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

FRANKLIN AMOG, as an individual and
on behalf of all others similarly situated,

Plaintiffs,

vs.

EL CAMINO HOSPITAL, a California
nonprofit public benefit corporation; and
DOES 1 through 50, inclusive,

Defendants.

Case No. 20CV363828

(Assigned to the Honorable Patricia M. Lucas,
Dept. 3)

**PLAINTIFF'S NOTICE OF MOTION AND
MOTION FOR FINAL APPROVAL OF CLASS
AND REPRESENTATIVE ACTION
SETTLEMENT**

Date: October 13, 2021

Time: 1:30 p.m.

Dept.: 3

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

2 **PLEASE TAKE NOTICE** that on October 13, 2021, at 1:30 p.m., or as soon thereafter
3 as the matter may be heard, before the Honorable Patricia M. Lucas, judge presiding, in
4 Department 3 of the above referenced Court located at 191 North First Street, San Jose,
5 California 95113, Plaintiff Franklin Amog (“Plaintiff”) will seek an Order:

6 (1) granting final approval of the Joint Stipulation of Class and Representative Action
7 Settlement (“Settlement Agreement” or “Settlement”) in this matter;

8 (2) approving distribution of the settlement funds to Settlement Class Members
9 pursuant to the terms of the Settlement Agreement;

10 (3) approving Plaintiff’s request for an award of the Enhancement Payment of
11 \$10,000.00 to Plaintiff pursuant to the terms of the Settlement Agreement;

12 (4) approving Class Counsel’s request for an award of attorneys’ fees of
13 approximately one-third (1/3) of the Maximum Settlement Amount, *i.e.* the sum of \$333,333.33,
14 and reimbursement of litigation costs of \$11,155.35, pursuant to the terms of the Settlement
15 Agreement;

16 (5) approving Plaintiff’s request for payment of the settlement administration costs to
17 Phoenix Settlement Administrators in the amount of \$18,500.00 pursuant to the terms of the
18 Settlement Agreement;

19 (6) approving Plaintiff’s request for payment to the LWDA of \$30,000.00 pursuant to
20 the terms of the Settlement Agreement; and

21 (7) entering final judgment as to all members of the Settlement Class in this action.

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

28 This Motion will be based on the attached Memorandum of Points and Authorities and

1 the supporting Declarations of Larry W. Lee, Kristen M. Agnew, Nicholas Rosenthal, William L.
2 Marder, Plaintiff Franklin Amog, and Elizabeth Kruckenberg of Phoenix Settlement
3 Administrators, upon the oral arguments of counsel (should there be any), and on the complete
4 records and file herein.

5
6 DATED: September 17, 2021

DIVERSITY LAW GROUP, P.C.

7
8 By: _____

Larry W. Lee

Kristen M. Agnew

Nicholas Rosenthal

Attorneys for Plaintiff and the Class
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MEMORANDUM OF POINTS AND AUTHORITIES

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1 **I. INTRODUCTION**

2 On February 10, 2020, Plaintiff Franklin Amog (“Plaintiff”) filed a class and
3 representative action complaint against Defendant El Camino Hospital (“Defendant”) in the
4 Superior Court of California for the County of Santa Clara. The Complaint alleged class and
5 representative action claims for violation of Labor Code sections 226(a) and 2698, *et seq.*,
6 asserting that the wage statements provided to Plaintiff and other non-exempt employees failed
7 to identify the correct total hours worked when shift differential and/or per diem wages were
8 paid, in violation of Labor Code section 226(a)(6). As set forth in the Complaint, Plaintiff sought
9 damages, penalties, attorneys’ fees, and costs.

10 Plaintiff now seeks the Court’s final approval of the Joint Stipulation of Class and
11 Representative Action Settlement (“Settlement Agreement” or “Settlement”). The Settlement
12 Agreement provides for a \$1,000,000 fund to be created for the benefit of the Class, from which
13 attorneys’ fees, litigation costs, Enhancement Payment to Plaintiff, payment to the California
14 Labor and Workforce Development Agency (“LWDA”), and costs of settlement administration
15 are to be paid. The entire Net Settlement Amount after these deductions will be paid to all Class
16 Members who did not opt-out of the Settlement.

17 The history of this litigation was previously detailed in Plaintiff’s Motion for Preliminary
18 Approval of Class Action Settlement. This Court preliminarily approved this Settlement on June
19 23, 2021, directing distribution of Notice of Class Action Settlement (“Class Notice”) and
20 scheduling the hearing for final approval of settlement (the “Preliminary Approval Order”).

21 As directed by the Court, the Settlement Administrator distributed the Notice to 2,469
22 Class Members. (Declaration of Elizabeth Kruckenberg on behalf of Phoenix Settlement
23 Administrators (“Phoenix”) [“Kruckenberg Decl.”] ¶ 5.) To date, only four requests for
24 exclusion have been received, and there have been no objections filed. (*Id.* at ¶¶ 8-9.) As such,
25 there is a 99.99% participation rate. Thus, an inference can be made that the Class supports the
26 Court’s Preliminary Approval Order finding that the Settlement Agreement is fair and
27 reasonable.

