relevant documents and information relevant to the claims alleged. Lidman Decl., ¶ 22. After the detailed review of the payroll and time records and other documents and policies produced by FallTech, Class Counsel drew on their extensive experience in similar cases to assess the strengths and weaknesses of Plaintiff’s case. *Id.* This discovery allowed the parties to assess the merits and value of Plaintiff’s claims and FallTech’s defenses thereto, if a settlement could not be reached. *Id.*

On January 14, 2020, after extensive research and analysis, a full-day mediation was held with Jeffrey Krivis, a well-respected wage and hour class action mediator. Lidman Decl., ¶ 23. During mediation, the parties vigorously debated their opposing legal positions, the likelihood of certification of Plaintiff’s claims, and the legal basis for the claims and defenses. *Id.* Ultimately, through a mediator’s proposal, the parties agreed in principle on a class-wide resolution. *Id.* As part of the Settlement, the Parties agreed (and the Court ultimately approved) that Plaintiff would file a First Amended Complaint which would add claims for failure to provide accurate, itemized wage statements and liability for civil penalties under PAGA. *Id.* In the weeks that followed, the parties finalized the terms of settlement and executed the Stipulation of Settlement.

C. Preliminary Approval of Settlement

Plaintiff submitted the Settlement to the Court with his Motion for Preliminary Approval on June 4, 2020. Lidman Decl., ¶ 24. Plaintiff also submitted the Settlement to the LWDA. Lidman Decl., ¶ 38, Exh. D.

At the June 29, 2020 Motion for Preliminary Approval hearing, the Parties and the Court discussed certain changes to Settlement and the Court. On July 1, 2020, the Parties then prepared and executed Joint Stipulation Re Parties’ Stipulation and Settlement of Class and Representation Action

reflecting all of the changes discussed with the Court. *See* Lidman Decl., ¶ 24.

On July 6, 2020, the Court granted preliminary approval of the class action settlement. Lidman Decl., ¶ 24, Exh. A (Order Granting Preliminary Approval). Plaintiff submitted the Order Granting Preliminary Approval on October 5, 2020 to the LWDA. Lidman Decl., ¶ 39, Exh. E.

On July 27, 2020, the Court-approved Legal Notice was sent to 273 Settlement Class members. The Settlement Class members had until September 25, 2020 to submit disputes, objections, and/or requests for exclusion. *See* Declaration of Emilio Cofinco of CPT Group, Inc. (“Cofinco Decl.”), ¶ 8. As of the date of this filing, there have been **no objections, no disputes** and **only one (1) opt-out.** *Id.*, ¶¶ 12-15. Plaintiff now respectfully submits the Settlement for this Court’s final approval.

III. SUMMARY OF THE SETTLEMENT AND NOTICE PROCESS

A. Settlement Class Definition

The Settlement Class encompasses “current and former non-exempt employees employed by Defendant in the State of California during the period of July 31, 2015 through June 26, 2020.” Lidman Decl., ¶ 25.

B. Monetary Terms of the Settlement

The Settlement requires FallTech to pay a Class Settlement Amount (“CSA”) of \$650,000.00. Cofinco Decl., ¶ 17. The Net Settlement Amount (“NSA”) is the amount remaining from the CSA after deducting requested attorneys’ fees (\$216,666.67) and verified costs (\$20,369.69), proposed Class Representative Enhancement to Plaintiff (\$5,000.00), Settlement Administration costs (\$12,500.00), and PAGA payment to the LWDA (\$15,000.00). Based on these requested amounts, the NSA is calculated to be approximately \$380,463.64. Cofinco Decl., ¶ 19; Lidman Decl., ¶ 33, Exh. B.

To determine each Class Member’s Individual Settlement Payment, the Settlement Administrator will use the following formula: Individual Settlement Payment = (Individual Shifts ÷ Class Shifts) x Net Settlement + the pro rata share of any unclaimed Individual Settlement Payment from those Class Member(s) who submit a timely and valid Request for Exclusion. *See* Joint Stipulation re Parties’ Stipulation and Settlement of Class and Representation Action.

