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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SANTA CLARA

CLARENCE SMITH, as an individual and on
behalf of all others similarly situated,

Plaintiffs,

v.

WATLOW ELECTRIC MANUFACTURING
COMPANY, a Missouri corporation; and
DOES 1 through 50, inclusive,

Defendants.

PHUOC TRUONG, on behalf of himself and
all "aggrieved employees" pursuant to Labor
Code § 2698 et seq.,

Plaintiff,

v.

WATLOW ELECTRIC MANUFACTURING
COMPANY, a Missouri corporation, and
DOES 1 through 10, inclusive,

Defendants.

CASE NO. 20CV365250

Consolidated with Case No. 20CV362069

[Assigned for all purposes to the Hon. Sunil R.
Kulkarni, Dept. 1]

CLASS ACTION

**PLAINTIFFS' APPLICATION FOR
APPROVAL OF ATTORNEYS' FEES AND
COSTS, CLAIMS ADMINISTRATION FEES,
AND CLASS REPRESENTATIVES' SERVICE
PAYMENTS**

DATE: May 26, 2021

TIME: 1:30 P.M.

DEPT.: 1

Complaint filed: March 18, 2020

Trial Date: None

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1 **PLEASE TAKE NOTICE THAT** on May 26, 2022 at 1:30 P.M., or as soon thereafter as
2 the matter may be heard, in Department 1 of the above-entitled Court, located at 191 North First
3 Street, San Jose, California 95113, the Honorable Sunil R. Kulkarni presiding, Plaintiffs Phuoc
4 Truong and Clarence Smith will and hereby do move for an Order: (1) awarding Class Counsel
5 attorneys' fees in the total amount of \$175,000, (2) awarding Class Counsel litigation costs in the
6 total amount of \$13,303.65, (3) approving an Enhancement Payment in the amount of \$10,000 each
7 to Plaintiffs and Class Representatives Phuoc Truong and Clarence Smith (totaling \$20,000), and
8 (4) approving claims administration fees of \$6,500. This application is made pursuant to California
9 Rules of Court Rule 3.769, which requires court approval of the settlement of class actions. This
10 application will be based on the Memorandum of Points and Authorities, the Amended Joint
11 Stipulation of Class Action and PAGA Settlement and Release, the Declarations of Larry W. Lee,
12 Mai Tulyathan, Daniel F. Gaines and Alex P. Katofsky, the Declaration of Jarrod Salinas of
13 Phoenix Settlement Administrators, the Declarations of Plaintiffs Phuoc Truong and Clarence
14 Smith, such evidence or oral argument as may be presented at the hearing, and on the complete
15 records and file herein.¹

16
17 Dated: May 4, 2022

Respectfully Submitted,

18 DIVERSITY LAW GROUP, P.C.

19
20
21 By: 

Larry W. Lee, Esq.
Mai Tulyathan, Esq.
Attorneys for Plaintiffs
and Proposed Class Counsel

22
23
24
25
26
27 ¹ This application should not be construed as a waiver of any attorney-client or attorney work-
28 product privileges.

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiffs Phuoc Truong (“Truong”) and Clarence Smith (“Smith”) (collectively, “Plaintiffs”)
4 move for an award of attorneys’ fees and costs, approval of the claims administrator’s fees, as well
5 as approval of the Enhancement Payments to the Class Representatives in connection with the final
6 approval of the class action settlement of this action. As discussed in the Motion for Final Approval
7 submitted concurrently herewith, Plaintiffs and Defendant Watlow Electric Manufacturing
8 Company (“Defendant”) have settled the Released Claims of the Settlement Class Members as
9 defined in the Amended Joint Stipulation of Class Action and PAGA Settlement and Release (the
10 “Settlement Agreement”, “Stipulation”, or “Stip.”) for a settlement package worth \$500,000. This
11 class action settlement (“Settlement”) resolves the named Plaintiffs and Class Members’ pending
12 Released Claims against Defendant and other Released Parties.

13 Since the notice of the Settlement was mailed to all 79 Class Members, only one of them has
14 requested exclusion from the Settlement, and none have submitted an objection. Declaration of
15 Jarrod Salinas of Phoenix Settlement Administrators (“PSA”) (“Salinas Decl.”) ¶ 3-9. In other
16 words, the Settlement has a significantly high participation rate of **99.17%**. Declaration of Mai
17 Tulyathan (“Tulyathan Decl.”) at ¶ 14.

18 Based on the current claims information, the 78 participating Settlement Class Members will
19 receive, on average, net payments of approximately \$2,850.59 each. Salinas Decl. at ¶ 12. The
20 highest settlement share to be paid is approximately \$5,610.04. *Id.* The Labor and Workforce
21 Development Agency (“LWDA”) shall be paid \$60,000, which is 75% of the \$80,000 total
22 allocated to settle the claims brought pursuant to Labor Code § 2698 *et. seq.*, the Private Attorneys
23 General Act of 2004 (“PAGA”), and the remaining 25%, or \$20,000, will be distributed to
24 Settlement Class Members as part of the Net Settlement Amount. Settlement at ¶ 13.

25 Because the Settlement achieves outstanding results for the settlement class, Plaintiffs
26 respectfully request that the Court approve their request for attorneys’ fees and costs, service
27 payments for serving as the class representatives, and the claims administrator’s fees.

1 Plaintiffs seek the Court's approval of an attorneys' fee award of \$175,000, plus the
2 reimbursement of \$13,303.65 in actual litigation costs. The attorney fee request equals 35% of the
3 Total Settlement Amount of \$500,000 as agreed upon by the Parties. Class Counsel's request for an
4 award of attorneys' fees and costs is reasonable and appropriate in light of the outstanding work
5 performed by Class Counsel in the case providing significant recovery to Class Members, the
6 contingent nature of this action, and the results achieved under the Settlement. *Lealao v. Beneficial*
7 *California, Inc.* (2000) 82 Cal.App.4th 19. Furthermore, Class Counsel's lodestar information
8 support the fee award requested.

