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on behalf of himself, all others similarly situated,
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SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN BERNARDINO

ERIK MARTINEZ on behalf of himself, all
others similarly situated, and on behalf of the
general public,

Plaintiffs,

v.

PATRICK INDUSTRIES, INC.; and DOES
1-100,

Defendants

Case No. CIVDS2009663

*[Assigned for All Purposes to the
Hon. David Cohn; Dept. S26]*

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PLAINTIFF ERIK MARTINEZ'S
MOTION FOR FINAL APPROVAL OF
CLASS ACTION SETTLEMENT,
ATTORNEYS' FEES AND COSTS,
CLASS REPRESENTATIVE
ENHANCEMENT PAYMENT,
ADMINISTRATION COSTS, LWDA
PAYMENT, AND ENTERING OF
FINAL JUDGMENT**

Date: December 15, 2022
Time: 10:00 a.m.

Complaint Filed: June 1, 2020
Trial Date: None Set

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	BACKGROUND, INVESTIGATION AND LITIGATION HISTORY	3
a.	Discovery.....	4
b.	The Parties Agreed to Attend Mediation.....	4
III.	THE PROPOSED SETTLEMENT AND THE CLASS MEMBERS' RESPONSE	4
a.	Deductions from the Settlement	4
b.	Release of Claims	5
c.	The Class Members Support the Settlement – No Objections or Requests for Exclusion Have Been Received to Date – and 100% of the Settlement Funds Will Be Paid Out	6
d.	Distribution of Funds.....	7
IV.	ARGUMENT	8
a.	The Settlement is Fair, Reasonable, and Adequate and Satisfies the Standard for Final Approval	8
b.	The Court Should Approve the Requested Fees and Costs	9
i.	The Court Should Approve the Requested Fees.....	9
ii.	The Requested Fee Award is Fair and Reasonable, Calculated as a Percentage of the Settlement Amount	10
iii.	A Lodestar Cross-Check with a Modest Multiplier Confirms the Reasonableness of the Requested Fee	12
1.	The Fees Requested Represent a Reasonable Hourly Rate of Compensation in Light of Class Counsel's Efforts and Experience	15
2.	Class Counsel's Total Hours are Reasonable	16
c.	Costs of Litigation	17
V.	THE CLASS REPRESENTATIVE ENHANCEMENT PAYMENT IS REASONABLE..	17
VII.	CONCLUSION	20

TABLE OF AUTHORITIES

Cases

<i>Beech Cinema, Inc. v. Twentieth-Century Fox Film Corp.</i> (S.D.N.Y. 1979) 480 F.Supp. 1195 ..	10
<i>Bell v. Farmers Ins. Exch.</i> (2004) 115 Cal. App. 4th 715	18
<i>Boeing Co. v. Van Gemert</i> (1980) 444 U.S. 472	10
<i>Boyd v. Bechtel Corp.</i> (N.D. Cal. 1979) 485 F. Supp. 610	8
<i>Cates v. Chiang</i> (2013) 213 Cal. App. 4th 791	13
<i>Cellphone Termination Fee Cases</i> (2009) 180 Cal.App.4th 1110	9
<i>Chavez v. Netflix, Inc.</i> (2008) 162 Cal.App.4th 43.....	10
<i>Cho v. Seagate Tech. Holdings, Inc.</i> (2009) 177 Cal. App. 4th 734	8
<i>City and County of San Francisco v. Sweet</i> (1995) 12 Cal.4th 105	11
<i>Consumer Privacy Cases</i> (2009) 175 Cal.App.4th 545	9
<i>Cook v. Niedert</i> (7th Cir. 1998) 142 F.3d 1004.....	18
<i>Craft v. County of San Bernardino</i> (C.D. Cal. 2008) 624 F. Supp. 2d 1113.....	15
<i>Dunk v. Ford Motor Co.</i> (1996) 48 Cal. App. 4th 1794.....	8
<i>Early v. Superior Court</i> (2000) 79 Cal.App.4th 1420	18
<i>Flannery v. California Highway Patrol</i> (1998) 61 Cal. App. 4th 629	15
<i>Glendora Community Redevelopment Agency v. Demeter</i> (1984) 155 Cal.App.3d 465.....	15
<i>Graham v. DaimlerChrysler Corp.</i> (2004) 34 Cal.4th 553	13
<i>Green v. Obledo</i> (1981) 29 Cal.3d 126	10
<i>Hopson v. Hanesbrands Inc.</i> (N.D. Cal. Apr. 3, 2009) 2009 U.S. Dist. LEXIS 33900	15
<i>In re Ampicillin Antitrust Litigation</i> (D. D.C. 1981) 526 F.Supp. 494	10
<i>In re Cellphone Fee Termination Cases</i> (2010) 186 Cal. App. 4th 1380	18
<i>In re Microsoft I-V Cases</i> (2006) 135 Cal. App. 4th 706	8
<i>Ketchum v. Moses</i> (2001) 24 Cal.4th 1122.....	9, 13, 16
<i>Kullar v. Foot Locker Retail, Inc.</i> (2008) 168 Cal.App.4th 116	9
<i>Laffitte v. Robert Half Int’l, Inc.</i> (2016) 1 Cal.5th 480	9