1 All Individual Settlement Payments will be allocated as follows: one-third (1/3) of each
2 Individual Settlement Payment will be allocated as wages and two-thirds (2/3) will be allocated as non-
3 wages, including penalties and interest. Settlement, ¶ XII.²

4 **C. Summary of Notice Process**

5 **1. *Mailing of Notice Packets***

6 On July 20, 2020, FallTech provided CPT Group, Inc. (“CPT”) with data files that included
7 each Class Member’s full name, last known mailing address, last known telephone number, Social
8 Security number, dates of employment, approximate number of shifts worked during the Class Period
9 and any other relevant information needed to calculate settlement payments. Cofinco Decl., ¶ 6. After
10 performing address updates and verifications, CPT mailed the Legal Notice to the 273 Settlement Class
11 members on July 27, 2020. *Id.*, ¶¶ 7-8. Following the initial mailing, eight (8) Legal Notices were
12 returned to CPT as undeliverable. *Id.*, ¶ 9. As a result of a skip trace, forwarding address provided by
13 the Post Office, or re-mail requests from Counsel or Class Members, eight (8) Legal Notices were re-
14 mailed. *Id.*, ¶ 11. As of the date of filing this final approval motion, three (3) Legal Notices remain
15 undeliverable with no forwarding address, and where no new address could be located through skip
16 trace. *Id.*, ¶ 12.

17 Settlement Class members had until September 25, 2020 to submit objections, requests for
18 exclusion, or disputes. Cofinco Decl., ¶ 8.

19 As of the date of this filing, there were no objections, no disputes, and only one (1) Settlement
20 Class member has elected to opt-out of the Settlement. *Id.*, ¶¶ 10-16. Accordingly, as of the date of
21 this Motion, the participation rate amongst the Settlement Class members is 99.63% and the average
22 estimated payment is \$1,398.76, with the highest estimated payment to a Settlement Class member
23 being \$4,622.42. *Id.*, ¶¶ 11-19.

24 **D. Timing of Payments**

25 Within ten (10) business days of the Effective Date³ of the Settlement, Defendant will deposit

26
27 ² FallTech will pay the employer’s share of payroll taxes separately and apart from the Class Settlement Amount.
See Settlement, ¶ I.J; Cofinco Decl., ¶ 17.

28 ³ Effective date is the date on which the Final Award becomes final. For purposes of this Section, the Final Award
“becomes final” only after the Court grants the Motion for Final Approval and upon the latter of: (i) if no appeal

the Class Settlement Amount into a Qualified Settlement Account to be established by the Settlement Administrator. Within seven (7) calendar days of the full funding of the Settlement, the Settlement Administrator will issue payments to: (a) Class Members; (b) the LWDA; (c) Plaintiff; and (d) Class Counsel. The Settlement Administrator will also issue a payment to itself for Court-approved services performed in connection with the Settlement. *See* Settlement, ¶ II.

E. Uncashed Funds

The Settlement provides that Settlement Class members with 180 days from the date the Settlement Administrator mails the checks and any funds remaining after 180 days shall be transmitted by the Settlement Administrator to the California State Controller's Office under the unclaimed property laws in the names and corresponding amounts associated with each Settlement Class member. Settlement ¶ IX.k; Lidman Decl., ¶ 26.

IV. ARGUMENT

A. This Court Should Confirm its Conditional Certification of the Settlement Class for Settlement Purposes Because It Meets All of the Requirements for Class Certification Under Code of Civil Procedure § 382

Under Code of Civil Procedure § 382, a class may be certified if: (1) it is ascertainable and its members are too numerous for joinder to be practical; (2) the representative and absent class members share a community of interest, and questions of law and fact common to the class predominate over questions unique to individual class members; (3) the representative's claims are typical of the class' claims; and (4) the representative will fairly and adequately represent the class' interests. *See Richmond v. Dart Industries, Inc.* (1981) 29 Cal.3d 462, 470.

Here, this Court found that the Settlement Class meets all the requirements for class certification for settlement purposes when it granted preliminary approval of the Settlement on July 6, 2020. *See* Lidman Decl., ¶ 28; Exh. A. Subsequent to the Court's order granting preliminary approval, no events have cast doubt on the propriety of this determination, and in fact, the reaction of the Settlement Class

is filed, the expiration date of the time for the filing or noticing of any appeal from, or other challenge to, the Order Granting Final Approval (this time period shall not be less than 60 calendar days after the Court's Order is entered); (ii) the date of affirmance of an appeal of the Order Granting Final Approval becomes final under the California Rules of Court; or (iii) the date of final dismissal of any appeal from the Order Granting Final Approval or the final dismissal of any proceeding on review of any court of appeal decision relating to the Order Granting Final Approval. *See* Settlement, ¶ I.K.

members thus far to the Settlement has been strongly in support of the Settlement, with no Settlement Class members objecting to any portion of the Settlement and only one Settlement Class member electing to opt-out of the Settlement. *See* Cofinco Decl., ¶¶ 12-15. This Court should therefore confirm its conditional certification of the Settlement Class.