9 Plaintiffs also request the Court confirm the amount of the service payments agreed to be
10 paid to the named Plaintiffs in the amount of \$10,000 each, totaling \$20,000. The amount proposed
11 to be awarded to the representative Plaintiffs is fair and reasonable. Courts approve incentive
12 awards to plaintiffs when justified and appropriate to compensate plaintiffs for time, effort, and
13 inconvenience. *See e.g., Van Vranken v. Atlantic Richfield Co.* (N.D. Cal. 1995) 901 F. Supp. 294,
14 299.

15 Finally, Plaintiffs requests that the Court approve the payment of \$6,500 to PSA as
16 compensation for the claims administration services it has and will provide in connection with this
17 settlement. Salinas Decl. at ¶ 12.

18 II. STATEMENT OF FACTS

19 A. Background and Procedural History

20 On February 24, 2020, Plaintiff Smith filed his written notice with the LWDA, alleging
21 violations of Labor Code § 226(a) against Defendant, pursuant to the PAGA, Labor Code § 2699.
22 Declaration of Mai Tulyathan ("Tulyathan Decl.") at ¶ 2. Thereafter, on March 18, 2020, Plaintiff
23 Smith filed his class and representative PAGA complaint against Defendant in Santa Clara County
24 Superior Court. (*Id.*) The *Smith* complaint alleges causes of action for: (1) violation of Labor Code
25 § 226(a), and (2) violation of the PAGA, Labor Code § 2698, *et seq. Id.*

26 On October 31, 2019, Plaintiff Truong filed his written PAGA notice with the LWDA,
27 alleging violations of Labor Code §§ 212, 225.5, 226(a), 226.3, 226.7, and 512. Declaration of
28 Daniel F. Gaines ("Gaines Decl.") at ¶ 8. Plaintiff Truong filed his complaint against Defendant in

1 the Santa Clara County Superior Court on January 17, 2020. *Id.* The *Truong* complaint was filed
2 as a representative PAGA complaint seeking penalties for violations of Labor Code §§ 225.5,
3 226(a), 226.3, 212, 226.7, and 512. *Id.*

4 The *Smith* and *Truong* actions have since been consolidated in the Santa Clara County
5 Superior Court pursuant to a joint stipulation between the Parties. Tulyathan Decl. at ¶ 3. On June
6 8, 2021, Plaintiffs filed the operative First Amended Consolidated Class and Representative Action
7 Complaint (“FAC”) in this Court. *Id.*

8 **B. The Underlying Allegations**

9 Plaintiffs’ class and PAGA claims as pled in this consolidated lawsuit are predicated upon
10 the following allegations. With respect to Plaintiffs’ meal and rest period claims, Plaintiffs allege
11 that Defendant failed to provide proper off-duty meal and rest breaks to Plaintiffs and other non-
12 exempt employees. Plaintiffs also allege that Defendant failed to pay premium compensation to
13 Plaintiffs and other employees in lieu of the noncompliant meal and rest breaks.

14 With respect Plaintiffs’ Labor Code § 212 claim, Plaintiffs allege that Defendant failed to
15 pay wages to Plaintiffs and employees in a form that was negotiable and payable in cash, without
16 discount, at an established place of business in California. In this regard, Plaintiffs and employees
17 received paychecks drawn from a bank without California locations and could not be cashed in
18 California without incurring fees. As a result, Plaintiffs and employees were allegedly forced to
19 incur various fees to access their wages and therefore were not provided with all earned wages upon
20 separation of employment.

21 With respect to Plaintiffs’ wage statement claims, Plaintiffs contend that Defendant issued
22 deficient wage statements that failed to identify the gross wages earned, net wages earned, and
23 premium pay for missed meal and rest breaks. Additionally, Plaintiffs also allege that whenever
24 overtime wages were paid, the wage statements issued to Plaintiffs and other employees failed to
25 accurately state the overtime rates of pay, in violation of Labor Code § 226(a)(9), and failed to
26 accurately state the correct total hours worked during the pay period, in violation of Labor Code §
27 226(a)(2).

1 As to Plaintiffs' claim pursuant to Labor Code §§ 201-203, Plaintiffs allege on a derivative
2 basis that Plaintiffs and other employees were denied the timely payment of wages at the separation
3 of their employment, based on the failures to pay all wages as detailed above.

4 As a result of the alleged violations, Plaintiff seeks wages, statutory penalties, and civil
5 penalties under the California Labor Code and the PAGA, restitution under California's Unfair
6 Competition Law, as well as attorneys' fees and costs and other forms of relief. Tulyathan Decl. at
7 ¶¶ 4-8.

