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SUPERIOR COURT OF CALIFORNIA

FOR THE COUNTY OF ORANGE

MANUEL GUTIERREZ, on behalf of himself
and all others similarly situated,

Plaintiff,

v.

KITE ELECTRIC INCORPORATED, a
California corporation; and DOES 1 through 10,
Inclusive,

Defendants.

CASE NO. 30-2020-01133960-CU-OE-CXC
ASSIGNED FOR ALL PURPOSES TO:

The Honorable Peter J. Wilson
Department CX 102

CLASS ACTION

**POINTS AND AUTHORITIES IN
SUPPORT OF MOTION FOR ORDER
GRANTING FINAL APPROVAL OF
CLASS ACTION SETTLEMENT AND
ENTERING JUDGMENT**

Hearing Set by Court
(03/04/2022 Order - ROA 137)

Date: July 7, 2022
Time: 2:00 p.m.
Dept: CX 102
Judge: Honorable Peter J. Wilson

Filed: February 24, 2020
Trial date: Not set

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I. INTRODUCTION

Plaintiff seeks final approval of a non-reversionary wage and hour class and Private Attorneys General Act (PAGA) settlement of \$458,991 - \$220,000 new money and \$238,991 paid in May 2020, three months after the action was filed. The proposed Settlement will benefit 100 electricians employed by Kite Electric, Inc. (“Kite”) in California at any time from February 24, 2016 to February 19, 2021 (“Class Period”). Declaration of Jeff Geraci, (“Geraci Decl.”), ¶11.

The Court-approved Notice Packet (in English and Spanish) was mailed informing Class Members of their rights and benefits, including estimated Settlement Payment amount, and the right to request exclusion, dispute workweeks, or file a written objection to the Settlement, within 45 days. Declaration of Nathalie Beltran, ILYM Group, Inc. (“ILYM Decl.”), ¶7, Exh. A. Support for the Settlement is strong. No Class Member objected or opted out. ILYM Decl. ¶¶11, 12; Geraci Decl. ¶12.

II. THE PARTIES, CLASS, AND AGGRIEVED EMPLOYEES

A. Plaintiff and Defendant

Kite is an electrical contractor that began in 2000 in Irvine, California. It performs work on new multi-family projects Orange County. Geraci Dec ¶13. Plaintiff Manual Gutierrez worked for Kite as an electrician from June to October 2019, and was paid on a piece-rate basis. Geraci Decl. ¶14.

B. The Class and Aggrieved Employees

The Class is, “all persons employed by Kite in California as non-exempt electricians at any time during the period from February 24, 2016 through February 19, 2021.” Geraci Decl. ¶15. The 100 Class Members worked an estimated 12,436 workweeks in the Class Period; 78 aggrieved employees worked 3,061 Pay Periods from December 21, 2018 to February 19, 2021 (“PAGA Period”). *Id.*

III. PROCEDURAL HISTORY, INVESTIGATION AND INFORMAL DISCOVERY

On October 16, 2019, Plaintiff’s counsel formally requested his personnel file and obtained job applications, schedules, and time and pay records. Geraci Decl. ¶16. Kite produced the documents in November 2019. In January 2020, Plaintiff filed Labor and Workforce Development Agency (LWDA) charges. On February 24, 2020, Plaintiff filed this lawsuit. Plaintiff filed a First Amended Complaint alleging Kite failed to provide (1) minimum/overtime wages; (2) rest periods; (3) final wages; (4) accurate wage statements; which violated (5) the UCL, and, (6) PAGA. Geraci Decl. ¶17.

1 By the end of May 2020, after receiving LWDA charges and being served with the Action, Kite
2 paid 98 Class Members for past damages based on the number of weeks each was paid with piece-rate
3 wages, a total of \$238,991, in exchange for purported releases of the claims alleged. Geraci Decl. ¶18.

4 In January 2020, Kite's new payroll provider, Heartland Payroll, began correctly calculating
5 piecework wages, separately paying for rest periods and non-productive time. Geraci Decl. ¶19.

6 Plaintiff served Kite with form interrogatories (employment), special interrogatories, requests for
7 admission, and requests for production of documents, and a notice of taking deposition of Kite's person
8 most qualified about topics relevant to the allegations. Geraci Decl. ¶20.