B. This Court Should Finally Approve the Settlement Because it is a Fair, Adequate, and Reasonable Compromise of Disputed Wage and Hour Claims

California courts have a strong policy in favor of settlement. *See, e.g., Stambaugh v. Superior Court*, 62 Cal.App.3d 231, 236 (1976). Unlike individual settlements, class action settlements involve a court approval process that exists to prevent fraud, collusion, and unfairness to class members. *Malibu Outrigger Bd. of Governors v. Superior Court*, 103 Cal.App.3d 573, 578-79 (1980). This approval process consists of preliminary settlement approval, notice being given to class members, and a final fairness and approval hearing being held, at which class members have the opportunity to be heard with respect to the settlement. *Id.* Now that notice has been provided to the Settlement Class, Plaintiff respectfully requests that the Court finally approve the Settlement as fair, adequate, and reasonable.

1. The Settlement was Reached at Arm's-Length, Through Experienced Counsel and an Experienced Mediator, and Was Based on Sufficient Information to Intelligently Negotiate a Fair Settlement in Light of the Claims Asserted and Risks of Continued Litigation

A settlement is presumptively fair where it is reached through arm's-length bargaining, based on sufficient discovery and investigation to allow counsel and the court to act intelligently, counsel is experienced in similar litigation, and the percentage of objectors to the settlement is small. *Dunk v. Ford Motor Co.*, 48 Cal.App.4th 1794, 1802 (1996). In deciding whether to approve a proposed settlement, a trial court has broad powers to determine if the proposed settlement is fair under the circumstances of the case. *Mallick v. Superior Court*, 89 Cal.App.3d 434, 438 (1979). In exercising these powers, the overriding concern is to ensure that a proposed settlement is "fair, adequate, and reasonable." *Dunk, supra*, 48 Cal.App.4th at 1801 (internal quotations omitted). Relevant factors for the Court to consider include, but are not limited to:

[T]he strength of plaintiffs' case, the risk, expense, complexity and likely duration of further litigation, the risk of maintaining class action status through trial, the amount offered in settlement, the extent of discovery completed and the stage of the

proceedings, the experience and views of counsel, the presence of a governmental participant, and the reaction of the class members to the proposed settlement.

Id. These factors require balancing, are non-exhaustive and, as such, trial courts should tailor the factors to each case and give due regard to “what is otherwise a private consensual agreement between the parties.” *Id.*

“In the context of a settlement agreement, the test is not the maximum amount plaintiffs might have obtained at trial on the complaint, but rather whether the settlement is reasonable under all of the circumstances.” *Wershba v. Apple Computer, Inc.*, 91 Cal.App.4th 224, 250 (2001). Because settlements inherently involve compromise, even settlements providing for substantially narrower relief than likely would be obtained if the suit were successfully litigated can be reasonable because, “the public interest may indeed be served by a voluntary settlement in which each side gives ground in the interest of avoiding litigation.” *Id.* (quoting *Air Lines Stewards, etc., Local 550 v. American Airlines, Inc.*, 455 F.2d 101, 109 (7th Cir. 1972)).

Here, the Settlement resulted from extensive arm’s length settlement negotiations between qualified and experienced counsel, with the assistance of a well-respected mediator, and is fair, adequate, and reasonable for all Settlement Class members. While Plaintiff maintains that his claims are meritorious, Plaintiff acknowledges that his position includes substantial risks and uncertainty, which justifies a downward departure from the maximum exposure that Plaintiff’s calculated each claim carried.

As detailed in Plaintiff’s Motion for Preliminary Approval, there is significant risk of non-certification and/or not prevailing on the merits with respect to each of Plaintiff’s claims. For example, with respect to Plaintiff’s meal period claim, FallTech counters that it has always provided non-exempt employees with an opportunity to take legally compliant meal periods, and any non-compliant meal periods reflected in employee timekeeping records were solely the result of employee choice, rather than any policy or practice of FallTech. Lidman Decl., ¶ 12. FallTech points out that under *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal. 4th 1004, it is only required to “provide” the opportunity to take meal periods, not “ensure” meal periods are taken, and that they have always done so. *Brinker, supra*, 53 Cal.4th at 1038 (rejecting “ensure” standard). FallTech also contends that it

1 changed certain practices that would resolve any meal period issues, if any at all. Finally, FallTech
2 contends Plaintiff’s meal period claim is not suited for class certification, since individual inquiries
3 would be required to assess which employees took non-compliant meal periods, how many meal
4 periods were non-compliant or missed, and the reasons why a particular employee took what appeared
5 in the time records to be a non-compliant meal period or missed a meal period during a particular shift.
6 *Id.*