28 In addition to the results of the notice process, for the same reasons as set forth earlier in

Plaintiff's Motion for Preliminary Approval of Class Action Settlement, the following represent the basic points supporting approval of the Settlement:

- The Settlement provides a Maximum Settlement Amount of \$1,000,000.00;
- The Settlement is fair given that Settlement Class Members will receive (*after deductions for fees, costs, etc.*) a substantial amount of money (on average, each Settlement Class Member will receive approximately \$242.20) (*See* Kruckenberg Decl. ¶ 11);
- Class Members did not need to submit claim forms to participate in the settlement, but are being paid automatically;
- The allocation reflects that payment of claims will be paid to all Class Members in proportion to the number of wage statements wherein each Class Member was paid shift differential and/or per diem wages during the Class Period;
- Plaintiff conducted significant investigation in this case, including informal discovery and exchanges of information by Plaintiff and Defendant of class data for the entire class necessary for Plaintiff to fully evaluate this case;
- A highly regarded administrator, Phoenix Settlement Administrators, was retained for fees estimated to be \$18,500.00; and
- California's LWDA will also be the beneficiary of this Settlement as it will receive \$30,000.00, should this Settlement be granted final approval.

Accordingly, the Court should grant final approval of the Settlement consistent with the Preliminary Approval Order.

II. CLASS MEMBERS RECEIVED PROPER NOTICE OF THE SETTLEMENT

The notice procedures required by the Preliminary Approval Order, have been followed and satisfy all due process rights of Class Members. The Preliminary Approval Order contemplated that the Class Notice, as approved in the Preliminary Approval Order, be sent to all Class Members by first class mail, as specified in the Settlement. Furthermore, the Preliminary Approval Order contemplated that Phoenix would serve as the Settlement Administrator.

As clearly stated in the Kruckenberg Declaration, notice was provided to Class Members,

1 as required by the Preliminary Approval Order. On June 30, 2021, the Settlement Administrator
2 received a Class Member mailing list from Defendant’s counsel that included 2,469 Class
3 Members. (Kruckenberg Decl. ¶ 3.) On July 7, 2021, each of the persons identified on the
4 mailing list were sent the Class Notice via first class mail. (*Id.* at ¶ 5.) From the date of mailing,
5 fifty-seven Class Notices were returned due to an incorrect address and forty-six were then re-
6 mailed to an updated address after performing an address trace. (*Id.* at ¶ 6.) As of the date of this
7 filing, eleven Class Notices remain undeliverable because an updated address could not be
8 located despite skip tracing efforts for the other Notice. (*Id.* at ¶ 7.) Further, the Class Notice
9 provided Class Members with Class Counsel’s contact information, where they could further
10 seek information regarding the class settlement, leave questions for the Settlement
11 Administrator, and update their address. (Declaration of Kristen M. Agnew [“Agnew Decl.”] ¶
12 3.)

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

22 Here, the Class Members were provided with a mailing regarding the settlement that
23 explained the settlement and allowed Class Members to seek information, ask questions, and
24 object, if so desired. As such, proper notice has been given to the Class Members. Thus, the
25 Court may determine the fairness and adequacy of the Settlement and enter an order granting
26 final approval, secure in the knowledge that all absent Class Members have been given the
27 opportunity to participate fully in the claims, exclusion, and the approval process.
28

1 **III. THE SETTLEMENT TERMS ARE FAIR, ADEQUATE, AND REASONABLE,**
2 **AND THE SETTLEMENT SHOULD BE GIVEN FINAL APPROVAL**

3 **A. Strength of Plaintiff’s Case and Likelihood of Certifying the Class**

4 The Court already addressed the requirements for certifying a class for settlement
5 purposes in its Order granting preliminary approval. Plaintiff briefly addresses the requirements
6 again here.

7 **1. The Class is Ascertainable**

8 Whether a class is “ascertainable” within the meaning of Code of Civil Procedure section
9 382 “is determined by examining (1) class definition, (2) the size of the class, and (3) the means
10 available for identifying the class members.” *Reyes v. San Diego County Board of Supervisors*,
11 196 Cal.App.3d 1263, 1271 (1987). Here, the Class is defined as: “all current and former
12 employees of Defendant in the State of California who were paid shift differential and/or per
13 diem wages at any time during the Class Period.” There are 2,469 individuals that comprise the
14 Class. (Kruckenberg Decl. ¶ 3.) This is more than the minimum required to certify a class.
15 Within the context of manageability, the issue is whether there exists sufficient means for
16 identifying class members at the remedial stage. *Reyes*, 196 Cal.App.3d at 1274-75. Class
17 Members have already been identified by Defendant and notice was provided to all of the above
18 Class Members.