8 **C. Investigation and Settlement Discussions**

9 After the initial Case Management Conference held on July 24, 2020, the Parties agreed to
10 participate in private mediation. Tulyathan Decl. at ¶ 9. In connection with mediation, the Parties
11 engaged in informal discovery to allow Plaintiffs to assess the claims and liability, as well as
12 analyze the maximum exposure of damages and penalties. *Id.* Defendant provided Plaintiffs'
13 counsel with informal data and information pertaining to the number of putative class members, the
14 number of shifts at issue, the number of pay periods at issue, the number of wage statements and
15 paychecks at issue, the hourly rates of pay for class members, as well as information pertaining to
16 Defendant's various wage and hour policies and practices. *Id.* The information provided by
17 Defendant allowed Plaintiffs to review and analyze the liability and potential exposure. *Id.*

18 On January 19, 2021, the Parties engaged in a full-day mediation with mediator Steven
19 Rottman, Esq. Tulyathan Decl. at ¶ 10. After thorough investigation and evaluation of the facts
20 and claims, and as a result of the arm's-length negotiations facilitated by Mr. Rottman, the Parties
21 and their counsel ultimately reached the current settlement. (*Id.*) In resolution of Plaintiffs' class
22 and PAGA claims, the Parties entered into the Joint Stipulation of Class Action and PAGA
23 Settlement and Release. *Id.*

24 On August 17, 2021, Plaintiffs filed their Motion for Preliminary Approval of Class Action
25 Settlement as a "hybrid" class action settlement and settlement under the federal Fair Labor
26 Standards Act (FLSA) at the time. Tulyathan Decl. at ¶ 11. The Court initially denied preliminary
27 approval, as it had concerns with approving such a hybrid FLSA/class action settlement at the time.
28 *Id.* The Court directed the Parties to revise the FLSA component of the settlement as well as meet

1 and confer on other issues pertaining to the settlement. *Id.* In connection with addressing the issues
2 identified by the Court, the Parties executed an Amended Joint Stipulation of Class Action and
3 PAGA Settlement and Release (the “Settlement Agreement”, “Stipulation”, or “Stip.”) to remove
4 the FLSA component. *Id.* The Settlement Agreement is attached as Exhibit A to the Declaration of
5 Mai Tulyathan.

6 On December 27, 2021, Plaintiffs filed their Renewed Motion for Preliminary Approval of
7 Class Action Settlement. On January 25, 2022, the Court granted preliminary approval of this
8 settlement. Tulyathan Decl. at ¶ 12, Ex. B.

9 The Parties recognize the risk, expense, and delay in continuing litigation with the class and
10 PAGA claims, and believe the Settlement to be fair, reasonable, and adequate. Gaines Decl. at ¶¶
11 10-11; Tulyathan Decl. at ¶ 13. Accordingly, the Parties desire to settle, compromise, and discharge
12 all disputes and claims arising from or relating to the class and PAGA claims as set forth in the
13 Settlement Agreement.

14 **D. Summary of Settlement Terms**

15 **1. Benefits to the Class and the Public**

16 The Settlement provides that (a) the Court may certify the Settlement Class as described in
17 the Stipulation on a provisional, non-mandatory basis for the purposes of this settlement only,
18 conditioned upon the Court granting final approval of the Settlement; and (b) Defendant shall pay
19 \$500,000 (the “Total Settlement Amount”), which includes: all Attorneys’ Fees and Costs,
20 Enhancement Payments to Plaintiffs, LWDA Payment, Net Settlement Amount to be paid to the
21 Settlement Class Members (which includes the Settlement Class Members’ portion of the PAGA
22 Payment), and Settlement Administration Costs. No portion of the Total Settlement Amount shall
23 revert to Defendant. The employer’s share of taxes on the wages portion of Individual Settlement
24 Shares will be paid separately and in addition to the Total Settlement Amount. Defendant shall not
25 be required to pay, under any circumstances, any amount in excess of the Total Settlement Amount.
26 All amounts to be paid by Defendant shall be paid to a Qualified Settlement Account to be
27 established by the Settlement Administrator. Settlement at ¶ dd.

1 **2. The Settlement Class**

2 The Court has preliminarily certified the following Settlement Class for settlement purposes:
3 all current and former hourly-paid or non-exempt employees, who worked for Defendant in
4 California at any time during the Class Period [(November 15, 2018, through the date of
5 Preliminary Approval)], and who received at least one paycheck during the Class Period from
6 Defendant. Tulyathan Decl. at ¶ 12, Ex. B; Settlement at ¶ d. The final settlement class includes
7 79 members.¹ Salinas Decl. at ¶¶ 3, 8.

8 **3. Allocations to be Paid from the Total Settlement Amount**

9 The Stipulation provides that Plaintiffs’ counsel may request an award of attorneys’ fees not
10 to exceed 35% of the Total Settlement Amount (\$175,000) and litigation costs not to exceed
11 \$25,000. Stip. at ¶ 10. It also provides that Plaintiffs will seek, and Defendant will not oppose,
12 Enhancement Payments to named Plaintiffs Phuoc Truong and Clarence Smith not to exceed
13 \$10,000 to each Plaintiff for their service in the Action and in exchange for providing a general
14 release of all claims. Settlement at ¶¶ 11, 31.

15 The Parties have agreed that Phoenix Settlement Administrators (“PSA”), an experienced
16 and competent claims administration company, will administer the settlement. The administration
17 expenses shall not exceed \$6,500, which has been allocated to compensate PSA for its work related
18 to the administration. Settlement at ¶ 12.

19 From the Total Settlement Amount, \$60,000 shall be paid to the LWDA as its 75% share of
20 PAGA penalties and the remaining portion of the PAGA Settlement Amount (the Net PAGA
21 Settlement Amount of \$20,000) will be distributed to Settlement Class Members as part of the Net
22 Settlement Amount. Stipulation at ¶ 13; *Labor Code* § 2699(i).

23 _____
24 ¹ As explained by the Settlement Administrator, the Settlement Administrator received a Class List
25 from Defendant that contained 121 Class Members. After the Settlement Administrator mailed the
26 Class Notice to all 121 individuals, it was discovered that 42 individuals who are/were exempt
27 employees were inadvertently included in the Class List. Said 42 individuals should not have been
28 included on the Class List as they are exempt employees and do not belong in the Settlement Class
during the Class Period. As such, the Settlement Administrator removed the 42 exempt individuals
from the Class List, and thus reducing the final Settlement Class count to 79 members. *See* Salinas
Decl. at ¶¶ 3-6.

