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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN BERNARDINO

SHAYNIA VERNON, as an individual and on
behalf of all others similarly situated;
BENJAMIN CASTANEDA-RIVERA, as an
individual and on behalf of all others similarly
situated,

Plaintiffs,

vs.

MCLANE/SUNEAST, INC., a Texas
corporation; MCLANE FOODSERVICE,
INC., a Texas corporation; and DOES 1
through 50, inclusive,

Defendants.

Case No.: CIVSB2123367

[Assigned for all Purposes to Hon. David
Cohn, Dept. S-26]

**PLAINTIFFS' NOTICE OF MOTION
AND MOTION FOR FINAL APPROVAL
OF CLASS AND REPRESENTATIVE
ACTION SETTLEMENT;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT**

Date: December 23, 2022

Time: 10:00 a.m.

Dept.: S-26

Complaint Filed: August 12, 2021

FAC Filed: September 8, 2022

Trial Date: None Set

1 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

2 **PLEASE TAKE NOTICE** that on December 23, 2022, at 10:00 a.m., or as soon
3 thereafter as the matter may be heard, before the Honorable David Cohn, judge presiding, in
4 Department S-26 of the above referenced Court, located at 247 W. Third Street, San Bernardino,
5 California 92415, Plaintiffs Shaynia Vernon and Benjamin Castaneda-Rivera (together,
6 “Plaintiffs”) will seek an Order: (1) granting final approval to the Stipulation for Leave to File
7 First Amended Complaint and Settlement and Release of Class Action and PAGA Claims
8 (“Settlement Agreement” or “Agreement”) in this action; (2) approving distribution of the
9 settlement funds to Participating Class Members, pursuant to the terms of the Settlement
10 Agreement; (3) approving Plaintiffs’ request for an award of the Class Representative
11 Enhancement Award of \$10,000.00 to each Plaintiff, pursuant to the terms of the Settlement
12 Agreement; (4) approving Class Counsel’s request for an award of attorneys’ fees in the amount
13 of \$140,000 and reimbursement of litigation costs in the amount of \$23,191.12, pursuant to the
14 terms of the Settlement Agreement; (5) approving Plaintiffs’ request for payment of the
15 settlement administration costs to Simpluris, Inc. in the amount of \$11,968.00, pursuant to the
16 terms of the Settlement Agreement; (6) approving Plaintiffs’ request for payment to the
17 California Labor and Workforce Development Agency for \$7,500.00, pursuant to the terms of
18 the Settlement Agreement; and (7) entering final judgment as to all members of the Class in this
19 action.

20 This Motion is made pursuant to Rule 3.769 of the California Rules of Court, which
21 provides for court approval of the settlement of a purported class action and allows the Court to
22 grant final certification of a class for settlement purposes. In light of the overwhelmingly positive
23 response, as shown by the lack of objections and opt-outs to the settlement, there is no question
24 that the settlement is fair, reasonable, and adequate and thus should be granted final approval.

25 This Motion will be based on the attached Memorandum of Points and Authorities and
26 the supporting Declarations of Larry W. Lee, Kristen M. Agnew, Nicholas Rosenthal, and
27 Stephen Gomez of Simpluris, Inc., upon the oral arguments of counsel (should there be any), and
28 on the complete records and file herein.

1 Dated: December 1, 2022

DIVERSITY LAW GROUP, P.C.

2
3 By: _____

Larry W. Lee

Kristen M. Agnew

Nicholas Rosenthal

Attorneys for Plaintiffs and the Class

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1 **I. INTRODUCTION**

2 Plaintiffs Shaynia Vernon and Benjamin Castaneda-Rivera (“Plaintiffs”) seek the Court’s
3 final approval of the Stipulation for Leave to File First Amended Complaint and Settlement and
4 Release of Class Action and PAGA Claims (“Settlement Agreement” or “Agreement”). This is a
5 wage and hour class and representative Private Attorneys General Act (“PAGA”) action seeking
6 statutory and civil penalties. As detailed in the operative First Amended Complaint, Plaintiffs
7 allege that Defendants McLane/Suneast, Inc. and McLane Foodservice, Inc. (“Defendants”)
8 failed to provide wage statements that identified accurate applicable hourly rates of pay to Class
9 Members. Plaintiffs further allege individual claims for violation of Labor Code section 226.7
10 and Business and Professions Code section 17200 *et seq.*

11 The Settlement Agreement, which has been preliminarily approved by the Court, provides
12 for a gross settlement amount of \$400,000 (“Gross Settlement Fund”). The entire Net Settlement
13 Fund—after deduction of attorneys’ fees, litigation costs, enhancement award to the Class
14 Representatives, payment to the California Labor and Workforce Development Agency
15 (“LWDA”), and costs of settlement administration— will be paid to all Class Members who did
16 not opt-out of the settlement. No funds shall revert to Defendants.

17 As directed by the Court, the Settlement Administrator distributed the Notice of Class
18 Action Settlement (“Class Notice”) to 1,448 Class Members. Declaration of Stephen Gomez on
19 Behalf of Settlement Administrator (“Gomez Decl.”) ¶ 6. To date, there have been *zero* (0)
20 objections filed to the Settlement and zero (0) Requests for Exclusion have been received.
21 Gomez Decl. ¶¶ 9-12. As such, there is a 100% participation rate. This favorable response by the
22 Class supports the Court’s Preliminary Approval Order finding that the Settlement was fair,
23 adequate, and reasonable and the granting of the instant Motion.