19 **2. There is a Community of Interest**

20 The “community of interest” requirement embodies three separate factors: (1)
21 predominant common questions of law or fact; (2) class representatives whose claims are typical
22 of the class; and (3) class representatives who can adequately represent the class. *Richmond*, 29
23 Cal.3d at 470; *Reese v. Wal-Mart Stores, Inc.*, 73 Cal.App.4th 1225, 1234 (1999).

24 **a. There are Predominant Common Questions of Law and Fact**

25 “The ultimate question in every case of this type [class actions] is whether...the issues
26 which may be jointly tried, when compared with those requiring separate adjudication, are so
27 numerous and substantial that the maintenance of a class action would be advantageous to the
28 judicial process and to the litigants.” *Lockheed Martin Corp. v. Superior Court*, 29 Cal.4th 1096,

1 1104-05 (2003).

2 Plaintiff alleges that Defendant, as a matter of its corporate policy, practice, or procedure,
3 violated the Labor Code by its failure to provide accurate wage statements. Defendant denies that
4 liability could be established on a class-wide basis and contends instead that liability and
5 damages would need to be conducted on a case-by-case basis.

6 **b. Plaintiff's Claims are Typical of the Class Claims**

7 The purported class representative's claim must be "typical" but not necessarily identical
8 to the claims of other class members; it is sufficient that the representative is similarly situated so
9 that he or she will have the motive to litigate on behalf of the class. *Classen v. Weller*, 145
10 Cal.App.3d 27, 45 (1983). Courts look to whether class members have similar injuries, "whether
11 the action is based on conduct which is not unique to the named Plaintiff," and whether other
12 class members were injured by the same conduct. *Hanon v. Dataproducts Corp.*, 976 F.2d 497,
13 508 (9th Cir. 1992). The purpose of the typicality requirement "is to assure that the interest of the
14 named representative aligns with the interests of the class." *Id.* at 508.

15 Plaintiff was employed by Defendant and he alleges he was subjected to the same payroll
16 policies as all other Class Members. Specifically, like other members of the Class, Plaintiff
17 received wage statements that he alleges did not include the correct rate of pay for shift
18 differential and/or per diem wages. (Declaration of Franklin Amog ["Amog Decl."] ¶ 3.) Plaintiff
19 alleges he was subjected to the same policies and practices as other Class Members. Thus,
20 Plaintiff's claims are typical to those of Class Members.

21 **c. Plaintiff Adequately Represented the Class**

22 The class representative, through qualified counsel, must be capable of "vigorously and
23 tenaciously" protecting the interests of the class members. *Simons v. Horowitz*, 151 Cal.App.3d
24 834, 846 (1984). Here, Plaintiff does not have any interests adverse to the Class, nor have any
25 such issues been raised or presented. Plaintiff has taken all necessary steps to represent the
26 interests of the Class, including providing information and documents to his counsel and
27 reviewing pleadings in this case. (Amog Decl. ¶ 5.) For such reasons, Plaintiff has adequately
28 represented the Class Members and will continue to do so.

1 **B. Defendant’s Allegations and Unlikelihood of Class Certification**

2 Defendant asserts that individualized issues predominate in this case, including without
3 limitation, whether Defendant provided accurate wage statements in compliance with the law. In
4 any event, even assuming that a class could have been certified, Defendant asserts that it has
5 complied with all laws. Based thereon, Defendant continues to maintain that it is not liable for
6 the allegations made by the Plaintiff.

7 **C. Risks, Expenses, and Complexity of Further Litigation**

8 Plaintiff believes that a class can be certified. However, Plaintiff also believes in the
9 fairness of the settlement that is based on factoring in the uncertainty and risks to Plaintiff
10 involved in not prevailing on one or more of the causes of action or theories alleged in his
11 Complaint, the possibility of non-certification, and potential for appeals. These risks on class
12 certification are compounded by the California Supreme Court’s holding in *Duran v. U.S. Bank*
13 *Nat’l Ass’n*, 59 Cal.4th 1 (2014).

14 Defendant alleges that a class could not have been certified. There is always a risk that
15 the court will not grant certification of the class, wherein the class will not be entitled to any
16 damages. Furthermore, Defendant asserted the additional defense that it is exempt from the wage
17 and hour provisions of California’s Labor Code and Industrial Welfare Commission’s Wage
18 Orders. More specifically, Defendant contends that it qualifies for the public entity exemption
19 under Labor Code section 226(i), which provides that “this section does not apply to the state, to
20 any city, county, city and county, district, or to any other governmental entity.” Based on the
21 foregoing, there was a substantial risk that Plaintiff would not have obtained the total amount of
22 damages alleged, and a substantial number of complex issues that would have necessitated
23 significant expenditure of time and expenses. Therefore, the risks, expenses, and complexity of
24 further litigation warrant granting of this Motion.