1 The Net Settlement Amount means the portion of the Total Settlement Amount that is
2 available for distribution to Settlement Class Members, which is the Total Settlement Amount less
3 the Court-approved Enhancement Payments to Plaintiffs, Settlement Administration Costs, LWDA
4 Payment, and Attorneys' Fees and Costs. Settlement at ¶ r. This amount is estimated at
5 approximately \$225,196.35 (i.e., the Total Settlement Amount of \$500,000, minus the PAGA
6 Settlement Amount to be distributed to the LWDA of \$80,000.00, proposed Attorneys' Fees in the
7 amount of \$175,000 and Costs to Plaintiffs' Counsel in the amount of \$13,303.65, Plaintiffs'
8 Enhancement Payments not to exceed \$10,000 each, and Settlement Administration Costs not to
9 exceed \$6,500). Salinas Decl. at ¶ 12.

10 The Individual Settlement Payment means the net payment of each Settlement Class
11 Member's Individual Settlement Share, after reduction for the employee's share of taxes and
12 withholdings with respect to the wages portion of the Individual Settlement Share. Settlement at ¶ o.
13 Each Individual Settlement Share will be allocated as follows: 25% as wages and 75% as penalties,
14 interest, and non-wage damages. The portion allocated to wages will be reported on an IRS Form
15 W-2 and the portions allocated to interest and penalties will be reported on an IRS Form-1099 by
16 the Settlement Administrator. The Settlement Administrator will withhold the employee's share of
17 taxes and withholdings with respect to the wages portion of the Individual Settlement Shares, and
18 issue checks to Settlement Class Members for their Individual Settlement Payment (i.e., payment of
19 their Individual Settlement Share net of these taxes and withholdings). The employer's share of
20 taxes and contributions on the wages portion of Individual Settlement Shares will be paid separately
21 and in addition to the Total Settlement Amount. Settlement at ¶ 25.

22 **E. Preliminary Approval, Notice, and the Claims Process**

23 By Order dated January 25, 2022, this Court granted Plaintiffs' motion for preliminary
24 approval of the Settlement and provisionally certified the Settlement Class, finding that the
25 Settlement appeared to be within the range of reasonableness of settlements that could ultimately be
26 given final approval. See Tulyathan Decl. at ¶ 12, Ex. B. The Court also approved the distribution
27 of the Notice. *Id.*

1 Pursuant to the Court's Preliminary Approval Order, on February 18, 2022, PSA mailed
2 Notice packets containing the notice of the terms of the Settlement — including the terms relating
3 to attorneys' fees and costs — to 121 individuals. Salinas Decl. at ¶ 5, Salinas Decl., Ex. A. As
4 explained by the Settlement Administrator, the Settlement Administrator received a Class List from
5 Defendant that contained the names and information of 121 individuals. After the Settlement
6 Administrator mailed the Class Notice to all 121 individuals, it was discovered that 42 individuals
7 who are/were exempt employees were inadvertently included in the Class List. Said 42 individuals
8 should not have been included on the Class List as they are exempt employees and do not belong in
9 the Settlement Class during the Class Period. As such, the Settlement Administrator removed the
10 42 exempt individuals from the Class List, and thus reducing the final Settlement Class count to 79
11 members. See Salinas Decl. at ¶¶ 3-6.

12 The Notice packet was mailed to all 79 Class Members in both English and Spanish. *Id.*
13 Class Members were given 45 days after the Notice was mailed to participate in or opt out of the
14 Settlement. Salinas Decl. at ¶ 5; Salinas Decl., Ex. A. Class Members were given 45 days after the
15 Notice was mailed to object to the Settlement. *Id.* As of the date of this motion, one (1) Class
16 Member has opted out, and zero Class Members have submitted an objection to the Settlement. *Id.*
17 at ¶¶ 8, 9. In other words, the settlement has a significantly high participation rate of 99.17%
18 which further supports that the settlement is fair and reasonable. Tulyathan Decl. at ¶ 14.

19 **F. Compliance with Procedural Requirements of PAGA**

20 On May 3, 2022, in compliance with Labor Code § 2699(1)(2), my office submitted a
21 copy of the Settlement Agreement to the LWDA through its online submission interface. The
22 LWDA has not objected or otherwise responded to the submission. Tulyathan Decl. at ¶ 29; Ex.
23 E.

24 //

25 //

26 //

27 //

28 //

1 **III. ARGUMENT**

2 **A. Class Counsel Request an Award Under the Common Benefit Doctrine**

3 **1. A 35% Fee Award Is Reasonable Here**

4 Class Counsel respectfully requests that this Court approve the fees and costs to be paid in
5 this action. This Application is made pursuant to California Rules of Court, Rule 3.769 which
6 requires court approval of the fees paid through settlement in a class action.

7 Class Counsel seeks attorneys' fees of \$175,000, representing 35% of the settlement
8 consideration under the "common fund" doctrine. Courts have long recognized the "common fund"
9 or "common benefit" doctrine, under which attorneys who create a common fund or benefit for a
10 group of persons may be awarded their fees and costs to be paid out of the fund. *Serrano v. Priest*
11 (*"Serrano III"*) (1977) 20 Cal.3d 25, 34, quoting *D'Amico v. Board of Medical Examiners* (1974)
12 11 Cal.3d 1; *Glendale City Employees' Association v. City of Glendale* (1975) 15 Cal.3d 328, 341
13 fn.19; *Quinn v. State of California* (1995) 15 Cal.3d 162, 167; *see also Boeing Co. v. Van Gemert*
14 (1980) 444 U.S. 472, 478; *Mills v. Electric Auto-Lite Co.* (1970) 396 U.S. 375, 391-392.