9 During discussions regarding outstanding discovery responses, the Parties agreed to mediate, and
10 Kite informally produced over 2,000 pages of documents and data for the relevant time period,
11 including: (a) Employee Handbooks (in English and Spanish); (b) documents to determine number of
12 Class Members, including current and former employees; (c) aggregate number of Work Weeks; (d)
13 aggregate number of Pay Periods during the PAGA Period; (e) a breakdown of pay periods in which at
14 least some piece work was performed; (f) wage statements and time sheets for each Pay Period for each
15 Class Member from February 24, 2016 to May 2020, (g) Pick Up Stix settlement agreements and
16 releases; and (h) unredacted spreadsheets reflecting \$238,991 in Pick Up Stix payments to 98 Class
17 Members, ranging from \$350 to \$10,900, in exchange for purported releases; and (i) detailed
18 information showing how payments were calculated. Geraci Decl. ¶21. (Kite could not locate two Class
19 Members who worked briefly in 2016, whose payments would have been \$200 and \$350. Plaintiff's
20 payment, \$2,020, was calculated, but not paid. Geraci Dec. ¶22.)

21 **IV. PLAINTIFF'S CONTENTIONS AND KITE'S DEFENSES**

22 Plaintiff contended employees performing piece work were not compensated for time in which
23 piece-rate wages could not be earned, or for rest periods. *Armenta v. Osmose*, 135 Cal.App.4th 314,
24 322-24 (2005); *Gonzalez v. Downtown LA Motors, LP*, 215 Cal. App. 4th 36, 41 (2013); *Vaquero v.*
25 *Stoneledge Furniture, LLC*, 9 Cal.App.5th 98, 111 (2017).

26 Plaintiff also contended Kite's wage statements did not display all required information, including
27 inclusive dates, actual hours worked, number of pieces completed, and rates earned for all hours and
28 pieces. Labor Code §226.

1 Kite contended no employee ever received less than the applicable minimum wage for all time
2 worked during any pay period; not all Class Members received piece rate wages or received them in
3 every pay period; there was little to no time that could be characterized as non-productive or unpaid
4 when piece-rate was paid, as all time spent earned piece rate wages, or was directly related to tasks
5 which earned those wages; if any overtime was worked, Kite's compensation plan properly paid for
6 that small amount of time; Kite began to take steps to insure compliance, and did comply, with all Labor
7 Code requirements after receiving a request for documents from an attorney, a PAGA charge, and this
8 lawsuit, and paid all sums it believed in good faith could arguably be owed to current and former
9 employees; that in practice, it followed California law at all times by authorizing and permitting rest
10 breaks, not discouraging employees from taking them, and that to the extent any missed a break, it was
11 voluntarily. Geraci Decl. ¶23.

12 Plaintiff acknowledged Kite's good faith in calculating and paying amounts owed, but contended
13 not all damages and penalties were paid, and that the Court might not uphold its "Pick-Up Stix"
14 settlement agreements. Geraci Decl. ¶24.

15 **V. MEDIATION**

16 The Parties mediated with Hon. Jeffrey Winikow (Ret.) on February 19, 2021. After a full day of
17 arms'-length negotiations, the Parties reached a settlement and later negotiated the Stipulation of Class
18 and Representative Action Settlement Agreement and Release and Amendment to the Stipulation of
19 Class and Representative Action Settlement and Release (Settlement Agreement"). Geraci Decl. ¶25.

20 **VI. SUMMARY OF PROPOSED SETTLEMENT**

21 **A. Settlement Terms**

22 Kite will pay the Gross Settlement Amount (GSA) of \$458,991, (\$220,000, plus \$238,991 paid
23 to 98 class members pre-mediation) which includes: (a) attorneys' fees of \$152,997 (one-third of GSA)
24 to compensate Class Counsel for all work performed and remaining to be performed securing final
25 Court approval (apportioned 50/50 between Class Counsel with Plaintiff's consent. Geraci Decl. ¶27);
26 (b) litigation costs of \$8,995.09; (c) Service Payment of \$10,000 to Plaintiff for serving as Class
27 Representative, foregoing an individual settlement payment, risks undertaken for costs if the case had
28 not successfully concluded, and benefits conferred on the Class; (d) \$10,000 in PAGA Penalties

1 (\$7,500/75% to the LWDA, \$2,500/25% to the Class Members in PAGA Period); and (e) Settlement
2 Administration expenses up to \$7,500. Kite will pay the employer's share of payroll taxes in addition
3 to the GSA. Geraci Decl. ¶26. After Court-approved deductions, the estimated Net Settlement Amount
4 (NSA) of \$30,507.91 will be distributed to Participating Class and PAGA Members. Geraci Decl. ¶28;
5 ILYM Decl. ¶14.