25 **D. The Terms, Negotiation, and Reception of the Settlement by Class Members**
26 **All Strongly Support the Conclusion that the Settlement is Fair, Adequate,**
27 **and Reasonable**

27 Without reiterating the Parties’ showing that the Settlement Agreement and the
28 negotiation process that led up to it was fair and adequate, as set forth in detail in the Motion for

1 Preliminary Approval of Class Action Settlement, the Parties highlight the following facts. The
2 Settlement Agreement was the product of negotiation between highly able and experienced
3 attorneys on both sides who possessed the relevant data and extensive legal research which they
4 had carefully analyzed. (Agnew Decl. ¶ 2.)

5 The results after mailing of the Notice support confirmation of the Court’s preliminary
6 approval of the settlement with final approval of the settlement, as evidenced by the fact that to
7 date, only four requests for exclusion and no objections to the settlement have been received.
8 (Kruckenberg Decl. ¶¶ 8, 9.) The Court may appropriately infer that the class action settlement is
9 fair, adequate, and reasonable, given that not a single Class Member has submitted an objection.
10 *See Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1291 (9th Cir. 1992).

11 **E. Under Well-Established Legal Principles, the Court Should Grant Final**
12 **Approval of the Settlement**

13 **1. Standard of Review**

14 On a motion for final approval of a class action settlement under California Code of Civil
15 Procedure section 382 and California Rule of Court 3.769, a court’s inquiry is whether the
16 settlement is “fair, adequate and reasonable.” *Officers for Justice v. Civil Serv. Comm’n*, 688
17 F.2d 615, 625 (9th Cir. 1982), *cert. denied subnom.*, *Byrd v. Civil Serv. Comm’n*, 459 U.S. 1217
18 (1983). A settlement is fair, adequate, and reasonable, and therefore merits final approval, when
19 “the interests of the class are better served by the settlement than by further litigation.” *See*
20 *Manual for Complex Litigation, Fourth* § 21.6 at 309 (Fed. Jud. Ctr., 4th ed. 2004) (“MCL”).
21 The law favors settlement, particularly in class actions and other complex cases, where
22 substantial resources can be conserved by avoiding the time, cost, and rigors of formal litigation.
23 *See Alba Conte & Herbert B. Newberg, 4 Newberg on Class Actions* § 11.41 (4th ed. 2002);
24 *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992); *Van Bronkhorst v. Safeco*
25 *Corp.*, 529 F.2d 943, 950 (9th Cir. 1976).

26 Although the Court possesses “broad discretion” in determining that a proposed class
27 action settlement is fair, the Court’s role must be limited to the extent necessary to reach a
28 reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion

1 between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable, and
2 adequate to all concerned. *See Officers for Justice*, 688 F.2d at 625. Accordingly, the Court
3 should give due regard to what is otherwise a “private consensual agreement” between the
4 parties. *Id.*; *see also Church v. Consolidated Freightways, Inc.*, 1993 WL 149840 (N.D. Cal.
5 1993); *In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 720 F.Supp. 1379 (D. Ariz. 1989), *aff’d*
6 *sub nom.*; *City of Seattle*, 955 F.2d 1268; MCL § 21.6 at 309 (“The judicial role in reviewing a
7 proposed settlement is critical, but limited to approving the proposed settlement, disapproving it,
8 or imposing conditions on it. The judge cannot rewrite the agreement”).

9 A court’s approval of a class action settlement will only be reversed for a clear abuse of
10 discretion. *See Dunk v. Ford Motor Co.*, 48 Cal.App.4th 1794, 1801 (1996); *Officers for Justice*,
11 688 F.2d at 626 (“reverse only upon a strong showing that the district court’s decision was a
12 clear abuse of discretion”); *City of Seattle*, 955 F.2d at 1276; *Ackerman v. Kassar*, 1993 WL
13 326453 (9th Cir. 1993); *Linney v. Cellular Alaska P’ship*, 151 F.3d 1234, 1238 (9th Cir. 1998).

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

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

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

21 2. The Settlement is Presumed to Be Fair

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

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

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

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

4 Second, Class Counsel engaged in extensive factual investigation and legal research
5 before settling, including reviewing class data. (Agnew Decl. ¶ 2.) Further, Class Counsel is
6 highly experienced in this type of litigation. As shown in the supporting declarations, Class
7 Counsel has significant experience in class actions and employment wage and hour matters.
8 (Agnew Decl. ¶¶ 4-10, 12; Declaration of Larry W. Lee ["Lee Decl."] ¶¶ 4, 5, 8; Declaration of
9 Nicholas Rosenthal ["Rosenthal Decl."] ¶¶ 4, 5, 7; Declaration of William L. Marder ["Marder
10 Decl."] ¶¶ 3-10, 12.)