15 The California Supreme Court has held that, "when a number of persons are entitled in
16 common to a specific fund, and an action brought by a plaintiff or plaintiffs for the benefit of all
17 results in the creation or preservation of that fund, such plaintiff or plaintiffs may be awarded
18 attorneys' fees out of the fund." *Serrano III, supra*, 20 Cal.3d at 34, quoting *D'Amico*, 11 Cal.3d 1;
19 *see also Boeing, supra*, 444 U.S. at 478 ("[A] lawyer who recovers a common fund for the benefit
20 of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as
21 a whole."); *Mills, supra*, 396 U.S. at 391-392 (United States Supreme Court endorsing the common
22 fund approach in class actions). California Practice Guide: Civil Trials and Evidence (The Rutter
23 Group) at § 17:172.3 explains the common fund doctrine as follows:

24 Where the lawsuit results in the recovery of a fund or property
25 benefiting others as well as plaintiff (e.g., a class action), the court has
26 inherent equitable power to order plaintiff's attorney fees paid out of
27 the common fund or property [citations]. Such fee spreading assures
28 that all of those benefited by the litigation pay their fair share of
 obtaining the recovery.

1 The California Supreme Court recently considered the propriety of attorneys' fee awards in
2 the context of class action settlements and concluded, consistent with the fee request made by Class
3 Counsel here, that a percentage of the fund is a fair and appropriate method to award such fees. *See*
4 *Laffitte v. Robert Half Intern. Inc.* (2016) 1 Cal.5th 480, 503. The percentage-of-the-fund approach
5 is the preferred method of awarding fees in traditional common fund cases, such as this case.
6 Where the settlement amount is a "certain or easily calculable sum of money," use of the
7 percentage-of-the-fund method is appropriate. *Serrano III*, 20 Cal. 3d at 35.

8 In *Glendale City Employees' Association v. City of Glendale* (1975) 15 Cal.3d 328, 341
9 fn.19, the California Supreme Court upheld an attorneys' fee award based on a percentage of the
10 common benefit obtained in a lawsuit by a city employees' association for retroactive wages:

11 It is not necessary to find this suit a proper class action in order to
12 uphold the portion of the judgment awarding counsel for plaintiffs 25
13 percent of all retroactive salaries and wages received. That award may
14 be sustained under the rule that a litigant who creates a fund in which
15 others enjoy beneficial rights may require those beneficiaries to pay
their fair share of the expense of litigation. (*See Sprague v. Ticonic
National Bank* (1939) 307 U.S. 161, 159; *Estate of Stauffer* (1959) 53
Cal.2d 124, 132).

16 In *Quinn v. State of California* (1995) 15 Cal.3d 162, 167, the California Supreme Court
17 stated: "[O]ne who expends attorneys' fees in winning a suit which creates a fund from which
18 others derive benefits may require those passive beneficiaries to bear a fair share of the litigation
19 costs." Similarly, in *City and County of San Francisco v. Sweet* (1995) 12 Cal.4th 105, 110-111,
20 the California Supreme Court recognized that the common benefit doctrine has been applied
21 "consistently in California when an action brought by one party creates a fund in which other
22 persons are entitled to share."

23 Numerous appellate courts have similarly found. *See e.g., Knoff v. City and County of San*
24 *Francisco* (1969) 1 Cal.App.3d 184, 203-204 (court upheld a "contingent percentage" award of
25 attorneys' fees in a representative action as the proper exercise of the court's broad equitable
26 powers); *Rider v. County of San Diego* (1992) 11 Cal.App.4th 1410, 1423 (attorneys' fees and
27 expenses properly awarded from common benefit composed of illegally imposed sales and use tax);
28 *Bank of America v. Cory* (1985) 164 Cal.App.3d 66, 89-92 (fees awarded from common benefit

1 created by action compelling state to claim dormant bank accounts); *Parker v. Los Angeles* (1974)
2 44 Cal.App.3d 556, 567-568 (court upheld fee award equal to one-third of the damages to owners of
3 residential property in an inverse condemnation action).

4 Moreover, at least eight federal courts of appeal-the First, Third, Sixth, Seventh, Ninth,
5 Tenth, Eleventh and the D.C. Circuit-have endorsed the “percentage fee” method for determining
6 reasonable attorneys’ fees in common benefit cases. *See e.g., In re Sumitomo Copper Litig.*
7 (S.D.N.Y. 1999) 74 F. Supp. 2d 393, 396-398 (describing the overwhelming weight of federal
8 authority in favor of the percentage fee method); *see also, Lealao, supra*, 82 Cal.App.4th at 30-31
9 (describing same).

10 Attorneys’ fees awards in line with the amount sought here are frequently upheld. *See e.g.,*
11 *In re Activision Sec. Litig.* (9th Cir. 1989) 723 F. Supp. 1373, 1375.

12 The requested fee, which is 35 percent of the Total Settlement Amount, falls in line with –
13 even below – the percentages awarded in other class action litigation numerous California trial
14 courts. *See Martin v. AmeriPride Servs.*, 2011 U.S. Dist. LEXIS 61796, 23 (S.D. Cal. June 9, 2011)
15 (recognizing that “courts may award attorney’s fees in the 30-40% range in wage and hour class
16 actions that result in recovery of a common fund under \$10 million.”) *See e.g., Walgreens*
17 *Overtime Cases*, JCCP No. 4387 (Coordinated Actions); *Laykin et al. v. Ann Taylor Retail Inc., et*
18 *al.*, LASC BC328843 and BC342729 (Coordinated Actions); *Crandall v. U-Haul International, Inc.*,
19 LASC Case No. BC178775 (40% award); *Albrecht v. Rite Aid Corp.*, San Diego Super. Ct. Case No.
20 729219 (35% award).