6 The 100 Class Members will receive an average estimated payment of \$305.08, with a lowest
7 payment of \$4.91, and highest payment of \$485.73, upon Approval. Plaintiff's estimated individual
8 settlement amount is \$54.78. Geraci Decl. ¶29; ILYM Decl. ¶14. Class Members employed during the
9 PAGA Period will receive a share of the \$2,500 PAGA Payment based on Pay Periods worked during
10 the PAGA Period, even if they request to be excluded, as no right exists to opt out of a PAGA
11 Settlement. The 78 PAGA Members will receive an average PAGA payment of \$32.05, with a lowest
12 payment of \$0.82, and the highest PAGA payment of \$46.55. Geraci Decl. ¶30; ILYM Decl. ¶14.

13 No portion of the GSA will revert to Kite under any circumstances. After 180 days of issuance,
14 all uncashed checks will be sent to the State of California Controller, Unclaimed Property Division for
15 further handling on behalf of the Class Member's whose check was voided. Geraci Decl. ¶31.

16 **B. Preliminary Approval, Notice to the Class, and Its Response**

17 **1. Preliminary Approval and Class Notice**

18 On March 4, 2022, the Court preliminarily approved the proposed Settlement and Notice Packet
19 for mailing to the Class. Geraci Decl. ¶32. On April 22, 2022, after searching the National Change of
20 Address database, and updating Class Member addresses, the Settlement Administrator mailed Notice
21 Packets to 100 Class Members. The Notice Packet informed them of (1) the pendency of the Action;
22 (2) proposed settlement terms; (3) automatic payment of Settlement shares if exclusion not requested;
23 (4) estimated amount each Participating Class Members will receive based on eligible pay periods
24 worked during the Class and PAGA Period; (5) released claims; (6) right to object or request exclusion,
25 and (7) date, time and place of the final approval hearing. Geraci Decl. ¶33; ILYM Decl. ¶7, Exh A.

26 **2. The Class' Response to the Notice**

27 The Class response to the Settlement was extremely favorable. No objections and no requests for
28 exclusion were received. Geraci Decl. ¶¶12, 24; ILYM Decl. ¶¶11, 12

1 The Court determined the first three Dunk factors were met when it granted preliminary approval:
2 (1) the settlement was reached through arm's-length bargaining; (2) investigation and discovery
3 allowed counsel and the court to act intelligently; and, (3) counsel was experienced in similar litigation.
4 The fourth factor could not be known until the Class had notice and an opportunity to respond. *Dunk v.*
5 *Ford Motor Co.*, 48 Cal. App. 4th 1794, 1801-1802 (1996).

6 The fourth *Dunk* factor was established when the Class overwhelmingly approved the Settlement.

7 **VII. THE SETTLEMENT IS FAIR, ADEQUATE, AND REASONABLE**

8 The Preliminary Approval Motion thoroughly analyzed the terms of the proposed Settlement in
9 light of *Dunk*, (establishing factors supporting a presumption of fairness); and *Kullar v. Foot Locker*
10 *Retail, Inc.*, 168 Cal.App.4th 116, 130 (2008), (establishing factors determining whether a settlement
11 is in the Class' best interest, is adequate, and reasonable). The Court carefully reviewed and ruled on
12 these analyses and they are fully incorporated here by reference. *See*, Preliminary Approval Motion, at
13 8:4 – 14:12 (ROA 101), and Order Granting Preliminary Approval (ROA 137) ¶3.

14 Nothing has changed since Preliminary Approval to negate the presumption of fairness and
15 Class Counsel remains convinced the Settlement is in the Class' best interest.

16 **VIII. ATTORNEYS' FEES ARE REASONABLE AND SHOULD BE AWARDED**

17 Class Counsel requests attorneys' fees of one-third of the GSA and actual litigation costs. Class
18 Counsel have expended 180.1 hours, a lodestar of \$126,457.00. Geraci Decl. ¶36, Exh. 1 – Consolidated
19 Summary of Class Counsel's Time & Costs; Exh. 2 – Attorney Time Records; Exh 3. – Itemized Costs;
20 Declaration of Sahag Majarian II, ("Majarian Decl."), ¶6, Exh. A – Attorney Time Records.