7 As for Plaintiff’s rest period claim, FallTech contends it has always maintained and enforced
8 lawful rest period policies and practices, and that Settlement Class Members were authorized and
9 permitted to take all off-duty rest periods in compliance with California law. Lidman Decl., ¶ 14.
10 FallTech contends its bell signal provides 10 minutes rest periods. *Id.* Further, FallTech argues that
11 Plaintiff’s rest period claim is inherently unsuited for class treatment as it requires an individualized
12 inquiry into whether each Settlement Class Member was in fact authorized and permitted to take a
13 compliant rest period, which would devolve into an unmanageable series of mini-trials. *Id.*

14 As for Plaintiff’s wage statement claim, FallTech argues that meal and rest period claims cannot
15 support a claim for wage statement penalties after *Naranjo v. Spectrum Security Services, Inc.* (2019)
16 40 Cal. App. 5th 444, review granted and *Kirby v. Immoos Fire Protection, Inc.* (2012) 53 Cal.4th 1244
17 (see, e.g., *Jones v. Spherion Staffing*, No. LA-CV-11-06462-JAK(JCx) (C.D. Cal. 2012) 2012 WL
18 3264081 at **8-9). Lidman Decl., ¶ 16. FallTech further argues that its alleged wage statement
19 violations could not be shown to be “knowing and intentional,” and that Plaintiff cannot show that he
20 or any other employee “suffer[ed] injury” as a result of the alleged wage statement violations, as
21 required by Lab. Code § 226(e) for imposition of penalties. *Id.*

22 As for Plaintiff’s waiting time penalties, FallTech asserts it has strong defenses to the waiting
23 time claim because there exist good-faith disputes as to Plaintiff’s underlying claims, precluding
24 imposition of penalties. Lidman Decl., ¶ 18. *See also* 8 Cal. Code Regs. § 13520 (a “good faith dispute
25 that any wages are due will preclude imposition of waiting time penalties”); *Kao v. Joy Holiday*, 12
26 Cal.App.5th 947, 963 (2017) (holding that “good faith dispute” over whether employee was exempt
27 precluded imposition of waiting time penalties over contested wages owed). *Id.*

28 Lastly, since Plaintiff’s PAGA claim is a derivative claim based on the underlying claims,

1 FallTech asserts the PAGA claim would fail with those claims. Lidman Decl., ¶ 20. FallTech also
2 maintains that given its good faith defenses, this Court would exercise its discretion to substantially
3 reduce any PAGA penalties if it were to find FallTech liable for any of Plaintiff's claims. *Id.*

4 These considerations, not only bore heavily on the negotiations leading to the Settlement, but
5 also confirm that the Settlement is fair, adequate, and reasonable compromise in view of the risks of
6 further litigation. Lidman Decl., ¶ 21. As detailed in Plaintiff's Motion for Preliminary Approval,
7 Plaintiff carefully vetted the claims at issue and conducted a detailed statistical analysis of class-wide
8 data to arrive at the calculated damages figures. Thus, while these risks are far from exhaustive, they
9 demonstrate that the Settlement is fair, adequate, and reasonable in view of them. *Id.*

10 **2. *The Settlement Fairly, Reasonably, and Adequately Compensates Class***
11 ***Members Because Each Participating Class Member Will Be Paid Based on***
the Extent of His or Her Injury

12 Individual settlement payments will be calculated based on the number of shifts worked by each
13 Settlement Class member. *See* Settlement ¶ VIII. This method of distribution compensates Settlement
14 Class members based on the estimated extent of their injuries, as Settlement Class members who
15 worked more shifts, would have been subject to more of the alleged wage and hour violations than
16 those who worked fewer shifts. Thus, the formula for compensating Settlement Class members is fair,
17 adequate, and reasonable, as it is tethered to the damages and penalties that could be recovered by them.

18 **3. *The 99.63% Participation Rate and Absence of Any Objections Further***
Confirms that the Settlement is Fair, Adequate, and Reasonable

19 Class members' response to a settlement is relevant in evaluating whether it merits final
20 approval. *Dunk, supra*, 48 Cal.App.4th at 1801. The lack of objections and requests for exclusion
21 supports a fairness presumption. *See 7-Eleven Owners for Fair Franchising v. Southland Corp.* (2000)
22 85 Cal.App.4th 1135, 1152-53 (finding 9 objections and 80 opt-outs from a class of 5,454 showed a
23 "particularly impressive" favorable response from class members). Here, as of the filing of this Motion,
24 not a single Settlement Class member has objected to the Settlement, only one (1) Settlement Class
25 member has elected to opt-out, and only two (2) of the 273 Legal Notices were returned undeliverable.
26 Cofinco Decl., ¶¶ 12-17. The extremely favorable response of the Settlement Class further confirms
27 that the Settlement is fair, adequate, and reasonable.