21 As the cases cited above demonstrate, attorneys’ fee awards in the amount sought here are
22 well-established by California law and practice. Accordingly, Class Counsel’s fee request is fair
23 and reasonable and is consistent with the awards in California and the Ninth Circuit. It is also
24 reasonable given the history of this action and the significant results obtained by Class Counsel
25 which provide a high amount of monetary recovery to Settlement Class Members.

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1 developing a factual record and convincing Defendant of its litigation exposure under California
2 law were essential to achieving the Settlement. Through their skill and reputation, Class Counsel
3 was able to obtain a settlement that provides an outstanding result for Class Members. Gaines
4 Decl. at ¶¶ 6-7.

5 **c. The Results Achieved**

6 The excellent results achieved by the Settlement support Class Counsel's request for
7 attorneys' fees. Class Members' support for the results achieved by Class Counsel is demonstrated
8 by the fact that there is not a single objection to the Settlement nor to Class Counsel's request for
9 fees, both of which were described clearly in the Notice. Based on the current claims information,
10 Class Members who participate in the settlement will receive, on average, approximately \$2,850.59
11 each. The highest individual settlement is approximately \$5,610.04, which is a significantly high
12 amount to any Class Member. This is a significant benefit for the Class Members here – it
13 represents a recovery for highly disputed claims. Gaines Decl. at ¶ 13. Equally important is the
14 fact that the State of California will receive \$60,000 for enforcement of labor laws and education of
15 employers. Gaines Decl. at ¶ 14.

16 Furthermore, the efficiency with which this litigation was conducted and resolved should be
17 rewarded. After preparing and investigating the case prior to filing the complaint, Class Counsel
18 litigated and resolved the case in an efficient manner. The Class Members directly benefited from
19 the prompt and fair resolution of their claims. They will be receiving a significant award in a short
20 period of time as opposed to waiting years to recover some undetermined amount if they succeeded
21 at trial, which is an uncertainty in itself.

22 **d. Preclusion of Other Employment**

23 As California law recognizes, Class Counsel's commitment to this litigation should not be
24 assessed in a vacuum. *See Serrano, supra*, 20 Cal.3d at 49. A relevant factor in determining
25 attorneys' fees is whether the litigation required Class Counsel to forego other employment. *See id.*
26 Additional work was available that Class Counsel had to forego to devote the time necessary to
27 pursue this litigation. *See* Gaines Decl. at ¶ 40.

28 //

1 **B. The Requested Fees are Also Justified Under the Lodestar Method**

2 Fee calculations under the lodestar method would result in a similar award, demonstrating
3 the fairness of Class Counsel’s percentage fee request. Under the lodestar method, a base fee
4 amount is calculated from a compilation of time reasonably spent on the case and the reasonable
5 hourly compensation of the attorney. The base amount is then adjusted by use of a multiplier in
6 light of various factors. *Serrano III, supra*, 20 Cal.3d at 48.

7 Class Counsel’s hourly rates are summarized in Plaintiffs’ Counsel’s declarations. See
8 Declaration of Daniel F. Gaines at ¶¶ 31-34; Tulyathan Decl. at ¶ 26; Lee Decl. at ¶ 7.

9 One difficulty in determining the hourly rate of attorneys of similar skill and experience
10 in the relevant community is the scarcity of hourly fee-paying clients in class action litigation.
11 As a practical matter, few if any employees or consumers pay attorneys’ fees on an hourly basis
12 for such extensive litigation, and thus retainer agreements in such cases are based on a stepped-
13 up contingency fee (with the percentage increasing from one-third to forty percent if the case
14 goes to trial). Therefore, there is no customary hourly billing rate for work that is routinely
15 based on a contingent fee relationship, but the nature of class action work should be strongly
16 considered by the Court. In addition, wage and hour work presents a difficult area of law that is
17 not within the knowledge of many lawyers. This kind of class action work requires specialized
18 learning and the willingness to take large risks. Gaines Decl. at ¶ 37.

19 Class Counsel has spent approximately 221.3 hours litigating this case to date.² Gaines
20 Decl. at ¶¶ 28, 30; Ex. B; Tulyathan Decl. at ¶ 24, Ex. C; Lee Decl. at ¶ 5, Ex. A. Class Counsel
21 collectively expects to spend another 30 hours preparing for and attending the Final Approval
22 Hearing and dealing with claims administration issues as well as other post-approval matters,

23 _____
24 ² In *Martino v. Denevi* (1986) 182 Cal.App.3d 553, 559, the court addressed the issue of what
25 evidence is required in California to support a fee application. The court held: “Testimony of an
26 attorney as to the number of hours worked on a particular case is sufficient evidence to support an
27 award of attorney fees, even in the absence of detailed time records.” *Id* There is no need to
28 attach the voluminous invoices prepared in a case as a basis for an award of fees and costs. *Id*.
Through Class Counsel’s declarations in support of this application, however, Plaintiffs present a
thorough breakdown of all hours spent, and costs incurred, in prosecuting this class action.
Pursuant to *Martino, supra*, this presentation is more than sufficient to support the amount sought.

1 including any issues that may arise from Settlement Class Members. Gaines Decl. at ¶ 28;
2 Tulyathan Decl. at ¶ 25; Lee Decl. at ¶ 6. Reasonable hours include, in addition to time spent
3 during litigation, the time spent before the action was filed, including time spent interviewing the
4 clients, investigating the facts and the law, preparing the initial pleadings and litigating the case.
5 *Webb v. Board of Educ.* (1985) 471 U.S. 234. Further, the fee award should include fees incurred
6 to establish and defend the attorneys' fee claim. *Serrano v. Priest* (1982) 32 Cal.3d 621, 639
7 (“*Serrano IV*”).