24 In addition to the results of the notice process, for the same reasons as set forth earlier in
25 Plaintiffs’ Motion for Preliminary Approval of Class and Representative Action Settlement, the
26 following represent the basic points supporting approval of the Settlement:

- 27 ▪ The settlement provides a total settlement sum of \$400,000.00;
- 28 ▪ The settlement is fair given that Participating Class Members will receive (*after*

1 *deductions for fees, costs, etc.*) a substantial amount of money (on average, each
2 Participating Class Member will receive approximately \$134.55). *See* Gomez
3 Decl. ¶14;

- 4 ▪ Class Members did not need to submit claim forms to participate in the
5 settlement, but are being paid automatically;
- 6 ▪ The allocation reflects that payment of claims will be paid to all Class Members
7 in proportion to the number of wage statements with overtime wage payments
8 each Class Member received during the Settlement Periods;
- 9 ▪ Plaintiffs conducted significant investigation in this case, including formal and
10 informal discovery, and exchanges of information by Plaintiffs and Defendant of
11 class data necessary for Plaintiffs to fully evaluate this case;
- 12 ▪ A highly regarded administrator, Simpluris, Inc., was retained for fees estimated
13 to be \$11,968.00; and
- 14 ▪ California’s LWDA will also be the beneficiary of this settlement as it will
15 receive \$7,500.00, should this settlement be granted final approval.

16 With this additional information, the Court should grant Final Approval consistent with the
17 Preliminary Approval Order.

18 **II. CLASS MEMBERS WERE PROVIDED PROPER NOTICE OF THE**
19 **SETTLEMENT**

20 The notice procedures required by the Preliminary Approval Order, have been followed
21 and satisfy all due process rights of Class Members. The Preliminary Approval Order
22 contemplated that the Notice of Class Action Settlement (“Class Notice”), as approved in the
23 Preliminary Approval Order, be sent to all Class Members by first class mail, as specified in the
24 settlement. Further, the Preliminary Approval Order contemplated that Simpluris, Inc. would
25 serve as the Settlement Administrator.

26 As clearly stated in the Declaration of Stephan Gomez, notice was provided to Class
27 Members, as required by the Preliminary Approval Order. On October 24, 2022, the Settlement
28 Administrator received the Class List and the Class Data List from Defendants’ counsel that

1 included 1,448 Class Members. Gomez Decl. ¶ 4. On November 2, 2022, the Settlement
2 Administrator conducted a National Change of address search to confirm the addresses were
3 accurate. *Id.* ¶ 5. On November 2, 2022, each of the persons identified on the mailing list were
4 sent the Class Notice via first class mail. *Id.* ¶ 6, Ex. A. From the date of mailing, thirty (30)
5 Notices Class Notices were returned due to incorrect addresses. *Id.* 7. None were returned with a
6 forwarding address. *Id.* Simpluris attempted to locate a current mailing address using
7 TransUnion TLOxp, one of the most comprehensive address databases available for skip tracing.
8 *Id.* As of the date of this filing, eight (8) Class Notices remain undeliverable because new
9 addresses could not be located by skip tracing. *Id.*

10 The provision of sending the notice to Class Members as described above meets the
11 requirements for the “best notice practicable” in this case as necessary to protect the due process
12 rights of class members. *See, Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985)
13 (provision of “best notice practicable” with description of the litigation and explanation of opt-
14 out rights satisfies due process); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 174-75 (1974)
15 (individual notice must be sent to class members who can be identified through reasonable
16 means); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (best
17 practicable notice is that which is “reasonably calculated, under all the circumstances, to apprise
18 interested parties of the pendency of the action and afford them an opportunity to present their
19 objections”).

20 Here, the Class Members were provided with a mailing regarding the settlement that
21 explained the settlement and allowed Class Members to seek information, ask questions, and
22 object, if so desired. Gomez Decl. ¶ 6, Ex. A. As such, proper notice has been given to the Class
23 Members. Thus, the Court may proceed to determine the fairness and adequacy of the settlement
24 and enter its Order granting final approval, secure in the knowledge that all absent Class
25 Members have been given the opportunity to participate fully in the claims, exclusion, and the
26 approval process.

27 //

28 //

1 **III. THE COURT SHOULD GRANT FINAL APPROVAL OF THE SETTLEMENT**

2 **A. The Terms of the Settlement, Negotiation of Settlement, and Reception of the**
3 **Settlement by Class Members All Strongly Support the Conclusion that the**
4 **Settlement is Fair, Adequate, and Reasonable**

5 As explained by the Court of Appeal in *Kullar v. Foot Locker Retail, Inc.*, 168 Cal. App.
6 4th 116, 130, 133 (2008), a class action settlement should be approved when the plaintiff has
7 conducted sufficient discovery and the settlement is reasonable in light of the strengths of the
8 plaintiff's claims. As discussed herein, Class Counsel have conducted extensive discovery and
9 investigation and, in light of the strength and weaknesses of Plaintiffs' claims, Plaintiffs'
10 attorneys submit that this settlement is fair pursuant to *Kullar*.