1 **C. The Requested Award of Attorneys’ Fees is Reasonable as a Percentage of the**
2 **Common Fund Confirmed by a Lodestar Cross-Check**

3 Plaintiff and the Settlement Class, as the prevailing parties in settlement, are entitled to recover
4 their attorneys’ fees and costs for their wage claims. *See* Lab. Code §§ 218.5, 226(e) and 2699(g). A
5 fee award is justified where the legal action has produced its benefits by way of a voluntary settlement.
6 *See, e.g., Maria P. v. Riles*, 43 Cal.3d 1281, 1290-91 (1987); *Westside Community for Independent*
7 *Living, Inc. v. Obledo*, 33 Cal.3d 348, 352-53 (1983). When a settlement results in a common fund for
8 the benefit of a class, class counsel may be awarded fees as a percentage of the common fund. *See*
9 *Wershba, supra*, 91 Cal.App.4th at 254 (recognizing the “percentage of recovery” method). The
10 California Supreme Court confirmed in *Laffitte v. Robert Half Int’l, Inc.*, 1 Cal.5th 480, 506 (2016),
11 that “[t]he percentage of fund method survives in California class action cases.” Specifically, the
12 *Laffitte* Court held:

13 The recognized advantages of the percentage method—including relative ease of
14 calculation, alignment of incentives between counsel and the class, a better
15 approximation of market conditions in a contingency case, and the encouragement it
16 provides counsel to seek an early settlement and avoid unnecessarily prolonging the
17 litigation—convince us the percentage method is a valuable tool that should not be
18 denied our trial courts.”

19 *Id.* at 503 (internal citation omitted); *see also, e.g., Serrano v. Priest*, 20 Cal.3d 25, 34 (1977) (“when
20 a number of persons are entitled in common to a specific fund, and an action brought by a plaintiff or
21 plaintiffs for the benefit of all results in the creation or preservation of that fund, such plaintiff or
22 plaintiffs may be awarded attorney’s fees out of the fund.”); *Serrano v. Unruh*, 32 Cal.3d 621, 627
23 (1982) (in awarding a fee from the common fund obtained for the benefit of all parties, the trial court
24 acts within its equitable power to prevent the other parties’ unjust enrichment.); *Rawlings v. Prudential-*
25 *Bache Properties, Inc.*, 9 F.3d 513, 516 (6th Cir. 1993) (the percentage of the fund method for
26 calculating attorneys’ fees more accurately reflects the results achieved for the putative class than the
27 lodestar method and “establishes reasonable expectations on the part of plaintiffs’ attorneys as to their
28 expected recovery; and it encourages early settlement, which avoids protracted litigation.”); *In re Rite*
 Aid Corp. Securities Litigation, 396 F.3d 294, 300 (3rd Cir. 2005) (“The percentage-of-recovery
 method is generally favored in common fund cases because it allows courts to award fees from the fund
 ‘in a manner that rewards counsel for success and penalizes it for failure.’”) (citation omitted).

1 *Laffitte* also held that trial courts have discretion to assess reasonableness of fee awards with
2 tools such as the “lodestar cross-check,” whereby the trial court calculates class counsel’s lodestar
3 (hours worked multiplied by hourly rate) and determines whether the “lodestar multiplier” needed to
4 bring the lodestar on par with the percentage of recovery is reasonable. *Laffitte* at 503-06. While a
5 trial court may utilize the lodestar cross-check, it need not do so. *Id.* at 506 (“[w]e hold further that
6 trial courts have discretion to conduct a lodestar cross-check on a percentage fee, as the court did here;
7 they also retain the discretion to forgo a lodestar cross-check and use other means to evaluate the
8 reasonableness of a requested percentage fee.”)