8 In cases where a common fund analysis is not used, once the court establishes the lodestar
9 amount, it should adjust the fee award by a multiplier in order to make an appropriate fee award.
10 *Serrano III, supra*, 20 Cal.3d at 48. In applying the multiplier, *Newberg on Class Actions* states
11 that “[m]ultiples ranging from one to four frequently are awarded in common fund cases when
12 the lodestar method is applied. A large common fund award may warrant an even larger
13 multiplier.” 4 *Newberg on Class Actions* 4th (4th ed. 2002) § 14.6. If the class members paid the
14 fees that the market would bear, they would pay a fee of anywhere from one-third to forty percent
15 of any recovery. Since this is the market rate, the lodestar calculation should be enhanced to
16 reflect what the class members would pay on the open market. *Lealao, supra*, 82 Cal.App.4th at
17 47-48.

18 In *Lealao*, the court held that trial courts should award lodestar fees by examining the
19 percentage-of-the-benefit and adjusting the lodestar calculation accordingly. *Id.* at 49, 53. The
20 court indicated that this is an upward adjustment and should be akin to a contingency fee recovery;
21 the court stated, “[a]n adjustment reflecting the amount of the class recovery is not significantly
22 different from an adjustment reflecting a percentage of that amount; and California courts have
23 evaluated a lodestar as a percentage of the benefit.” *Id.* at 46. The *Lealao* method appears
24 particularly appropriate because class actions generally are contingency fee cases for plaintiffs –
25 and the class action clients do not expect to pay an hourly fee.

26 The rationale of *Lealao* comports with the purpose of the multiplier. The multiplier is
27 “primarily to compensate the attorney for the prevailing party at a rate reflecting the risk of
28

1 nonpayment in contingency cases.” *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1138. The *Lealao*
2 court reasoned:

3 Given the unique reliance of our legal system on private litigants to
4 enforce substantive provisions of law through class and derivative
5 actions, attorneys providing the essential enforcement services must
6 be provided incentives roughly comparable to those negotiated in the
7 private bargaining that takes place in the legal marketplace, as it will
8 otherwise be economic for defendants to increase injurious behavior.
9 It has therefore been urged (most persistently by Judge Richard
10 Posner) that in defining a reasonable fee’ in such representative
11 actions the law should mimic the market.

12 In the class action context, that would mean attempting to award the
13 fee that informed private bargaining, if it were truly possible, might
14 have reached. The simplest way for the law to duplicate the bargain
15 that informed parties would reach if agency costs were low is to look
16 to fee award levels in actions brought by sophisticated private parties
17 under the same or comparable statutes.

18 *Lealao*, 82 Cal.App.4th at 47 – 48 (internal citations and quotations omitted). The court added:

19 [T]rial judges need the flexibility *Serrano III* provides, as it enables
20 them to relate fee awards to the economic realities that determine the
21 efficacy of the private enforcement contemplated by our civil justice
22 system.

23 Accordingly, we hold that, in cases in which the value of the class
24 recovery can be monetized with a reasonable degree of certainty and
25 it is not otherwise inappropriate, a trial court has discretion to adjust
26 the basic lodestar through the application of a positive or negative
27 multiplier where necessary to ensure that the fee awarded is within
28 the range of fees freely negotiated in the legal marketplace in
29 comparable litigation.

30 *Id.* At 49-50.

31 In looking at similar cases, including those set forth above, Class Counsel’s requested fee
32 comports to the market and Class Counsel’s lodestar supports the fee requested. Based on the
33 hours and applicable hourly rates of Class Counsel, the total lodestar to be expended by Class
34 Counsel through finalizing this settlement will be approximately \$150,260.00, based on 251.3
35 total hours. Tulyathan Decl. at ¶¶ 24-26, Ex. C; Gaines Decl. at ¶ 35, Ex. B; Lee Decl. at ¶¶ 5-7,
36 Ex. A.

1 Based on the above lodestar information of \$150,260.00, Class Counsel's request for a
2 low multiplier of approximately **1.16** is reasonable and fair, given that this is well below the
3 typical range of multipliers awarded by the court. *Wershba v. Apple Computer, Inc.* (Ct. App.
4 2001) 91 Cal.App.4th 224 (noting that courts using the lodestar method to calculate attorney fees
5 awards in class actions typically apply multipliers in the range of 2 to 4); *Boyd v. Bank of Am.*
6 *Corp.* (C.D. Cal. 2014) 2014 U.S. Dist. LEXIS 162880 (awarding 33% of the common fund,
7 based on a multiplier of 2.58, in a wage and hour class action settlement); *Vandervort v. Balboa*
8 *Capital Corp.* (C.D. Cal. 2014) 8 F.Supp.3d 1200, 1210 (awarding 33% of the common fund,
9 based on a multiplier of 2.52).)

10 As such, the requested fee award is fair and reasonable, and should be awarded in its
11 entirety. Class Counsel risked not only a great deal of time, but also a great deal of expense to
12 ensure the successful litigation of this action on behalf of all Class Members. For such reasons,
13 Class Counsel's request for attorneys' fees in the amount of \$175,000.00 is fair, reasonable, and
14 adequate.

15 **C. Class Counsel's Request for Costs is Reasonable**

16 In the course of this litigation, Class Counsel had to (and will) incur substantial out-of-
17 pocket costs totaling \$13,303.65, which falls below the permitted \$25,000. *See* Gaines Decl. at ¶ 81,
18 Exhibit F; Tulyathan Decl. at ¶ 27, Ex. D.