11 Without reiterating the Parties' showing that the Settlement Agreement and the
12 negotiation process that led up to it was fair and adequate, as set forth in detail in the Motion for
13 Preliminary Approval of Class Action Settlement, Plaintiffs highlight the following facts. The
14 Settlement Agreement was the product of negotiation between highly able and experienced
15 attorneys on both sides, possessed of the relevant data and extensive legal research which they
16 had carefully analyzed. Declaration of Kristen M. Agnew ("Agnew Decl.") ¶¶ 2, 3. In addition,
17 the resolution of this case was reached only after the production of payroll data, exemplar wage
18 statements, and other information, and further drawn-out negotiations. *Id.* Based on the class
19 data, Plaintiffs were able to calculate a range of potential damages and penalties. *Id.* 3.

20 The results after mailing of the Class Notice further support confirmation of the Court's
21 preliminary approval of the settlement with final approval of the settlement. The Court may
22 appropriately infer that the class action settlement is fair, adequate, and reasonable when, among
23 other reasons, few, or no class members object to it. *See Class Plaintiffs v. City of Seattle*, 955
24 F.2d 1268, 1291 (9th Cir. 1992); *Churchill Vill. LLC v. Gen. Elec.*, 361 F.3d 566, 577 (9th Cir.
25 2004) (approving settlement with 45 objections and 500 opt-outs from a 90,000-person class,
26 representing 0.05% and 0.56% of the class, respectively); *Chun-Hoon v. McKee Foods Corp.*,
27 716 F. Supp. 2d 848, 852 (N.D. Cal. 2010) (where 16 of 329 class members opted out, court
28 found that positive class reaction "strongly supports settlement"). Here, ***there is not a single***
Class Member who has objected to the current settlement or submitted a request to opt-out.

1 Gomez Decl. ¶¶ 9, 10. This is a clear indication that Class Members themselves view the
2 settlement as fair, adequate, and reasonable.

3 **B. Under Well-Established Legal Principles, the Court Should Grant Final**
4 **Approval of the Settlement**

5 **1. Standard of Review**

6 On a motion for final approval of a class action settlement under California Code of Civil
7 Procedure section 382 and California Rule of Court 3.769, a court's inquiry is whether the
8 settlement is "fair, adequate and reasonable." *Officers for Justice v. Civil Serv. Comm'n*, 688
9 F.2d 615, 625 (9th Cir. 1982), *cert. denied subnom.*, *Byrd v. Civil Serv. Comm'n*, 459 U.S. 1217
10 (1983). A settlement is fair, adequate, and reasonable, and therefore merits final approval, when
11 "the interests of the class are better served by the settlement than by further litigation." *See*
12 *Manual for Complex Litigation, Fourth* § 21.6 at 309 (Fed. Jud. Ctr., 4th ed. 2004) ("MCL").
13 The law favors settlement, particularly in class actions and other complex cases, where
14 substantial resources can be conserved by avoiding the time, cost, and rigors of formal litigation.
15 *See* Alba Conte & Herbert B. Newberg, *4 Newberg on Class Actions* § 11.41 (2008); *Class*
16 *Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992); *Van Bronkhorst v. Safeco*
17 *Corp.*, 529 F.2d 943, 950 (9th Cir. 1976).

18 Although the Court possesses "broad discretion" in determining that a proposed class
19 action settlement is fair, the Court's role must be limited to the extent necessary to reach a
20 reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion
21 between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable, and
22 adequate to all concerned. *See Officers for Justice*, 688 F.2d at 625. Accordingly, the Court
23 should give due regard to what is otherwise a "private consensual agreement" between the
24 parties. *Id.*; *see also Church v. Consolidated Freightways, Inc.*, 1993 WL 149840 (N.D. Cal.
25 1993); *In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 720 F. Supp. 1379 (D. Ariz. 1989), *aff'd*
26 *sub nom.*; *City of Seattle*, 955 F.2d 1268; MCL § 21.6 at 309 ("The judicial role in reviewing a
27 proposed settlement is critical, but limited to approving the proposed settlement, disapproving it,
28 or imposing conditions on it. The judge cannot rewrite the agreement").

1 A court's approval of a class action settlement will only be reversed for a clear abuse of
2 discretion. *See Dunk v. Ford Motor Co.*, 48 Cal. App. 4th 1794, 1801 (1996); *Officers for*
3 *Justice*, 688 F.2d at 626 ("reverse only upon a strong showing that the district court's decision
4 was a clear abuse of discretion"); *City of Seattle*, 955 F.2d at 1276; *Ackerman v. Kassar*, 1993
5 WL 326453 (9th Cir. 1993); *Linney v. Cellular Alaska P'ship*, 151 F.3d 1234, 1238 (9th Cir.
6 1998).

7 As the court cautioned in *7-Eleven Owners for Fair Franchising v. Southland Corp.*:

8 It cannot be overemphasized that neither the trial court in approving
9 the settlement nor this Court in reviewing that approval have the
10 right or duty to reach any ultimate conclusions on the issues of fact
11 and law which underlie the merits of the dispute. It is well settled
12 that in the judicial consideration of proposed settlements, 'the [trial]
13 judge does not try out or attempt to decide the merits of the
14 controversy,' [citation] and the appellate court 'need not and should
15 not reach any dispositive conclusions on the admittedly unsettled
16 legal issue.