1	<i>Lealao v. Beneficial Cal., Inc.</i> (2000) 82 Cal.App.4th 19	9, 11
2	<i>New York Gaslight Club, Inc. v. Carey</i> (1980) 447 U.S. 54	16
3	<i>Officers for Justice v. Civil Serv. Comm’n of City & Cnty. of S.F.</i> (9th Cir. 1982) 688 F.2d 615 ..	8
4	<i>PLCM Group, Inc. v. Drexler</i> (2000) 22 Cal.4th 1084	13, 15
5	<i>Potter v. Pacific Coast Lumber Co. of Cal.</i> (1951) 37 Cal. 2d 592	8
6	<i>Quinn v. State of California</i> (1995) 15 Cal.3d 162	11
7	<i>Roberts v. Texaco</i> (S.D.N.Y. 1997) 979 F. Supp. 185	18
8	<i>Serrano v. Priest</i> (1977) 20 Cal.3d 25	10, 13
9	<i>Serrano v. Priest</i> (1982) 32 Cal.3d 621	16
10	<i>Stambaugh v. Superior Court</i> (1976) 62 Cal. App. 3d 231	8
11	<i>Thayer v. Wells Fargo Bank</i> (2001) 92 Cal.App.4th 819	13
12	<i>Thornton v. East Texas Motor Freight</i> (6th Cir. 1974) 497 F.2d 416	18
13	<i>Vasquez v. Superior Court</i> (1971) 4 Cal.3d 800	10
14	<i>Vincent v. Hughes Air West, Inc.</i> (9th Cir. 1977) 557 F.2d 759	10, 11
15	<i>Vizcaino v. Microsoft Corp.</i> (9th Cir. 2002) 290 F.3d 1043	12, 13, 14, 15
16	<i>Vo v. Las Virgenes Municipal Water Dist.</i> (2000) 79 Cal.App.4th 440	16
17	<i>Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.</i> (2d Cir. 2005) 396 F.3d 96	15
18	<i>Wershba v. Apple Computer, Inc.</i> (2001) 91 Cal. App. 4th 224	8, 15

1 **I. INTRODUCTION**

2 This settlement seeks final approval of a non-reversionary \$1,800,000 proposed wage and
3 hour class action settlement reached by Plaintiff Erik Martinez (hereinafter “Plaintiff” or “Mr.
4 Martinez”) and Defendant Patrick Industries, Inc. (hereinafter “Defendant” or “Patrick”)
5 (hereinafter Plaintiff and Defendant are collectively referred to as the “Parties”). The settlement is
6 on behalf of Plaintiff and a Class comprised of all non-exempt employees of Defendant who
7 worked in California from June 1, 2016, through June 10, 2022. This motion also seeks an order
8 entering judgment.

9 This settlement seeks relief for 329 Class Members and will provide Class Members who
10 did not request to be excluded from the settlement (“Participating Class Members”) with an
11 average estimated payment of \$3,310.44 with the highest estimated payment being \$18,731.91.¹
12 In addition, the settlement will provide relief to 127 PAGA Aggrieved Employees who worked for
13 Defendant between February 19, 2019 and June 10, 2022. The workweek value under the
14 settlement is \$59.66.² The average payout to PAGA Aggrieved Employees is estimated to be
15 \$95.18, with the high payment being \$357.46.³

16 On August 11, 2022, Phoenix Settlement Administrators (“Phoenix” or the “Settlement
17 Administrator”) mailed the Class Notice to all 329 Class Members. Class Members had 30 days
18 to respond to the Class Notices (this is referred to as the “Response Deadline”), including requests
19 for exclusion from the settlement. The Response Deadline was September 10, 2022. As of the
20 Response Deadline, the Settlement Administrator did not receive any disputes regarding the
21 number of workweeks that Class Members were credited to have worked.⁴ The Settlement
22 Administrator also did not receive any objections from Class Members.⁵ The Settlement
23 Administrator did not receive any requests for exclusion from Class Members.⁶

24 ¹ Declaration of Kevin Lee Regarding Notice and Settlement Administration (“Lee Dec.”) ¶ 12.

25 ² Lee Dec. ¶ 10.

26 ³ Lee Dec. ¶ 13.

27 ⁴ Lee Dec. ¶ 2.

⁵ Lee Dec. ¶ 8.

⁶ Lee Dec. ¶ 7.