21 **A. The Results Achieved Support the Fee Request**

22 The most important factor to consider in granting a fee award is the success obtained. *In re*
23 *Heritage Bond Litig. v. U.S. Trust Co. of Tex., N.A.*, No. 02-ML-1475 (RCx), 2005 U.S. Dist. LEXIS
24 13627, at *27 (C.D. Cal. June 10, 2005) (citing *Hensley v. Eckerhart*, 461 U.S. 424 (1983)). An
25 excellent result was achieved, enforcing the law and providing benefits to the Class.

26 The Class was provided notice of all settlement terms, including that Counsel would request an
27 award of attorneys' fees up to one-third of the GSA, \$152,997. ILYM Decl. ¶7, Exh. A, ¶7. No Class
28 Member objected to the attorneys' fees award. *Id.* at ¶12.

B. A Fee Award Based on a Percentage of the Common Fund is Appropriate

The California Supreme Court recognized it is appropriate to award attorneys' fees based on a percentage of the total value of benefits to Class Members from the settlement, also known as the "common fund" method. *Laffitte v. Robert Half International, Inc.*, 1 Cal.5th 480, 503 (2016); see also, *Serrano v. Priest*, 20 Cal.3d 25, 34 (*Serrano III*) (1977); *Vincent v. Hughes Air West, Inc.* 557 F.2d 759, 769 (9th Cir. 1977). (California courts may look to federal authority analyzing class issues for guidance. See *Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 239-40 (2001))

"Despite its primacy, the lodestar method is not necessarily utilized in common fund cases." *Lealao v. Beneficial California, Inc.*, 82 Cal.App.4th 19, 27 (2000); *Dunk*, at 1808 (attorneys' fees may be calculated as percentage of common fund where settlement amount is certain or easily calculable).

A common fund fee award is proper here as it spreads the attorneys' fees among all beneficiaries of the fund, aligns the incentives between Plaintiffs' counsel and the class, better approximates market conditions in a contingency case, and encourages class counsel to seek early settlement and avoid unnecessarily prolonging litigation. *Laffitte*, 1 Cal.5th at 503.

A lodestar "cross-check" is not required, but may be used at the trial court's option to double check "reasonableness of the percentage fee through a lodestar calculation." *Id.* at 504.

With the guiding principle that early class action settlements are favored and may not diminish an award of attorneys' fees, Class Counsel submits the fee request should be awarded, based on substantial hours expended, risks and complexities of prosecuting the action, the contingent nature of any fee, their experience in handling cases of this type, fees commonly awarded in these cases, and vindication of the Class' rights.

The purpose of the common fund approach is to "spread litigation costs proportionally among all the beneficiaries so that the active beneficiary does not bear the entire burden alone." *Vincent, supra*, 557 F.2d at 769. "[O]ne who expends attorneys' fees in winning a suit which creates a fund from which others derive benefits may require those passive beneficiaries to bear a fair share of the litigation costs." *Quinn v. State of California*, 15 Cal.3d 162, 167 (1995). The common fund doctrine has been applied "consistently in California when an action brought by one party creates a fund in which other persons are entitled to share." *City and County of San Francisco v. Sweet*, 12 Cal.4th 105, 110 (1995).

Class Counsel undertook representation at their own expense, with compensation wholly contingent upon providing a Class benefit. Class Members will benefit from the proposed Settlement and receive monetary payments. Based on the defined and clearly traceable Class benefit, the Court may award a percentage of the common fund as attorneys' fees.

C. One-Third of the Common Fund is a Reasonable Fee

"California courts routinely award attorneys' fees of one-third of the common fund." *Beaver v. Tarsadia Hotels*, 2017 U.S. Dist. LEXIS 160214, *28 (S.D. Cal. Sept. 28, 2017). Several studies of class action fee awards have found the median common fund fee award is approximately one-third of the total settlement fund. See, e.g., *Chavez v. Netflix, Inc.*, 162 Cal. App. 4th 43, 66, n.11 (2008) ("fee awards in class actions average around one-third of the recovery."); Reagan W. Silber and Frank E. Goodrich, *Common Funds and Common Problems: Fee Objections and Class Counsel's Response*, 17 Rev. Litig. 525, 546 (1998); T. Willging, L. Hooper and R. Niemic, *Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules*, 90 (1996) (attorneys' fees in class litigation "were generally in the traditional range of approximately one-third of the total settlement").

Counsel's request for one-third of the common fund is in the mid-range of awards which commonly range from 20% to 50%, and is fair compensation for undertaking complex, risky, litigation on a contingent basis, and for the result achieved for the Class. Geraci Decl. ¶37.