17 85 Cal. App. 4th 1135, 1146 (2000).

18 **2. The Settlement is Presumed to Be Fair**

19 The Court should begin its analysis with the presumption that the settlement is fair and
20 should be approved:

21 [A] presumption of fairness exists where: (1) the settlement is
22 reached through arm's-length bargaining; (2) investigation and
23 discovery are sufficient to allow counsel and the court to act
24 intelligently; (3) counsel is experienced in similar litigation; and (4)
25 the percentage of objectors is small.

26 *Dunk*, 48 Cal. App. 4th at 1802; *accord*, *Ellis v. Naval Air Rework Facility*, 87 F.R.D. 15, 18
27 (N.D. Cal. 1980); *In re Wash. Pub Power Supply*, 720 F. Supp. at 1387.

28 The settlement in the case at bar warrants approval and carries a presumption of fairness.
As previously noted in the Motion for Preliminary Approval, this current settlement was
negotiated at arm's length and resulted after mediation. Agnew Decl. ¶¶ 2, 3.

Second, Class Counsel engaged in extensive factual investigation before settling,
including reviewing class data. Agnew Decl. ¶¶ 2, 3. Further, Class Counsel is highly

1 experienced in this type of litigation. As shown in the supporting declarations, Class Counsel has
2 significant experience in class actions and employment wage and hour matters. Agnew Decl. ¶¶
3 6-11, 13; Declaration of Larry W. Lee (“Lee Decl.”) ¶¶ 3-5; Declaration of Nicholas Rosenthal
4 (“Rosenthal Decl.”) ¶¶ 3, 4, 7, 8; Declaration of William L. Marder (“Marder Decl.”) ¶¶ 3-8.

5 **3. Two-Way Costs and Other Risks Inherent in Continued Litigation**
6 **Favor Final Approval**

7 To assess the fairness, adequacy, and reasonableness of a class action settlement, the
8 Court also should weigh the immediacy and certainty of substantial settlement proceeds against
9 the risks inherent in continued litigation. *See also In re General Motors Corp.*, 55 F.3d 768, 806
10 (3d Cir. 1995) (“present value of the damages plaintiffs would likely recover if successful,
11 appropriately discounted for the risk of not prevailing, should be compared with the amount of
12 the proposed settlement”) (internal citations omitted); *Girsh v. Jepson*, 521 F.2d 153, 157 (3d
13 Cir. 1975); *Boyd v. Bechtel Corp.*, 485 F. Supp. 610, 616-17 (N.D. Cal. 1979).

14 If Plaintiffs pursued this case without settlement and failed to prevail, Plaintiffs would
15 have been potentially responsible for Defendants’ costs. As such, should individual current or
16 former employees of Defendants bring individual claims on the same causes of action, they
17 would each face the uncertainty of prevailing and the possibility of paying costs to Defendants.
18 Accordingly, such claims likely would not be brought by many of these current and former
19 employees—thus, this lawsuit achieves a true benefit for the Class that they might not otherwise
20 get or seek as individuals. Here, given that a fair and reasonable settlement has been reached,
21 neither Plaintiffs nor any of the Class Members will be required to pay for Defendants’ litigation
22 costs.

23 The risks of this case were weighed by Class Counsel and should be considered a
24 significant factor by the Court in its determination of final approval. Class Counsel obtained a
25 very substantial settlement for the Class that resulted in a fair recovery which at the same time
26 provides for finality and no risk of costs by the Class Members or Class Representatives.

27 The Settlement Agreement also affords the Class prompt, fair relief while avoiding
28 significant legal and factual battles that otherwise may have prevented the Class from obtaining

any recovery at all. While Class Counsel believe the Class Members’ claims are meritorious and can be successfully litigated, they are experienced and fully understand the inherent risks and uncertainty involved with such matters as the resolution of class certification, the outcome of a potential trial, and the outcome of any appeals that would inevitably follow should the Class prevail at trial. Class Counsel has also assessed the same risks in connection with the current settlement. Because the settlement provides immediate and substantial relief, without the attendant risks and delay of continued litigation—not to mention the threat of litigation fees and costs—Class Counsel believe that the settlement warrants the Court’s final approval.

4. The Complexity, Expense, and Likely Duration of Continued Litigation Against Defendants Favor Final Approval

Another factor considered by courts in approving a settlement is the complexity, expense, and likely duration of the litigation. *See Officers for Justice*, 688 F.2d at 625; *Girsh*, 521 F.2d at 157. In applying this factor, the Court must weigh the benefits of the settlement against the expense and delay involved in achieving an equivalent or more favorable result at trial. *Young v. Katz*, 447 F.2d 431, 433-34 (5th Cir. 1971).

As noted in the Motion for Preliminary Approval, continued litigation could have led to appeals on a number of issues. On the other hand, the settlement that was reached provides to all Class Members—regardless of their means—fair relief in a prompt and efficient manner. Were the Court to deny final approval, the Class Members would be left without a remedy as a practical matter and courts across the State would have to address the issues presented here in a piecemeal, costly, and time-consuming manner. The settlement in this case is therefore consistent with the “overriding public interest in settling and quieting litigation” that is “particularly true in class action suits.” *See Van Bronkhorst*, 529 F.2d at 950 (footnote omitted); *see also 4 Newberg* § 11.41.