11 **3. Two-Way Costs and Other Risks Inherent in Continued Litigation** 12 **Favor Final Approval**

13 To assess the fairness, adequacy, and reasonableness of a class action settlement, the
14 Court also should weigh the immediacy and certainty of substantial settlement proceeds against
15 the risks inherent in continued litigation. *See also In re General Motors Corp.*, 55 F.3d 768, 806
16 (3d Cir. 1995) ("present value of the damages plaintiffs would likely recover if successful,
17 appropriately discounted for the risk of not prevailing, should be compared with the amount of
18 the proposed settlement") (internal citations omitted); *Girsh v. Jepson*, 521 F.2d 153, 157 (3d
19 Cir. 1975); *Boyd v. Bechtel Corp.*, 485 F.Supp. 610, 616-17 (N.D. Cal. 1979).

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

28 The risks of this case were weighed by Class Counsel and should be considered a
significant factor by the Court in its determination of final approval. Class Counsel obtained a

1 significant settlement for the Class that resulted in a fair recovery which at the same time
2 provides for finality and no risk of costs by the Class Members or Class Representative.

3 The Settlement Agreement also affords the Class prompt, fair relief while avoiding
4 significant legal and factual battles that otherwise may have prevented the Class from obtaining
5 any recovery at all. While Class Counsel believe the Class Members' claims are meritorious and
6 can be successfully litigated, they are experienced and fully understand the inherent risks and
7 uncertainty involved with such matters as the resolution of class certification, the outcome of a
8 potential trial, and the outcome of any appeals that would inevitably follow should the Class
9 prevail at trial. Class Counsel has also assessed the same risks in connection with the current
10 settlement. Because the settlement provides immediate and substantial relief, without the
11 attendant risks and delay of continued litigation—not to mention the threat of litigation fees and
12 costs—Class Counsel believe that the settlement warrants the Court's final approval.

13 **4. The Complexity, Expense, and Likely Duration of Continued**
14 **Litigation Against Defendant Favor Final Approval**

15 Another factor considered by courts in approving a settlement is the complexity, expense,
16 and likely duration of the litigation. *See Officers for Justice*, 688 F.2d at 625; *Girsh*, 521 F.2d at
17 157. In applying this factor, the Court must weigh the benefits of the settlement against the
18 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).

19 As noted above, continued litigation could have led to appeals on several issues. On the
20 other hand, the settlement that was reached provides to all Class Members—regardless of their
21 means—fair relief in a prompt and efficient manner. Were the Court to deny final approval, the
22 Class Members would be left without a remedy as a practical matter and courts across the State
23 would have to address the issues presented here in a piecemeal, costly, and time-consuming
24 manner. The settlement in this case is therefore consistent with the “overriding public interest in
25 settling and quieting litigation” that is “particularly true in class action suits.” *See Van*
26 *Bronkhorst*, 5293at 950 (footnote omitted); *see also 4 Newberg* at § 11.41. Here, this case would
27 have likely involved years of litigation.
28

1 **5. The Opinion of Experienced Counsel Favors Final Approval**

2 Class Counsel supports the settlement as fair, reasonable, and adequate, and in the best
3 interest of the Class Members as a whole. (Lee Decl. ¶¶ 2, 3; Agnew Decl. ¶ 2; Rosenthal Decl. ¶
4 2, 3; Marder Decl. ¶ 2.) Similarly, counsel for Defendant is in favor of this settlement. The
5 endorsement of qualified and well-informed counsel of a settlement as fair, reasonable, and
6 adequate is entitled to significant weight by the Court in its final approval determination. *See*
7 *Officers for Justice*, 688 F.2d at 625; *Ellis*, 87 F.R.D. at 18; *Boyd*, 485 F.Supp. at 617; *Linney*,
8 151 F.3d at 1242.

9 **IV. THE PROPOSED PROCEDURE FOR UNCASHED SETTLEMENT CHECKS**
10 **SHOULD BE APPROVED**

11 As referenced in the Motion for Preliminary Approval, to the extent any uncashed
12 settlement funds remain after 120 days, the Parties have agreed that all funds shall be distributed
13 to El Camino Health Foundation – Hospital Employee Assistance Fund, pursuant to Code of Civil
14 Procedure section 384.

15 **V. THE REQUESTED CLASS REPRESENTATIVE ENHANCEMENT SHOULD BE**
16 **APPROVED**

17 Class Representative Franklin Amog requests a total enhancement of \$10,000.00.
18 Plaintiff met with Class Counsel, including providing substantive information regarding
19 Defendant’s practices. (Amog Decl. ¶ 4.) Accordingly, Plaintiff provided invaluable information,
20 evidence, and documents that resulted in this Settlement.

21 In addition to the invaluable services that he provided, Plaintiff took significant risks,
22 both professionally and monetarily, in acting as Class Representative, seeking benefits on behalf
23 of the Class. Because the claims alleged by Plaintiff involved the payment of costs to the
24 prevailing party, Plaintiff could have possibly faced paying the costs of Defendant, had he not
25 prevailed in this action. Moreover, Plaintiff understood that an individual case would have
26 resolved much faster than a class action and involved much less financial risk than a class action.
27 Despite this, however, Plaintiff agreed to pursue this case on behalf of the Class. (Amog Decl. ¶
28 8.)