Some courts have found an award of 33% of a common fund is the "benchmark" in California. *Smith v. CRST Van Expedited, Inc.*, No. 10-CV-1116-IEG (WMC), 2013 U.S. Dist. LEXIS 6049, *14 (S.D. Cal. Jan. 14, 2013) ("These percentages compare favorably with" the California (33%) benchmark.); *Dennis v. Kellogg Co.*, No. 09-CV-1786-L (WMC), 2013 U.S. Dist. LEXIS 163118, at *7 (S.D. Cal. Nov. 14, 2013). Class Counsel's fee request is in line with awards in similar California cases, consistent with market rates, and is reasonable. Geraci Decl. ¶38.

D. Optional Lodestar Cross-Check Confirms Reasonableness of Fee

Courts are not required to cross-check a common fund fee award against a lodestar increased by a risk multiplier, and many Courts decline to do so. See, *Glass v. UBS Financial Services, Inc.*, No. 06-4066-MMC, 2007 U.S. Dist. LEXIS 8476 (N.D. Cal. Jan. 26, 2007) ("no need to conduct a lodestar

1 cross-check [as] [c]lass counsel’s prompt action in negotiating a settlement while the state of the law
2 remained uncertain should be fully rewarded”); *Lopez v. Youngblood*, No. 07-0474-DLB, 2011 U.S.
3 Dist. LEXIS 99289 (E.D. Cal. Sep. 1, 2011) (“lodestar cross-check is not required in this circuit, and
4 in a case such as this, is not a useful reference.”)

5 When it is used, the cross-check “calculation need entail neither mathematical precision nor bean-
6 counting,” is not intended to be a “full-blown lodestar inquiry,” and “can be performed with a less
7 exhaustive cataloguing and review of counsel’s hours.” *Barbosa v. Cargill Meat Solutions Corp*, 297
8 F.R.D. 431, 451 (E.D. Cal. July 2, 2013).

9 Under the lodestar method, a base fee amount is calculated from a compilation of time reasonably
10 spent on the case and the reasonable hourly compensation of the attorneys. *Serrano v. Priest*, *supra*, at
11 48. The court then enhances the lodestar by a “multiplier” to account for a range of factors, such as the
12 novelty and difficulty of the case, its contingent nature, and the degree of success achieved. *Id.*, at 49;
13 see also *Ketchum v. Moses*, Cal.4th 1122, 1132-36 (2001).

14 If the fee award were calculated using the lodestar, rather than the common fund method, a
15 multiplier of slightly more than 1 would be applied. ($\$152,997/\$126,457 = 1.21$). Class Counsel’s work
16 to obtain a class settlement was reasonable and necessary and is reflected in the excellent result
17 achieved for Class Members and those who benefit from reclassification. Geraci Decl. ¶41, Exh. 1 -
18 Consolidated Summary of Class Counsel’s Time.

19 **E. Counsel’s Hourly Rates Are Reasonable**

20 Class Counsel is entitled to hourly rates charged by attorneys of comparable experience,
21 reputation, and ability for similar litigation. *Ketchum*, *supra* at, 1133; *Children’s Hospital and Med.*
22 *Center v. Bonta*, 97 Cal. App. 4th 740, 783 (2002) (affirming rates as “within the range of reasonable
23 rates charged by and judicially awarded comparable attorneys for comparable work”). When
24 determining reasonable rates, Courts may consider the attorney’s skill and experience, the nature of the
25 work performed, and the relevant area of expertise and the attorney’s customary billing rates. *Flannery*
26 *v. California Highway Patrol*, 61 Cal. App. 4th 629, 632 (1998).

27 Class Counsel’s skill and experience support their hourly rates and are in line with rates typically
28 approved in California wage and hour class actions. Geraci Decl. ¶¶2-10; Majarian Decl. ¶¶2-4.

Cohelan Khoury & Singer’s practice is limited to litigating class and representative actions on behalf of employees and consumers, and has been appointed Class Counsel or co-Class Counsel in over 200 such cases. Sahag Majarian has participated in over 300 cases. Geraci Decl. ¶¶9-10, 42; Majarian Decl. ¶¶3-4. As leading attorneys in the field, Class Counsel monitors prevailing market rates and sets billing rates to follow attorneys and staff of comparable skill, qualifications and experience. Geraci Decl. ¶43.