5. The Opinion of Experienced Counsel Favors Final Approval

Class Counsel supports the settlement as fair, reasonable, and adequate, and in the best interest of the Class Members as a whole. Lee Decl. ¶ 2; Agnew Decl. ¶ 4; Rosenthal Decl. ¶ 2; Marder Decl. ¶ 2. Similarly, counsel for Defendants is in favor of this settlement. The

endorsement of qualified and well-informed counsel of a settlement as fair, reasonable, and adequate is entitled to significant weight by the Court in its final approval determination. *See Officers for Justice*, 688 F.2d at 625; *Ellis*, 87 F.R.D. at 18; *Boyd*, 485 F. Supp. at 617; *Linney*, 151 F.3d at 1242.

IV. THE REQUESTED CLASS REPRESENTATIVE ENHANCEMENT AWARDS SHOULD BE APPROVED

Plaintiffs have requested, and Defendants do not oppose, a service award of Ten Thousand Dollars (\$10,000.00) to each Class Representative, pursuant to the terms of the Settlement Agreement. Plaintiffs request that this Court approve such service payments in light of the efforts Plaintiffs put into this case, the absence of any objection to the service payments, and the excellent result achieved.

The Class Representatives spent time with Class Counsel on a number of occasions to discuss the case, provide substantive information regarding Defendants' wage statement practices and policies and review the terms of the proposed settlement. Agnew Decl. ¶ 14. In addition to the invaluable services they provided, Plaintiffs also took a significant risk, both professionally and monetarily, in acting as Class Representatives. *Id.* ¶ 15. Because the claims alleged by Plaintiffs involved the payment of costs to the prevailing party, Plaintiffs could have possibly faced paying the costs of Defendants had they not prevailed in this action. *Id.* Moreover, given that future employers are much less likely to hire individuals who have filed suit against their prior employer, particularly cases of this nature, the Class Representatives could face negative employment prospects in the future. *Id.*

The Class Representatives took such risks upon themselves and the whole Class benefited from this. Class Members did not have to file individual lawsuits and bear the risks of payment of fees and costs if they did not prevail, nor did they have to face the potential for retaliation and not getting future employment had they filed a lawsuit which is a public record. These are significant benefits, even apart from the time the Class Representatives have spent working on this case, that weigh in favor of granting the requested enhancement.

Finally, as part of the class settlement, Plaintiffs also agreed to give a general release of

1 their individual claims, something that the Class Members did not have to do. *Id.* ¶ 16. Thus,
2 Plaintiffs have sacrificed their own individual rights for those of the Class Members. This is a
3 significant factor to take into account that further warrants the award of the requested service
4 amount.

5 Courts have routinely granted approval of settlements containing such enhancements. *See*
6 *Van Vranken v. Atlantic Richfield Co.*, 901 F. Supp. 294, 299-300 (N.D. Cal. 1995) (incentive
7 award of \$50,000); *In re Dun & Bradstreet Credit Servs. Customer Litig.*, 130 F.R.D. 366, 374
8 (S.D. Ohio 1990) (two incentive awards of \$55,000, and three incentive awards of \$35,000);
9 *Brotherton v. Cleveland*, 141 F. Supp. 2d 907, 913-14 (S.D. Ohio 2001) (granting a \$50,000
10 incentive award); *Enter. Energy Corp. v. Columbia Gas Transmission Corp.*, 137 F.R.D. 240,
11 251-52 (S.D. Ohio 1991) (\$50,000 awarded to each class representative); *Glass v. UBS Fin.*
12 *Servs.*, No. C-06-4068, 2007 U.S. Dist. LEXIS 8476, at *51-52 (N.D. Cal. Jan. 27, 2007)
13 (awarding \$25,000 incentive award in FLSA overtime wages class action); *Cook v. Niedert*, 142
14 F.3d 1004, 1016 (7th Cir. 1998) (affirming \$25,000 Incentive award to class representative in
15 ERISA case).

16 Here, this litigation has resulted in a significantly valuable benefit to the Class, and the
17 Class Representatives took on substantial risk and sacrifice in helping to get this financial benefit
18 to the Class. As such, the enhancement should be awarded to the named Plaintiffs for their
19 commitment, dedication, and risks taken for this litigation. Accordingly, the Court should find
20 the service awards as fair and reasonable

21 **V. THE REQUESTED ATTORNEYS' FEES SHOULD BE APPROVED**

22 Class Counsel seeks a fee award calculated at thirty-five percent (35%) of the Gross
23 Settlement Fund for the successful prosecution and resolution of this action. California state and
24 federal courts have recognized that an appropriate method for determining award of attorneys'
25 fees is based on a percentage of the total value of benefits to Class Members by the settlement.
26 *Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 254 (2001); *Serrano v. Priest*, 20 Cal.
27 3d 25, 34 (1977) [*Serrano III*]; *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); *Vincent v.*
28 *Hughes Air West, Inc.*, 557 F.2d 759, 769 (9th Cir. 1997). The purpose of this equitable doctrine

1 is to avoid unjust enrichment to the Class and to “spread litigation costs proportionally among all
2 the beneficiaries so that the active beneficiary does not bear the entire burden alone.” *Vincent v.*
3 *Hughes Air West, Inc.*, *supra*, 557 F.2d at 769.