 Also, given that future employers are much less likely to hire individuals who have filed

1 employment-related lawsuits, particularly cases of this nature, Plaintiff also faced significant risk
2 in not being able to find suitable employment, all as a result of filing of this case against
3 Defendant. Plaintiff took these risks upon himself to the benefit of the Class. (Amog Decl. ¶ 8.)
4 Class Members did not have to file individual lawsuits and bear the risks of payment of costs if
5 they did not prevail, nor did they have to face the potential for retaliation and not getting future
6 employment had they filed a lawsuit which is a public record. These are significant benefits that
7 weigh in favor of granting the requested enhancement. Moreover, this litigation has resulted in a
8 significantly valuable benefit to the Class, and Plaintiff took on substantial risks in helping to get
9 this financial benefit to the Class. As such, the enhancement should be awarded to Plaintiff for
10 his commitment, dedication, and risks taken for this litigation.

11 Finally, Plaintiff provided a general release and waiver of the protections of Civil Code
12 section 1542. (Settlement Agreement at §C-30; Amog Decl. ¶ 9.) This is a more extensive
13 release than that provided by the Class at large, also supporting the request for the enhancement.

14 Courts have routinely granted approval of settlements containing such enhancements. *See*
15 *Van Vranken v. Atlantic Richfield Co.*, 901 F.Supp. 294, 299-300 (N.D. Cal. 1995) (incentive
16 award of \$50,000); *In re Dun & Bradstreet Credit Servs. Customer Litig.*, 130 F.R.D. 366, 374
17 (S.D. Ohio 1990) (two incentive awards of \$55,000, and three incentive awards of \$35,000);
18 *Brotherton v. Cleveland*, 141 F.Supp.2d 907, 913-14 (S.D. Ohio 2001) (granting a \$50,000
19 incentive award); *Enter. Energy Corp. v. Columbia Gas Transmission Corp.*, 137 F.R.D. 240,
20 251-52 (S.D. Ohio 1991) (\$50,000 awarded to each class representative); *Glass v. UBS Fin.*
21 *Servs.*, No. C-06-4068, 2007 U.S. Dist. LEXIS 8476, at *51-52 (N.D. Cal. Jan. 27, 2007)
22 (awarding \$25,000 incentive award in FLSA overtime wages class action); *Cook v. Niedert*, 142
23 F.3d 1004, 1016 (7th Cir. 1998) (affirming \$25,000 Incentive award to class representative in
24 ERISA case).

25 **VI. THE REQUESTED ATTORNEYS' FEES SHOULD BE APPROVED**

26 Class Counsel seeks a fee award calculated at one-third of the Maximum Settlement
27 Amount for the successful prosecution and resolution of this action. California state and federal
28 courts have recognized that an appropriate method for determining award of attorneys' fees is

1 based on a percentage of the total value of benefits to class members by the settlement. *Wershba*
2 *v. Apple Computer, Inc.*, 91 Cal.App.4th 224, 254 (2001); *Serrano v. Priest*, 20 Cal.3d 25, 34
3 (1977) [*Serrano III*]; *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); *Vincent v. Hughes*
4 *Air West, Inc.*, 557 F.2d 759, 769 (9th Cir. 1997). The purpose of this equitable doctrine is to
5 avoid unjust enrichment to the Class and to “spread litigation costs proportionally among all the
6 beneficiaries so that the active beneficiary does not bear the entire burden alone.” *Vincent v.*
7 *Hughes Air West, Inc.*, *supra*, 557 F.2d at 769.

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

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

1 here are consistent with market rates).

2 The results delivered by Class Counsel also support the requested percentage of the fund.
3 Here, Plaintiff and his counsel secured a \$1,000,000.00 settlement.

4 Finally, “the response of the class members to attorneys’ fee notice, though not decisive,
5 is relevant to the... reasonable determination” regarding fees. *Swedish Hospital v. Shalala*, 1 F.3d
6 1261, 1272 (D.C. Cir. 1993). A positive response rate tends to suggest that the court’s
7 “approximation of the market” for fees is well supported. *Id.* at p. 1269. In this case, the Class
8 Notice specifically notified Class Members that Class Counsel would be seeking \$333,333.33 in
9 attorneys’ fees. To date, no Class Member has objected to the Settlement. This strong favorable
10 response also supports the requested fees.

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

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

18 495 F.2d 448, 470 (2d Cir. 1974). Here, it is clear that a settlement fund of \$1,000,000.00 has
19 been created. For Class Counsel, the fees here were wholly contingent in nature and the case
20 presented far more risk than the usual contingent fee case. Among the risks was the cost inherent
21 in class action litigation, as well as a long battle with a corporate Defendant who had retained a
22 premier and highly experienced defense firm. As such, the requested fee should be awarded.