Class Counsel’s skill and experience support their hourly rates ranging from \$725 to \$900. (Cohelan Khoury & Singer: Managing Partner, Michael D. Singer - \$900; Partner, Diana M. Khoury - \$725; Partner, Jeff Geraci - \$790) (Law Offices of Sahag Majarian II: Principal, Sahag Majarian II - \$750). These rates are in line with those typically approved in wage-and-hour class action litigation in California, and Cohelan Khoury & Singer attorneys working on this case have recently been approved at these rates in the Superior Courts for the Counties of Alameda (*Bandril/Reyes v. Plastikon Industries*, Case No. RG19038227), Los Angeles (*Torres v. Mercury Plastics, Inc.*, Case No. BC723631), Orange (*Crandall, et al. v. Maxim Healthcare Services, Inc.*, Case No. 2017-00940239), San Diego (*Babouchian, et al. v. Soleil Communications, Inc., et al.*, Case No. 2017-00044756; *Phillips, et al. v. So-Cal Dominoids, et al.*, Case No. 2013-00056664; *Ramirez v Town Park, LLC*, Case No. 2020-00003942), and Santa Clara (*Kebede, et al. v. Wrike, Inc.*, Case No. 20CV366599). Geraci Decl. ¶44.

F. Plaintiff’s Counsel’s Total Hours are Reasonable

Hours are reasonable if, “at the time rendered, [they] would have been undertaken by a reasonable and prudent lawyer to advance or protect his client’s interest.” *Moore v. Jas. H. Matthews & Co.*, 682 F.2d 830, 839 (9th Cir. 1982). *Norman v. Housing Auth.*, 836 F.2d 1292, 1306 (11th Cir. 1988) (“The measure of reasonable hours is determined by the profession’s judgment of the time that may be conscionably billed and not the least time in which it might theoretically have been done”).

G. A Multiplier of the Lodestar Would Be Awarded

A lodestar amount may be enhanced by a multiplier in order to make an appropriate fee award. *Serrano III*, 20 Cal.3d at 48. Pertinent factors determining the level of enhancement include the difficulty of the questions involved and the skill in presenting them, the contingent nature of the fee award, the extent to which the litigation precluded other employment, and the percentage-of-the-fund the attorney would have received on the fair market. *Lealao* at 49. This list is not

exhaustive and the Court can consider other factors it deems important in setting the multiplier. *Id.* at 40; *Ketchum, supra* at 1139. “Multipliers ranging from one to four frequently are awarded in common fund cases when the lodestar method is applied.” (Newberg on Class Actions §14.03 (4th ed. 2009)). Counsel pursued difficult claims, presented them with skill based on experience prosecuting employment class actions, and achieved an excellent result, on a contingent basis.

A 1.21 multiplier is reasonable and less than used in other cases. Multipliers may range “from 2 to 4 or even higher.” *Wershba v. Apple Computer, Inc., supra*, 91 Cal. App. at 255. *In re Linerboard Antitrust Litig., No. MDL 1261*, 2004 U.S. Dist. LEXIS 10532, *16 (E.D. Pa. June 2, 2004) (finding from 2001 to 2003, a 4.35 average multiplier in common fund cases). See *McGrath v. Wyndham Resort Dev. Corp.*, 2018 U.S. Dist. LEXIS 16095, *24 (S.D. Cal. 2017) (Class counsel Cohelan Khoury & Singer awarded 4.8 multiplier).

In *Lealao*, the Court held a trial court’s refusal to enhance the lodestar was an abuse of discretion, opining a multiplier more than 3.5 was reasonable and not ruling out the original request for 8.0. *Lealao, supra*, 82 Cal. App. 4th at 24, 52. See *SternwestCorp. v. Ash*, 183 Cal.App.3d 74, 76 (1986) (case remanded with directions “to enhance the lodestar award by such factor (two, three, four or otherwise) that the court, in its discretion shall deem proper”); *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1051 (9th Cir. 2002) (multiplier of 3.65); *Keith v. Volpe*, 501 F.Supp.403, 414 (C.D. Cal. 1980) (multiplier of 3.5).

To the extent a lodestar could be used to set the fee, a multiplier is supported by the difficulty of the questions involved, the skill displayed by Class Counsel in addressing them, and the contingent nature of any recovery. Class Counsel displayed creativity in identifying and pursuing claims related to piece work, although in many weeks, and for certain types of employees, Kite may have had strong or complete defenses.