4 Under California law, the award of attorneys’ fees in common fund wage and hour class
5 action settlements is proper under the percentage method. *See Laffitte v. Robert Half Int’l*, 1 Cal.
6 5th 480, 503 (Aug. 11, 2016) (“We join the overwhelming majority of federal and state courts in
7 holding that when class action litigation establishes a monetary fund for the benefit of the class
8 members, and the trial court in its equitable powers awards class counsel a fee out of that fund,
9 the court may determine the amount of a reasonable fee by choosing an appropriate percentage
10 of the fund created”). Under the percentage of the fund method, the Court’s objective remains to
11 “mimic the market” in fixing a reasonable fee. *See Gaskill v. Gordon*, 160 F.3d 361, 363 (7th
12 Cir. 1998) (J. Posner) (“When a fee is set by a court rather than by contract, the object is to set it
13 at a level that will approximate what the market will set....The judge, in other words, is trying to
14 mimic the market in legal services.”).

15 Here, the fee award representing thirty-five percent of the Gross Settlement Fund clearly
16 falls within that range and is consistent with other rulings of other courts and comprehensive
17 surveys of class action settlements and fee awards. *See Martin v. AmeriPride Servs.*, 2011 U.S.
18 Dist. LEXIS 61796, at *23 (S.D. Cal. June 9, 2011) (recognizing that “courts may award
19 attorney’s fees in the 30-40% range in wage and hour class actions that result in recovery of a
20 common fund under \$10 million”); *see also* Eisenberg & Miller, *Attorney Fees in Class Action*
21 *Settlements: An Empirical Study: 1993-2008*, 7 J. of Empirical Leg. Stud. 248, 262, fn. 16 (2010)
22 (independent studies of class action litigation nationwide conclude that fees in the range sought
23 here are consistent with market rates).

24 The results delivered by Class Counsel also support the requested percentage of the fund.
25 Here, Plaintiffs and their counsel secured a \$400,000.00 settlement.

26 Finally, “the response of the class members to attorneys’ fee notice, though not decisive,
27 is relevant to the...reasonable determination” regarding fees. *Swedish Hospital v. Shalala*, 1 F.3d
28 1261, 1272 (D.C. Cir. 1993). A positive response rate tends to suggest that the court’s

1 “approximation of the market” for fees is well supported. *Id.* at 1269. In this case, the Class
2 Notice specifically notified Class Members that Class Counsel would be seeking \$140,000.00 in
3 attorneys’ fees. To date, no Class Member has objected to the Settlement or requested exclusion.
4 This strong favorable response also supports the requested fees.

5 In addition, it is recognized that one of the primary factors justifying an enhanced
6 attorney’s fees reward is the attendant risks inherent in the litigation. As observed in *City of*
7 *Detroit v. Grinnell Corp.*:

8 No one expects a lawyer whose compensation is contingent upon his
9 success to charge, when successful, as little as he would charge a
10 client who had agreed to pay for his services, regardless of success.
11 Nor, particularly in complicated cases producing large recoveries, is
it just to make a fee depend solely on the reasonable amount of time
expended.

12 495 F.2d 448, 470 (2d Cir. 1974). Here, it is clear that a settlement fund of \$400,000.00 has been
13 created. For Class Counsel, the fees here were wholly contingent in nature and the case presented
14 far more risk than the usual contingent fee case. Among the risks was the cost inherent in class
15 action litigation, as well as a long battle with corporate Defendants who had retained a highly
16 experienced defense firm. As such, the requested fee should be awarded.

17 As a secondary support for the percentage of the fund method, when fees are allocated by
18 percentage method, courts have discretion to “cross-check” the fees awarded through the lodestar
19 method. However, the *Laffitte* Court “emphasize[d] [that] the lodestar calculation, when used in
20 this manner, does not override the trial court’s primary determination of the fee as a percentage
21 of the common fund and thus does not impose an absolute maximum or minimum on the
22 potential fee award.” *Laffitte*, 1 Cal. 5th at 505 (emphasis added); *In re Rite Aid Corp. Secs.*
23 *Litig.*, 396 F.3d 294, 306-307 (3d Cir. 2005) (“[The lodestar cross-check does not trump the
24 primary reliance on the percentage of common fund method”).

25 The Supreme Court in *Laffitte* stated: “If the multiplier calculated by means of a lodestar
26 cross-check is extraordinarily high or low, the trial court should consider whether the percentage
27 used should be adjusted so as to bring the imputed multiplier within a justifiable range, but the
28 court is not necessarily required to make such an adjustment.” *Id.* Thus, a lodestar cross-check is

1 aimed at astronomical multipliers. Indeed, cross-checks are not required; in many cases,
2 performing a cross-check “undermines” one of the primary reasons for using the percentage
3 method: aligning counsel’s incentives with the benefits delivered to the class and discouraging
4 protracted litigation. *Id.* at 506 (finding trial courts “retain the discretion to forgo a lodestar
5 cross-check”); *Report of the Third Circuit Task Force, Court Awarded Attorney Fees*, 108
6 F.R.D. 237, 258 (1985); *Lealao v. Beneficial California, Inc.*, 82 Cal. App. 4th 19, 29-30 (2000)
7 (citing the recommendations of the Third Circuit Task Force with approval and observing that
8 “[t]he criticisms of the lodestar approach set forth in this Report are now echoed by many
9 authorities, who have been most vocal about the manner in which it exacerbates the problem of
10 ‘cheap settlements’ and burdens already overworked trial judge”).