23 As secondary support for the percentage of the fund method, courts have discretion to
24 “cross-check” the fees awarded through the lodestar method. However, the *Laffitte* Court
25 “emphasize[d] [that] the lodestar calculation, when used in this manner, does not override the
26 trial court’s primary determination of the fee as a percentage of the common fund and thus does
27 not impose an absolute maximum or minimum on the potential fee award.” *Laffitte*, 1 Cal.5th at
28 505 (emphasis added); *In re Rite Aid Corp. Secs. Litig.*, 396 F.3d 294, 306-307 (3d Cir. 2005)

1 (“[The lodestar cross-check does not trump the primary reliance on the percentage of common
2 fund method”).

3 The Supreme Court in *Laffitte* stated: “If the multiplier calculated by means of a lodestar
4 cross-check is extraordinarily high or low, the trial court should consider whether the percentage
5 used should be adjusted so as to bring the imputed multiplier within a justifiable range, but the
6 court is not necessarily required to make such an adjustment.” *Id.* Thus, a lodestar cross-check is
7 aimed at astronomical multipliers. Indeed, cross-checks are not required; in many cases,
8 performing a cross-check “undermines” one of the primary reasons for using the percentage
9 method: aligning counsel’s incentives with the benefits delivered to the class and discouraging
10 protracted litigation. *Id.* at 506 (finding trial courts “retain the discretion to forgo a lodestar
11 cross-check”); *Report of the Third Circuit Task Force, Court Awarded Attorney Fees*, 108
12 F.R.D. 237, 258 (1985); *Lealao v. Beneficial California, Inc.*, 82 Cal.App.4th 19, 29-30 (2000)
13 (citing the recommendations of the Third Circuit Task Force with approval and observing that
14 “[t]he criticisms of the lodestar approach set forth in this Report are now echoed by many
15 authorities, who have been most vocal about the manner in which it exacerbates the problem of
16 ‘cheap settlements’ and burdens already overworked trial judge”).

17 Courts have defined reasonable multipliers on a lodestar cross-check to “range from 2 to
18 4 or even higher.” *Wershba v. Apple Computer, Inc.*, 91 Cal.App.4th 224, 255 (2001); *see also*,
19 *e.g.*, *Sutter Health Uninsured Pricing Cases*, 171 Cal.App.4th 495, 512 (2009) (applying a 2.52
20 multiplier on a cross-check in an antitrust class action); *Chavez*, 162 Cal.App.4th at 60 (applying
21 a 2.5 multiplier on a lodestar cross-check); *City of Oakland v. Oakland Raiders*, 203 Cal.App.3d
22 78 (1988) (affirming a 2.34 multiplier without remand). The intermediate court in *Laffitte*, after
23 finding that “2 to 4” is a reasonable range for multipliers on a cross-check, affirmed a 2.13
24 multiplier. *Laffitte*, 231 Cal.App.4th at 881-82. The intermediate court opinion was affirmed in
25 full by the California Supreme Court in its new decision guiding lower courts on assessing fees.

26 With respect to Class Counsel’s lodestar, to date, approximately 242.50 hours have been
27 expended by Class Counsel in this matter. (Agnew Decl. ¶ 11, Ex. A; Lee Decl. ¶ 6, Ex. A;
28 Marder Decl. ¶ 11, Ex. A; Rosenthal Decl. ¶ 6, Ex. A.) Moreover, Class Counsel expects to incur

1 approximately 15 additional hours of attorney time in finalizing this settlement. (Agnew Decl. ¶
2 12; Lee Decl. ¶ 7.) The courts are quite liberal in the evidence required to prove an attorney's
3 hours. Detailed time records are not required. An attorney's testimony alone may suffice:
4 "Testimony of an attorney as to the number of hours worked on a particular case is sufficient
5 evidence to support an award of attorney fees, even in the absence of detailed time records."
6 *Martino v. Denevi*, 182 Cal.App.3d 553, 559 (1986).

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

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

19 Class Counsel's skill and experience justify the requested rate. As shown in the
20 supporting declarations, Class Counsel have significant experience in the area of employment
21 and wage and hour class actions. Specifically, Class Counsel's practice focuses on representing
22 employees in employment matters, particularly wage and hour cases. (Agnew Decl. ¶ 4-10, 12;
23 Lee Decl. ¶¶ 4, 5, 8; Rosenthal Decl. ¶¶ 4, 5, 7; Marder Decl. ¶¶ 3-10, 12. As such, based on the
24 hours and applicable rate, the total lodestar to be expended by Class Counsel through finalizing
25 this settlement will be approximately \$182,765. (Agnew Decl. ¶ 12; Lee Decl. ¶ 8; Marder Decl.
26 ¶ 12; Rosenthal Decl. ¶ 7.)