9 Here, Class Counsel’s fee request of \$216,666.67 (one-third of the Class Settlement Amount)
10 is fair and reasonable based on a percentage of the recovery confirmed with a lodestar cross-check.
11 First, “regardless whether the percentage method or the lodestar method is used, fee awards in class
12 actions average around one-third of the recovery.” *Chavez v. Netflix, Inc.*, 162 Cal.App.4th 43, 66, n.11
13 (2008); *see also, e.g., Cicero v. DirectTV, Inc.*, No. EDCV 07-1182, 2010 WL 2991486 at * 7 (C.D.
14 Cal. July 27, 2010) (observing that “30-50% [is] commonly awarded in cases in which the common
15 fund is relatively small” and that in California, “courts usually award attorneys’ fees in the 30-40%
16 range in wage and hour class actions...”); *Williams v. Costco Wholesale Corp.*, No. 02-cv-2003 IEG
17 (AJB), 2010 WL 2721452 at * 6 (S.D. Cal. July 7, 2010) (collecting cases where courts awarded
18 between 33.33% and 40% in attorneys’ fees in wage and hour class actions). This is also consistent
19 with Class Counsel’s experience in similar wage and hour class action matters. *See* Lidman Decl., ¶
20 27. Thus, the percentage sought by Class Counsel here (the same percentage sought by class counsel
21 in *Laffitte*) is reasonable.

22 Next, as stated, under the lodestar method the court computes the “lodestar” amount by
23 multiplying the number of hours reasonably expended by each attorney or legal staff member by their
24 reasonable hourly rates. *See, e.g., Serrano v. Priest* 20 Cal.3d 25, 48 (1977). The court then enhances
25 this lodestar figure by a “multiplier” to account for a range of factors, such as the novelty and difficulty
26 of the case, its contingent nature, and the degree of success achieved. *Id.* at 49; *Ketchum v. Moses*, 24
27 Cal.4th 1122, 1132-36 (2001); *Thayer v. Wells Fargo Bank*, 92 Cal.App.4th 819, 834 (2001) (“There
28 is no hard-and-fast rule limiting the factors that may justify an exercise of judicial discretion to increase

or decrease a lodestar calculation”).

Under California law, lodestar multipliers can range from 2 to 4 or even higher. *See, e.g., Chavez, supra*, 162 Cal.App.4th at 49-50 (approving multiplier of approximately 2.5); *City of Oakland v. Oakland Raiders*, 203 Cal.App.3d 78 (1988) (approving multiplier of ~2.34); *Coalition for L. County Planning etc. Interest v. Bd. of Supervisors*, 76 Cal.App.3d 241, 251 (1977) (approving multiplier of ~2.04). In class actions such as this one, where the value of the benefit conferred to the class “can be monetized with a reasonable degree of certainty,” a court may “adjust the lodestar in comparison to a percentage of the common fund to ensure that the fee awarded is reasonable and within the range of fees freely negotiated in the legal marketplace in comparable litigation.” *Consumer Privacy Cases*, 175 Cal.App.4th 545, 557 (2009). In doing so, “the court determines, retrospectively, whether the litigation involved a contingent risk or required extraordinary legal skill justifying augmentation of the unadorned lodestar in order to approximate the fair market for such services.” *Id.* at 556; *see also Laffitte, supra*, 1 Cal.5th at 503-05.

In this case, Class Counsel have a lodestar of \$131,272.50, which results in a multiplier of approximately 1.65 compared to the \$216,666.67 fee request. Lidman Decl., ¶ 32. A summary showing the number of hours of work performed by each attorney and paralegals is set forth below. The billing rates used are reasonable especially in light of the hourly rates identified based on years of experience in the *Laffey* Matrix, submitted concurrently herewith. *Id.*, at ¶ 33, Exh. C.

Name	Rate	Hours	Pre-Multiplier Lodestar
Scott M. Lidman (22nd Year Attorney)	\$750	67.4	\$50,550.00
Elizabeth Nguyen (15th Year Attorney)	\$650	58.3	\$37,895.00
Paul K. Haines (14th Year Attorney)	\$650	22.7	\$14,755.00
Milan Moore	\$400	59.9	\$23,960.00

(5th Year Attorney)			
Paralegals	\$175	23.5	\$4,112.50
Total Lodestar			\$131,272.50