Most importantly, the excellent result achieved for the Class supports a significant multiplier. Without the risk and delay of litigation, the Class is receiving a substantial percentage of the value of its claims, and average individual payments over \$305.08 with a highest payment over \$485.73. These are in addition to payments made in May 2020 ranging from \$350 to over \$10,000, soon after Plaintiff served his complaint.

H. Litigation Expenses Are Reasonable

The Settlement allows Class Counsel to request up to \$9,500.00 in costs. Counsel seeks reimbursement of actual costs of \$8,995.09. These costs were reasonable and necessary. Geraci Decl. ¶45, Exh. 3 - Itemized Costs.

IX. THE PROPOSED PAGA PAYMENT IS REASONABLE

The settlement of PAGA penalties for \$10,000, of which \$7,500 (75%) will be paid to the LWDA and \$2,500 (25%) to aggrieved employees, is reasonable and appropriate. The Parties negotiated a good faith amount for PAGA penalties, which was not the result of self-interest at the expense of Class Members. Geraci Decl. ¶46. Where a “good faith amount” is negotiated and “there is no indication that this amount was the result of self-interest at the expense of other Class Members,” it is generally considered reasonable. *Hopson v. Hanesbrands Inc.*, No. CV-08-0844 EDL, 2009 U.S. Dist. LEXIS 33900, at *25 (N.D. Cal. Apr. 3, 2009).

The amount allocated to PAGA is within the range, or higher, than other settlements. See *Magadia v. Wal-Mart Assocs.*, 384 F. Supp. 3d at 1101, citing, among others, *Ceja-Corona v. CVS Pharm., Inc.*, 2015 U.S. Dist. LEXIS 5118 (E.D. Cal. Jan. 14, 2015) (\$10,000 PAGA penalties in settlement of \$900,000), recommendation adopted, 2015 U.S. Dist. LEXIS 25730 (E.D. Cal. Mar. 3, 2015); *Nen Thio v. Genji, LLC*, 14 F. Supp. 3d 1324, 1330 (N.D. Cal. 2014) (\$10,000 PAGA penalties, \$1.25m settlement); *Franco v. Ruiz Food Prods.*, 2012 U.S. Dist. LEXIS 169057, *5-6 (E.D. Cal. Nov. 27, 2012) (\$10,000 PAGA penalties, \$2.5m settlement); *Garcia v. Gordon Trucking*, 2012 U.S. Dist. LEXIS 160052 (E.D. Cal. 2012) (\$10,000 PAGA, \$3.7m settlement).

Class Counsel provided the LWDA with the Motion for Preliminary Approval, the Settlement Agreement, Supplemental Briefing and the Amendment to Settlement Agreement. The LWDA raised no objection. Geraci Decl. ¶48, Exh. 4 –January 4, 2022, February 22, 2022 and March 1, 2022 LWDA Confirmations of Receipt. The LWDA was served with this Final Approval Motion when filed. Geraci Decl. ¶49, Exh. 5 – LWDA Confirmation.

X. THE SERVICE AWARD IS REASONABLE AND SHOULD BE AWARDED

Service awards “are fairly typical in class action[s],” “to compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing

1 the action.” *Cellphone Termination Fee Cases* (2010) 186 Cal.App.4th 1380, 1394. The Court
2 preliminarily granted a \$10,000 service award to Plaintiff.

3 “Modern society seems increasingly to expose men to . . . group injuries for which individually
4 they are in a poor position to seek legal redress, either because they do not know enough or because
5 such redress is disproportionately expensive. If each is left to assert his rights alone if and when he can,
6 there will at best be a random and fragmentary enforcement, if there is any at all. This result is not only
7 unfortunate in the particular case, but it will operate seriously to impair the deterrent effect of the
8 sanctions which underlie much contemporary law. The problem of fashioning an effective and inclusive
9 group remedy is thus a major one.” *Vasquez v. Superior Court*, 4 Cal. 3d 800, 807 (1971).

10 Enforcement of laws protecting California employees would be “random and fragmentary,” or
11 non-existent, if no one was willing to come forward and spend time to work on behalf of others, and
12 perhaps most importantly, take risks those others do not bear.

13 Courts have concluded class action plaintiffs, not class members, take the risk of a judgment for
14 defendant’s costs. “Those who choose to take the risks of litigation should be the ones who bear the
15 cost when they are unsuccessful.” *Earley v. Superior Court*, 79 Cal.App.4th 1420, 1433 (2000). The
16 *Earley* court contended this risk was balanced by potential reward.