19 As demonstrated in the counsel declarations submitted herewith, the incurred costs included
20 filing and court fees, photocopy charges, service of process fees, mediation fees, CourtCall fees,
21 and mailing charges. *Id.* Such costs are appropriate for cost reimbursement in these types of cases.
22 *See e.g., In re United Energy Corp. Sec. Litig.* (C.D. Cal. 1989) 1989 WL 7321 1, *6 (quoting
23 *Newberg*, Attorney Fee Awards, § 2.19 (1987)); *see also, In re GNC Shareholder Litigation* (W.D.
24 Pa. 1987) 668 F. Supp. 450, 452.

25 The costs incurred by Class Counsel in this litigation benefited Class Members. In light of
26 the litigation costs that Class Counsel needed to incur to prosecute this action and the positive
27 reaction of Class Members, Plaintiffs' cost request is reasonable and should be granted.

D. The Class Representatives' Enhancement Payments Are Also Reasonable

Plaintiffs Smith and Truong seek service payments in the amount of \$10,000 each. The service payments are intended to recognize the time and efforts that the named Plaintiffs spent on behalf of the Class. Gaines Decl. at ¶ 23; *see also*, Declarations of Smith and Truong, submitted herewith.

When determining whether incentive awards are appropriate, courts consider a variety of non-exclusive factors such as:

[T]he actions the plaintiff has taken to protect the interests of the class, the degree to which the class has benefitted from those actions, and the amount of time and effort the plaintiff expended in pursuing the litigation . . . the risk to the class representative in commencing suit, both financial and otherwise, the notoriety and personal difficulties encountered by the class representative, the duration of the litigation, and the personal benefit (or lack thereof) enjoyed by the class representative as a result of the litigation.

Clark v. American Residential Services LLC (2009)175 Cal.App.4th 785, 804 (internal quotations omitted), *citing Cook v. Niedert* (7th Cir. 1998) 142 F.3d 1004, 1016 and *Van Vranken, supra*, 901 F.Supp. at 299.

As a result of the named Plaintiffs' efforts, Class Members will receive significant monetary settlement payments – approximately \$2,850.59, on average, per Class Member. The State of California will receive \$60,000, to be put toward education about and enforcement of California's labor laws.

In this case, the named Plaintiffs performed the following tasks, among others: (1) assisted Counsel in investigating and substantiating the claims alleged in this action, including multiple interviews and discussions with counsel to review facts, documents, and Defendant's policies; (2) assisted in the preparation of the complaint in this action; (3) searched for, reviewed, and produced evidentiary documents to Counsel as needed; and (4) assisted in the settlement of this litigation. Gaines Decl. at ¶ 23; *see also*, Declarations of Smith and Truong, submitted herewith. Moreover, as with any plaintiff who files a civil action, the named Plaintiffs undertook the financial risk that,

1 in the event of a judgment in favor of Defendant in this action, they could have been personally
2 responsible for any attorneys' fees and costs awarded in favor of the Defendant.

3 The award of service payments to the named Plaintiffs is especially warranted in a case like
4 this one. Service payments are necessary to ensure that employees, like Plaintiffs, continue to bring
5 claims like those brought here to enforce the rights of employees. Individuals like the named
6 Plaintiffs (and most Class Members) would have little, if any, recourse without the class action
7 device. Most Class Members – like the named Plaintiffs – would be fearful of retaliation in
8 response to filing any lawsuit, much less a class action one. Mr. Smith and Mr. Truong must be
9 commended for pursuing their claims; modest service payments like those sought here are an
10 appropriate means of doing so.

11 Not a single Class member objected to the service payments requested on behalf of the
12 named Plaintiffs, who brought this litigation on their behalf and who secured a benefit for them
13 worth \$500,000. The requested \$10,000 service payments fall in line with (if not below) other class
14 action settlements of this type. In light of the work that the named Plaintiffs performed on behalf of
15 Class Members, and the Class Members' response to the Settlement, the requested service payments
16 are reasonable and appropriate.

17 **E. Approval of the Fees Incurred by the Claims Administrator**

18 As part of the preliminary approval process, the Court approved the hiring of PSA as the
19 Claims Administrator. *See* Tulyathan Decl. at ¶ 12, Ex. B. In preliminarily approving the
20 Stipulation, the Court also tentatively approved a payment of up to \$6,500 to PSA. to perform all of
21 the duties required to administer the Settlement. *See id.* PSA has performed all of its required
22 duties to date and is committed to completing the claims administration process. *See generally*
23 Declaration of Jarrod Salinas. PSA's fees are \$6,500. Salinas Decl. at ¶ 13. Plaintiffs request that
24 the Court approve the payment of \$6,500 to PSA to account for the costs of administration as part
25 of its final order approving the Settlement.

26 **IV. CONCLUSION**

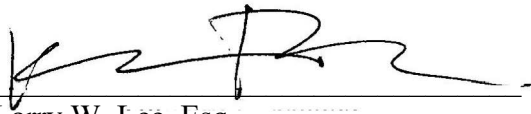
27 For all the foregoing reasons, Plaintiffs requests that the Court (1) approve Class Counsel's
28 request of \$175,000 as an award of attorneys' fees, (2) approve the requested award of \$13,303.65

1 in litigation costs to Class Counsel, (3) approve the request for a \$10,000 service payment to each
2 named Plaintiff in this action, and (4) approve payment of \$6,500 in administration costs to PSA
3 Group, Inc.

4
5 Dated: May 4, 2022

Respectfully Submitted,

6 DIVERSITY LAW GROUP, P.C.

7
8 By: 
9 Larry W. Lee, Esq.
10 Mai Tulyathan, Esq.
11 Attorneys for Plaintiffs
12 and Proposed Class Counsel
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