The fee award requested here is justified because Class Counsel achieved a significant monetary recovery for the Settlement Class in an uncertain and risky case, while bearing the substantial burdens of representation on a contingency basis, and the fees requested are in line with the market rate. *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1048-51 (9th Cir. 2002) (finding that exceptional results in a contingency case, significant risk and the absence of supporting precedents, are proper considerations in awarding attorneys' fees). First, Class Counsel negotiated a substantial recovery for the Settlement Class, resulting in a current participation rate of 99.63%, and not a single Settlement Class member has objected to the Settlement or to Class Counsel's requested fees as of the date of this filing. *See* Cofinco Decl., ¶¶ 11-16. Additionally, the *average* settlement payment in this case of approximately \$1,398.76 is in line with, and above, settlement payments in similar wage and hour class action settlements. *See, e.g., Sorenson v. PetSmart, Inc.*, Case No. 2:06-CV-02674-JAM-DAD (E.D. Cal. 2008) (wage and hour class action settlement approved where average class member recovery was approximately \$60); *Schiller v. David's Bridal, Inc.*, No. 1:10-cv-00616-AWI-SKO, 2012 WL 2117001, at *17 (E.D. Cal. 2012) (finding that average payment to class members of less than \$200 was a "good" result); *Williams v. Centerplate, Inc.*, Nos. 11-CV-2159-H-KSC, 12-CV-0008-H-KSC, 2013 WL 4525428, at *4 (S.D. Cal. 2013) (granting final approval of class action settlement where average recovery for each class member was approximately \$108). The fact that Class Counsel achieved these results without engaging in a protracted legal battle, in the face of serious defense challenges and an uncertain legal landscape confirms the strength of the results achieved.

As discussed above, this case presented significant risk as to both class certification and merits considerations. Accordingly, it is fair and reasonable to account for these risks in compensating Class Counsel. Class Counsel should also be compensated for the risks involved in undertaking this litigation and expending considerable effort, all while working on a pure contingency basis. Since undertaking representation of Plaintiff, Class Counsel have borne all the costs of litigation without receiving any

1 compensation for over one year of work. Lidman Decl., ¶ 28. During this time, Class Counsel have
2 expended \$19,369.69, in actual costs, have devoted substantial time to this litigation and expect to incur
3 approximately \$1,000.00 in future costs for filing the instant motion, filing the final declaration
4 regarding distribution of settlement, CaseAnywere fees, service and messenger fees, postage fees,
5 parking, mileage, and/or LACourtConnect costs for future appearances. Lidman Decl., ¶ 29, Exh. B.
6 Class Counsel's efforts have included conducting pre-filing investigation, analyzing Plaintiff's claims,
7 conducting legal research, reviewing FallTech's documents and policies, analyzing timekeeping data
8 and payroll records, creating a comprehensive damages model, preparing for and attending mediation,
9 negotiating and preparing the long-form Settlement Agreement and Joint Stipulation to the Settlement
10 Agreement, preparing the Motions for Preliminary and Final Approval, overseeing the settlement
11 administration process, and otherwise litigating this case. *See* Lidman Decl., ¶ 28. Given the
12 considerable potential for adverse outcomes in this case, including, but not limited to losing on class
13 certification and/or merits issues., the contingent risk borne by Class Counsel was great. Lidman Decl.,
14 ¶ 31.

15 Class Counsel's previous experience in litigating wage and hour class actions also supports the
16 reasonableness of the fee request. Class Counsel are well-versed in plaintiff and defense-side wage
17 and hour class action litigation, with substantial experience litigating claims for meal and rest period
18 violations, and related penalties. *See* Lidman Decl., ¶¶ 3-8; Declaration Elizabeth Nguyen ("Nguyen
19 Decl."), ¶¶ 3-8; Declaration of Paul K. Haines ("Haines Decl."), ¶¶ 3-8. They have been certified as
20 class counsel in numerous other cases. *Id.* Their experience in similar matters was integral in
21 evaluating the strengths and weaknesses of the case against FallTech and the reasonableness of the
22 Settlement. *See* Lidman Decl., ¶ 34. Practice in the narrow field of wage and hour litigation requires
23 skill and knowledge concerning the rapidly evolving substantive state and federal law, as well as the
24 procedural law of class action litigation. *Id.* Because it is reasonable to compensate Class Counsel
25 commensurate with their skill, reputation, and experience, a fee award of one-third of the Class
26 Settlement Amount is reasonable.

27 Other factors also show that the fee amount requested in this case is reasonable under the
28 circumstances. This case involved nuanced legal issues including questions surrounding FallTech's

obligation to “provide” meal periods and “authorize and permit” rest periods, and the propriety of statutory penalties, to name just a few. Lidman Decl., ¶¶ 11-20. Thus, Class Counsel’s requested fee award is fair, reasonable, and adequate and should be approved.