17 “While imposition of the entire cost burden on the named plaintiffs may have a chilling effect on
18 the willingness of plaintiffs to bring class action suits, this effect easily may be outweighed by the
19 potential recovery.” *Id.* The recovery for a plaintiff in a class action will always be less than an
20 individual action, and take much longer to obtain, with no potential for early settlement, as in some
21 individual cases, which may settle even before filing a public complaint.

22 So, if “[t]hose who choose to take the risks of litigation should be the ones who bear the cost
23 when they are unsuccessful,” how can that risk be offset? *Id.* An adequate Service Award.

24 Mr. Gutierrez more than satisfied his obligation to be available when asked and work with counsel
25 to protect the interests of the Class and place them above his own. Declaration of Manuel Gutierrez,
26 ¶4-8 (“Gutierrez Decl.”). Accepting the risk of judgment for Defendant’s costs, the potential loss of
27 employment opportunities, or achieving an excellent result for the Class, are each sufficient to support
28 a Class Representative Service Award of \$10,000. Considered together, they are more than sufficient.

1 It is impossible to know, or intervene, each time a class action plaintiff loses an employment
2 opportunity, making it essential to compensate them adequately at final approval, the only time that the
3 risk they accepted on behalf of the Class can be at least slightly offset and they can be rewarded for
4 their contribution.

5 The Class received notice Plaintiff would request \$10,000 for “work, efforts and burdens in
6 prosecuting the Action, and for undertaking the risks of a judgment for costs in the event of an
7 unsuccessful outcome, and obtaining the benefits on behalf of the Class.” ILYM Decl. ¶7, Exh. A, ¶7.
8 No Class Member objected. *Id.* at ¶12. The Class’ endorsement of the Award is not surprising.
9 Class Members received payments ranging from \$350 to \$10,900, without making a request within
10 months of Plaintiff filing his lawsuit, and will receive an additional payment without submitting a
11 claim form. Geraci Decl. ¶47.

12 A \$10,000 Service Award is especially appropriate here, where Class Members received
13 substantial sums almost immediately after Mr. Gutierrez filed this lawsuit, but he has waited more
14 than two years after that to receive anything, and will receive only \$54 as his share of the
15 Class settlement.

16 Class Representatives have received \$10,000 for achieving less than Plaintiff did here. *Loomis*
17 *v. Slendertone Distrib.*, 2021 U.S. Dist. LEXIS 44047, *35 (S.D. Cal. March 8, 2021) (\$10,000
18 paid from \$175,000 common fund); *McNeal v. RCM Techs. (USA), Inc.*, 2017 U.S. Dist. LEXIS
19 112137, *2 (C.D. Cal. July 12, 2017) (\$10,000, average class recovery of \$1,952).

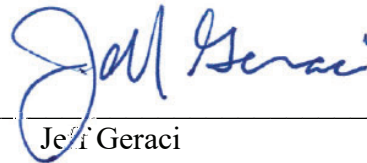
20 Mr. Gutierrez’ “requested service award falls within the range of incentive payments
21 typically awarded to class representatives in similar wage and hour class actions.” *Pagh v.*
22 *Wyndham Vacation Ownership, Inc.*, 2021 U.S. Dist. LEXIS 56040, *12 (C.D. Cal. March 23,
23 2021) (“The requested service award of \$10,000 to each class representative entails 0.67% of the
24 gross settlement amount [of \$450,000, which is within the range of reasonableness approved by
25 the Ninth Circuit.”); *Garner v. State Farm Mut. Auto. Ins. Co.*, 2010 U.S. Dist. LEXIS 49477, at
26 *17 n.8 (N.D. Cal. Apr. 22, 2010) (observing that “numerous courts in the Ninth Circuit and
27 elsewhere have approved incentive awards of \$20,000 or more where, as here, the class
28 representative has demonstrated a strong commitment to the class.”).

1 **XI. CONCLUSION**

2 Class Counsel respectfully requests the Court grant final approval of the proposed Settlement,
3 approve the Service Award, attorneys' fees and costs, and administration expenses as requested.

4 Respectfully submitted,

5 COHELAN KHOURY & SINGER
6 LAW OFFICES OF SAHAG MAJARIAN II

7 

8 Dated: June 14, 2022

9 By: Jeff Geraci

10 Attorneys for Plaintiff Manuel Gutierrez, on behalf of
11 himself and all others similarly situated
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