27 Once the court establishes the lodestar amount, it may enhance the fee award by a
28 multiplier in order to make an appropriate fee award. *Serrano III*, 20 Cal.3d at 48. The pertinent

1 factors include the difficulty of the questions involved and the skill in presenting them, the
2 contingent nature of the fee award, the extent to which the litigation precluded other
3 employment, and the percentage-of-the-fund the attorney would have received on the fair
4 market. *Id.*, *Lealao*, 82 Cal.App.4th at 49. However, this list is not exhaustive and the court can
5 consider other factors it deems important in setting the multiplier. *Ketchum v. Moses*, 24 Cal.4th
6 1122, 1139 (2001).

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

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

18 The multiplier should be enhanced by the contingent nature of counsel's fee recovery.
19 The risks in taking on a class action case are enormous, not the least of which is time and effort.
20 Not only was there significant risk taken upon by Class Counsel, but their ability to obtain the
21 current settlement should be seen as quite commendable.

22 As explained previously, Defendant maintained that there were significant obstacles.
23 Thus, the risk involved in this case was quite significant for Plaintiff and his counsel, and in the
24 face of such risks, the current settlement was still able to be obtained by Plaintiff's counsel.

25 Here based upon Plaintiff's counsel's lodestar of \$182,765, Plaintiff's requested fees
26 result in a multiplier of 1.82 ($\$333,333.33$ (requested fees) $\div$ $\$182,765$ (lodestar amount)). This
27 demonstrates that the requested fees are reasonable and fair, particularly based on the factors
28 described above. *Wershba v. Apple Computer, Inc.*, 91 Cal.App.4th 224 (Ct. App. 2001) (noting

1 that courts using the lodestar method to calculate attorney fees awards in class actions typically
2 apply multipliers in the range of 2 to 4); *Boyd v. Bank of Am. Corp.*, 2014 U.S. Dist. LEXIS
3 162880 (C.D. Cal. Nov. 18, 2014) (awarding 33% of the common fund, based on a multiplier of
4 2.58, in a wage and hour class action settlement); *Vandervort v. Balboa Capital Corp.*, 8
5 F.Supp.3d 1200, 1210 (C.D. Cal. 2014) (awarding 33% of the common fund, based on a
6 multiplier of 2.52).

7 As such, the requested fee award is fair and reasonable, and should be awarded in its
8 entirety. Class Counsel risked not only a great deal of time, but also a great deal of expense to
9 ensure the successful litigation of this action on behalf of all Class Members. For such reasons,
10 Class Counsel's request for attorneys' fees in the amount of \$333,333.33 is fair, reasonable, and
11 adequate.

12 **VII. THE COURT SHOULD APPROVE THE REQUEST FOR REIMBURSEMENT**
13 **OF COSTS**

14 The request for reimbursement of costs, in the amount of \$11,155.35 is fair and
15 reasonable. The costs are all litigation related costs. (Lee Decl. ¶ 9, Ex. B) The authority for the
16 Court to award this is the Parties' Settlement Agreement and Labor Code sections 226 and 2699.
As such, this request should be approved.

17 **VIII. THE SETTLEMENT ADMINISTRATOR'S FEES AND COSTS SHOULD BE**
18 **APPROVED**

19 Pursuant to the terms of the Settlement Agreement, the fees and costs of the Settlement
20 Administrator are to be paid out of the class settlement funds. As shown on the Declaration of
21 Elizabeth Kruckenberg, the class administration fees expended in this matter amount to a total of
22 \$18,500.00, which is the amount that was agreed upon by the Parties. (Kruckenberg Decl. ¶ 12,
Ex. B.) For such reasons, it is requested that the Settlement Administrator's fees be approved.

23 **IX. CONCLUSION**

24 For all the foregoing reasons, and on the basis of the authorities cited herein, Plaintiff
25 respectfully submits that the standards for final approval have been met and the terms of the
26 Settlement Agreement are fair, adequate, and reasonable. Accordingly, Plaintiff respectfully
27 requests that the Court enter an Order in the form proposed and submitted:

- 28 1. Granting final approval to the proposed Settlement Agreement in this action;

2. Approving distribution of the settlement funds to the Settlement Class Members pursuant to the terms of the Settlement Agreement;

3. Approving Plaintiff's request for an award of the Enhancement Payment of \$10,000.00 to Plaintiff pursuant to the terms of the Settlement Agreement;

4. Approving Class Counsel's request for an award of attorneys' fees of approximately one-third (1/3) of the Maximum Settlement Amount, *i.e.* the sum of \$333,333.33, and reimbursement of litigation costs of \$11,155.35, pursuant to the terms of the Settlement Agreement;

5. Approving Plaintiff's request for payment of the settlement administration costs to Phoenix Settlement Administrators in the amount of \$18,500.00 pursuant to the terms of the Settlement Agreement;

6. Approving Plaintiff's request for payment to the LWDA of \$30,000.00 pursuant to the terms of the Settlement Agreement; and

7. Entering final judgment as to all members of the Class in this action.

DATED: September 17, 2021

DIVERSITY LAW GROUP, P.C.

By: _____

Larry W. Lee

Kristen M. Agnew

Nicholas Rosenthal

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