11 Courts have defined reasonable multipliers on a lodestar cross-check to “range from 2 to
12 4 or even higher.” *Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 255 (2001); *see also*,
13 *e.g.*, *Sutter Health Uninsured Pricing Cases*, 171 Cal. App. 4th 495, 512 (2009) (applying a 2.52
14 multiplier on a cross-check in an antitrust class action); *Chavez v. Netflix*, 162 Cal. App. 4th 43,
15 60 (2008) (applying a 2.5 multiplier on a lodestar cross-check); *City of Oakland v. Oakland*
16 *Raiders*, 203 Cal. App. 3d 78 (1988) (affirming a 2.34 multiplier without remand). The
17 intermediate court in *Laffitte*, after finding that “2 to 4” is a reasonable range for multipliers on a
18 cross-check, affirmed a 2.13 multiplier. *Laffitte*, 231 Cal. App. 4th at 881-82. The intermediate
19 court opinion was affirmed in full by the California Supreme Court in its new decision guiding
20 lower courts on assessing fees.

21 With respect to Class Counsel’s lodestar, to date, approximately 147.40 hours have been
22 expended by Class Counsel in this matter. Agnew Decl. ¶ 12, Ex. A; Rosenthal Decl. ¶ 5, Ex. A.
23 Moreover, Class Counsel expects to incur approximately ten additional hours of attorney time in
24 finalizing this settlement, including responding to Class Members and implementing the
25 settlement with the Settlement Administrator. Agnew Decl. ¶ 12; Rosenthal Decl. ¶ 6. As
26 detailed in their declarations, Plaintiffs’ counsel request hourly rate of \$700, which is
27 commensurate with each counsel’s experience and mimics the market. Agnew Decl. ¶ 13;
28 Rosenthal Decl. ¶ 7. The courts are quite liberal in the evidence required to prove an attorney’s

1 hours. Detailed time records are not required. An attorney’s testimony alone may suffice:
2 “Testimony of an attorney as to the number of hours worked on a particular case is sufficient
3 evidence to support an award of attorney fees, even in the absence of detailed time records.”
4 *Martino v. Denevi*, 182 Cal. App. 3d 553, 559 (1986).

5 Reasonable hours include, in addition to time spent during litigation, the time spent
6 before the action is filed, including time spent interviewing the clients, investigating the facts and
7 the law, and preparing the initial pleadings. *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54,
8 62 (1980). Further, the fee award should include fees incurred to establish and defend the
9 attorneys’ fee claim. *Serrano v. Unruh*, 32 Cal. 3d 621, 639 (1982) [*Serrano IV*]. Thus, Class
10 Counsel requests that the court find that these hours were reasonable in this litigation.

11 A reasonable hourly rate is the prevailing rate charged by attorneys of similar skill and
12 experience in the relevant community. *PLCM Group, Inc. v. Drexler*, 22 Cal. 4th 1084, 1095
13 (2000). The court may consider other factors when determining a reasonable hourly rate, *e.g.*, the
14 attorney’s skill and experience, the nature of the work performed, the relevant area of expertise
15 and the attorney’s customary billing rates. *Flannery v. California Highway Patrol*, 61 Cal. App.
16 4th 629, 632-33 (1998).

17 Class Counsel’s skill and experience justify the requested rate. As shown in the
18 supporting declarations, Class Counsel have significant experience in the area of employment
19 and wage and hour class actions. Specifically, Class Counsel’s practice focuses on representing
20 employees in employment matters, particularly wage and hour cases. Lee Decl. ¶¶ 3-5; Agnew
21 Decl. ¶¶ 6-11, 13; Rosenthal Decl. ¶¶ 3, 4, 7, 8; Marder Decl. ¶¶ 3-8. As such, based on the hours
22 and applicable rate, including anticipated time, the total lodestar to be expended by Class
23 Counsel through finalizing this settlement will be approximately \$110,180. Agnew Decl. ¶ 13,
24 Ex. A; Rosenthal Decl. ¶¶ 5-7, Ex. A.

25 Once the court establishes the lodestar amount, it may enhance the fee award by a
26 multiplier in order to make an appropriate fee award. *Serrano III*, 20 Cal. 3d at 48. The pertinent
27 factors include the difficulty of the questions involved and the skill in presenting them, the
28 contingent nature of the fee award, the extent to which the litigation precluded other

1 employment, and the percentage-of-the-fund the attorney would have received on the fair
2 market. *Id.*; *Lealao*, 82 Cal. App. 4th at 49. However, this list is not exhaustive and the court can
3 consider other factors it deems important in setting the multiplier. *Ketchum v. Moses*, 24 Cal. 4th
4 1122, 1139 (2001).

5 *Lealao* contains several factors justifying an enhancement based on the percentage-of-
6 the-benefit, namely, no objections by Class Members, commendable conduct by counsel, and
7 significant recoveries by Class Members, all of which were previously detailed above. *Lealao*,
8 82 Cal. App. 4th at 51-53. As in *Lealao*, the Class was notified of the settlement and attorney's
9 fee with no objections. The extreme effort undertaken by counsel, as shown by their hours and
10 the significantly high amount of claims being paid out, shows commendable conduct.