1 This matter required 622 hours of attorney time from class counsel Mara Law Firm, PC
2 (“Class Counsel”). This litigation involved investigations into the claims asserted, significant
3 discovery, the production of documents from Defendant, the informal exchange of information
4 prior to mediation, a full day of mediation, and evaluation of continuing litigation.

5 As will be demonstrated herein, the attorneys’ fee request of \$599,940 (“Attorney Fee
6 Award”), which represents one third of the Gross Settlement Amount (“GSA”), is fully supported
7 using the percentage fee method. The Attorney Fee Award is also supported under the lodestar
8 cross-check method. Plaintiff further moves for reimbursement of litigation costs and expenses in
9 the amount of \$18,424.51 (“Cost Award”), originally estimated not to exceed \$30,000, for costs
10 incurred in litigating this matter.

11 Plaintiff also moves for final approval of the payment in the amount of \$7,500 to Plaintiff
12 (this payment is referred to as the “Class Representative Enhancement Payment”) to compensate
13 him for his vital role in representing the Class Members and spearheading the case to seek actual
14 and substantial monetary relief for the Class.

15 Additionally, Plaintiff moves for final approval of \$10,000, originally estimated not to
16 exceed \$15,000, to the Settlement Administrator for the costs and fees of administering settlement
17 (“Administration Costs”).⁷

18 The requested Attorney Fee Award, Cost Award, Class Representative Enhancement
19 Payment, and Administration Costs were fully disclosed to the Class Members when the Class
20 Notice was mailed to them. Most importantly, to date, the settlement and all of its terms have
21 received support from Class Members, as not a single Class Member has objected to the settlement
22 or requested to be excluded from the settlement. With an average and high payout to Settlement
23 Class Members of \$3,310.44 and \$18,731.91, respectively, the settlement is fair, adequate, and
24 reasonable. The Parties, therefore, respectfully request that the Court consider the Class Members’
25 endorsement of the settlement, grant final approval of the settlement, and approve the Attorney
26 Fee Award, Cost Award, Class Representative Enhancement Payment, Administration Costs, and

27 ⁷ Lee Dec. ¶ 15.

1 LWDA payment in the amounts as preliminarily approved of by this Court and disclosed to the
2 Class Members, and enter final judgment as requested herein.

3 As demonstrated below, Class Counsel is convinced that the proposed settlement is in the
4 best interests of the Class based on the negotiations and a detailed knowledge of the issues present
5 in this matter. The length and risks of trial and perils of litigation that affect the value of the claims
6 were all carefully weighed by Class Counsel. In addition, the affirmative defenses asserted by
7 Defendant, Defendant's contentions that Class Members were compensated for all wages due and
8 provided lawful meal and rest breaks, the uncertainty of class certification, the difficulties of
9 complex litigation, the lengthy process of establishing specific damages, and various possible
10 delays and appeals were all carefully considered by Class Counsel in arriving at the proposed
11 settlement.

12 **II. BACKGROUND, INVESTIGATION AND LITIGATION HISTORY**

13 Patrick is a major manufacturer and distributor of component and building projects for the
14 recreational vehicle, manufactured housing, and marine industries. Patrick also supplies many of
15 its products to certain industrial markets that include customers in the residential housing, high-
16 rise, hospitality, kitchen cabinet, office and household furniture, fixtures and commercial
17 furnishings, and other industrial markets.

18 On February 19, 2020, Plaintiff uploaded a notice to the Labor and Workforce
19 Development Agency in accordance with the PAGA. Plaintiff's notice alleges that Defendant
20 failed to pay all straight time and overtime wages, failed to provide lawful meal and rest periods,
21 failed to provide accurate itemized wage statements, and failed to pay all wages due at the
22 termination of employment. (Mara Dec. ¶ 9).

23 Plaintiff filed the Complaint against Defendant San Bernardino County Superior Court on
24 June 1, 2020 (Case No. CIV2009663). The complaint alleged the following causes of action
25 against Defendant: (1) failure to pay all straight time and/or minimum wages; (2) failure to pay
26 all overtime wages; (3) failure to provide meal periods; (4) failure to authorize and permit rest
27 periods; (5) knowing and intentional failure to comply with itemized employee wage statement

provisions; (6) violation of the Labor Code Private Attorneys General Act of 2004; and (8) violation of Unfair Competition Law. (Mara Dec. ¶ 10).

a. Discovery

Since the filing of the Action and through execution of this Settlement Agreement, Plaintiff has conducted a thorough investigation into the facts underlying the claims asserted in the Complaint. Plaintiff has also engaged in extensive informal and formal discovery, including, the production of an extensive data sampling of time clock punches and wage statements and all applicable policies. In total, Defendant produced over 5,500 documents. (Mara Dec. ¶ 11).