D. The Requested Cost Amount Warrants Final Approval as Fair, Adequate, and Reasonable

Class Counsel have incurred \$20,369.69 (including anticipatory fees and expenses related to the instant motion and other future activity in this case) in litigation costs. Class Counsel’s request is fair, adequate, and reasonable, as all of these costs are documented and reasonably incurred. *See* Lidman Decl., ¶ 29; Exh. B. Moreover, the costs Plaintiff seeks are the types of costs routinely approved by courts. *See, e.g., Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994) (counsel should recover “those out-of-pocket expenses that would normally be charged to a fee paying client”); *Ashker v. Sayre*, No. 05-03759 CW, 2011 WL 825713, at * 3 (N.D. Cal. 2011)(“costs of reproducing pleadings, motions and exhibits are typically billed by attorneys to their fee-paying clients” and are reimbursable); *Trustees of Const. Industry & Laborers Health and Welfare Trust v. Redland Ins. Co.*, 460 F.3d 1253, 1258-59 (9th Cir. 2006) (legal research costs are reimbursable); *In re Immune Response Securities Litigation*, 497 F. Supp. 2d 1166, 1177-78 (S.D. Cal. 2007) (mediation expenses, consultant and expert fees, legal research, copies, postage, filing fees, messenger and overnight delivery costs are reimbursable). Because the expense reimbursements requested by Class Counsel were reasonably incurred, and no Settlement Class member has objected to them, Plaintiffs respectfully request the Court should grant the request for actual costs incurred.

E. The Court Should Finally Approve the Requested Administration Costs

Plaintiffs also request that the Court approve \$12,500.00 in administration costs to the Settlement Administrator, CPT Group, Inc. As detailed in the declaration of Emilio Cofinco on Behalf of CPT Group, Inc. submitted herewith, CPT performed duties in connection with this Settlement that were integral in effectuating the Settlement and the Notice process. Among other things, CPT calculated each Settlement Class member’s individual settlement payment, updated addresses contained in the class data supplied by FallTech, formatted and translated Legal Notices for mailing, mailed Legal Notices to all 273 Settlement Class members, kept the parties informed of any objections

1 or requests for exclusion, and have otherwise administered the Settlement. *See* Cofinco Decl., ¶¶ 2-20.

2 For these reasons, CPT's requested costs are fair, reasonable, and adequate, and should be
3 finally approved.

4 **F. This Court Should Finally Approve Plaintiff's Requested Enhancement Payment**
5 **Because It Is Fair, Adequate, and Reasonable in View of Plaintiff's Efforts and the**
6 **Risks that He Assumed on Behalf of the Class**

7 Courts routinely approve service payments to compensate named plaintiffs for the services they
8 provide and the risks they incur during class action litigation. *See, e.g., Bell v. Farmers Ins. Exchange*,
9 115 Cal.App.4th 715, 726 (2004) (upholding "service payments" to named plaintiffs for their efforts in
10 bringing the case); *Van Vranken v. Atlantic Richfield Co.*, 901 F. Supp. 294 (N.D. Cal. 1995) (approving
\$50,000 service payment).

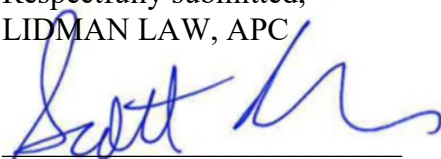
11 Here, Plaintiff seeks an enhancement payment of \$5,000.00, and believes this request is
12 reasonable given Plaintiff's efforts in this case and the risks he undertook on behalf of Settlement Class
13 members. *Lidman Decl.*, ¶ 37; Declaration of Lazaro Bor ("Bor Decl."), ¶ 3; Plaintiff gathered
14 documents for use in the lawsuit, and attended several meetings with Class Counsel discussing the case,
15 the merits, the defenses, and the overall fairness of the settlement reached. *See* *Lidman Decl.*, ¶ 37;
16 *Bor Decl.*, ¶ 5. Moreover, after receiving notice of the proposed Class Representative Enhancement
17 Payment for Plaintiff, no Settlement Class member has objected to the proposed award, as of the date
18 of this filing. *See* Cofinco Decl., ¶ 15. Thus, the enhancement payment to Plaintiff is appropriate and
19 justified as part of the Settlement and should be finally approved.

20 **V. CONCLUSION**

21 For the reasons stated herein, Plaintiff respectfully submit that this Court should grant Plaintiff's
22 motion in its entirety and adopt the [Proposed] Order Granting Plaintiff's Motion for Final Approval
23 of Class Action Settlement and Final Judgment submitted herewith.

24 Dated: October 7, 2020

Respectfully submitted,
LIDMAN LAW, APC

26 By: 

27 Scott M. Lidman
Attorney for Plaintiff
28 LAZARO BOR