11 It is also critical to note that prompt settlement cannot be used to diminish the fee or the
12 enhancement based on a percentage-of-the-fund. *Lealao*, 82 Cal. App. 4th at 52 (the promptness
13 of settlement "cannot be used to justify the refusal to apply a multiplier"). According to *Lealao*,
14 courts placed "an extraordinarily high value" on settlement, and counsel should be rewarded, not
15 punished, for achieving this goal in a timely fashion. *Id.*

16 The multiplier should be enhanced by the contingent nature of counsel's fee recovery.
17 The risks in taking on a class action case are enormous, not the least of which is time and effort.
18 As explained previously, Defendants maintained that there were significant obstacles to
19 succeeding in this lawsuit. Thus, the risk involved in this case was quite significant for Plaintiffs
20 and their counsel, and in the face of such risks, the current settlement was achieved by Plaintiffs'
21 counsel.

22 Here based upon Plaintiffs' counsel's lodestar of \$110,180 and the requested fees of
23 \$140,000.00, Plaintiffs' request for a multiplier of 1.27 is reasonable and fair, particularly based
24 on the factors described above. *Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224 (2001)
25 (noting that courts using the lodestar method to calculate attorney fees awards in class actions
26 typically apply multipliers in the range of 2 to 4); *Boyd v. Bank of Am. Corp.*, 2014 U.S. Dist.
27 LEXIS 162880 (C.D. Cal. Nov. 18, 2014) (awarding 33% of the common fund, based on a
28 multiplier of 2.58, in a wage and hour class action settlement); *Vandervort v. Balboa Capital*

1 *Corp.*, 8 F. Supp. 3d 1200, 1210 (C.D. Cal. 2014) (awarding 33% of the common fund, based on
2 a multiplier of 2.52).

3 As such, the requested fee award is fair and reasonable, and should be awarded in its
4 entirety. Class Counsel risked not only a great deal of time, but also a great deal of expense to
5 ensure the successful litigation of this action on behalf of all Class Members. For such reasons,
6 Class Counsel's request for attorneys' fees in the amount of \$140,000.00 is fair, reasonable, and
7 adequate.

8 **VI. THE COURT SHOULD APPROVE THE REQUEST FOR REIMBURSEMENT**
9 **OF COSTS**

10 The request for reimbursement of costs, in the amount of \$23,191.12 is fair and
11 reasonable. The costs are all litigation related costs. Lee Decl. ¶ 6, Ex. A. The authority for the
12 Court to award this is the Parties' Settlement Agreement and Labor Code sections 226 and 2699.
13 As such, this request should be approved.

14 **VII. THE SETTLEMENT ADMINISTRATOR'S FEES AND COSTS SHOULD BE**
15 **APPROVED**

16 Pursuant to the terms of the Settlement Agreement, the fees and costs of the Settlement
17 Administrator, Simpluris, Inc., are to be paid out of the class settlement funds. As shown in the
18 Declaration of Stephan Gomez, the settlement administration fees expended in this matter
19 amount to a total of \$11,968.00, which is the amount that was agreed upon by the Parties. Gomez
20 Decl. ¶ 16. For such reasons, it is requested that the Settlement Administrator's fees be approved.

21 **VIII. THE PROPOSED PROCEDURE FOR UNCASHED SETTLEMENT CHECKS**
22 **SHOULD BE APPROVED**

23 As referenced in the Motion for Preliminary Approval, to the extent any uncashed
24 settlement funds remain after 180 days, the Parties have agreed that all funds shall be remitted to
25 the California State Controller's Office—Office of Unclaimed Property Fund in the name of the
26 Class Member.

27 **IX. NOTICE TO LWDA**

28 Concurrent with the filing of this Motion, Plaintiffs provided notice to the LWDA.

Agnew Decl. ¶ 18.

X. CONCLUSION

For all the foregoing reasons, and on the basis of the authorities cited herein, Plaintiffs respectfully submit that the standards for final approval have been met and the terms of the Settlement Agreement are fair, adequate, and reasonable.

Accordingly, Plaintiffs respectfully request that the Court enter an Order in the form proposed and submitted:

1. Granting final approval to the proposed Settlement Agreement in this action;
2. Approving distribution of the settlement funds to Participating Class Members pursuant to the terms of the Settlement Agreement;
3. Approving Plaintiffs' request for an award of the Class Representative Enhancement Award of \$10,000.00 to each Plaintiff, with payments pursuant to the terms of the Settlement Agreement;
4. Approving Class Counsel's request for an award to Class Counsel for \$140,000.00 in attorneys' fees and \$23,191.12 in costs with payment pursuant to the terms of the Settlement Agreement;
5. Approving Plaintiffs' request for payment of the settlement administration costs to Simpluris, Inc. in the amount of \$11,968.00 with payment pursuant to the terms of the Settlement Agreement;
6. Approving Plaintiffs' request for payment to the LWDA for \$7,500.00 with payment pursuant to the terms of the Settlement Agreement; and
7. Entering final judgment as to all members of the Class in this action.

Dated: December 1, 2022

DIVERSITY LAW GROUP, P.C.

By: _____

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