Prior to mediation, Defendant provided Plaintiff with detailed information regarding the size of the Class, the applicable hiring and termination dates for Class Members, and the pay rates of Class Members, in addition to other relevant information. (Mara Dec. ¶ 12).

b. The Parties Agreed to Attend Mediation

On March 28, 2022, the Parties participated in a full-day mediation with respected wage and hour mediator, Michael Dickstein. This mediation was successful. The Parties then met and conferred over all the terms of the settlement and finalized their agreement in the Parties' Agreement. The Parties seek final approval of the Agreement in the instant motion. (Mara Dec. ¶ 13; *see also* Exhibit 5 attached thereto).

III. THE PROPOSED SETTLEMENT AND THE CLASS MEMBERS' RESPONSE

a. Deductions from the Settlement

The Parties have agreed (subject to and contingent upon the Court's approval) that this action be settled and compromised for the non-reversionary total sum of \$1,800,000 ("Gross Settlement Amount" or "GSA"), which includes, subject to Court approval: (a) attorneys' fees of \$599,940 (33.33% of the GSA) to compensate Class Counsel for work already performed and all work remaining to be performed in documenting the settlement, administering the settlement, and securing Court approval; (b) litigation costs of \$18,424.51 (originally estimated not to exceed \$30,000); (c) a Class Representative Enhancement Payment to the named class representative, Erik Martinez, in a sum of \$7,500 in consideration for prosecuting this class action, serving as Class

Representative, work performed, and risks undertaken for the payment of attorneys' fees and costs in the event he had been unsuccessful in the matter; (d) claims administration fees and expenses to Phoenix Class Action Administration Solutions (hereinafter "Phoenix") in the amount of \$10,000 (estimated in the settlement agreement not to exceed \$15,000); and (e) PAGA payment of \$75,000.

b. Release of Claims

The claims that Plaintiff and other Participating Class Members are releasing in exchange for an Individual Settlement Share payment are based on the facts and claims asserted in the case. In exchange for an Individual Settlement Share, Plaintiff and Participating Class Members will release and discharge the Released Parties⁸ from any and all claims, debts, liabilities, demands, obligations, penalties, guarantees, costs, expenses, attorney's fees, damages, action or causes of action of whatever kind or nature, whether known or unknown, contingent or accrued, that are alleged, or that reasonably could have arisen out of the same facts alleged in the Complaint, against the Released Parties and any and all Doe defendants. The Released Claims include, but are not limited to, 1) Failure to Pay All Straight Time Wages; 2) Failure to Pay All Overtime Wages; (3) Failure to Provide Meal Periods (Lab. Code §§ 226.7, 512, IWC Wage Order No. 5- 2001(11); Cal. Code Regs., tit. 8 § 11050); 4) Failure to Authorize and Permit Rest Periods (Lab. Code § 226.7; IWC Wage Order No. 5- 2001(12); Cal. Code Regs. tit. 8 § 11050); 5) Knowing and Intentional Failure to Comply with Itemized Employee Wage Statement Provisions (Lab. Code §§ 226, 1174, 1175); 6) Failure to Pay All Wages Due at the Time of Termination of Employment (Lab. Code §§ 201-203); and 7) Violation of Unfair Competition Law (Bus. & Prof. Code § 17200, et seq.). This release will be for the Class Period. (Exhibit 5 at Section I, Paragraph 36, Pages 5-

⁸ The Released Parties are Defendant and its successors and predecessors in interest, subsidiaries, affiliates, trusts, brother-sister or otherwise related companies, and parents, as well as all of their past, present and/or future, direct and/or indirect, officers, managing members, directors, owners, members, employees, principals, heirs, representatives, accountants, auditors, partners, trustees, insurers, reinsurers, administrators, attorneys, agents, parent companies, subsidiaries and affiliated corporations and entities, consultants, shareholders, joint ventures, predecessors, successors, and/or assigns; and any attorney or law firm representing Defendant and/or the other aforementioned Released Parties with regard to Plaintiff's asserted claims against Defendant. (Exhibit 1 at Section I, Paragraph 36, Page 6).

6).

In addition, the claims that Plaintiff and other PAGA Aggrieved Employees are releasing in exchange for a portion of the PAGA Payment are based on the facts and claims asserted in the case and PAGA notice. In exchange for an Individual Settlement Share, Plaintiff and PAGA Aggrieved Employees will release any and all claims, debts, liabilities, demands, obligations, penalties, guarantees, costs, expenses, attorney's fees, damages, action or causes of action of whatever kind or nature, whether known or unknown, contingent or accrued, that are alleged or could have been alleged based upon a reasonable interpretation of the facts alleged in the PAGA Action, against Defendant (including any and all unnamed Does). The Released PAGA Claims include, but are not limited to, violations of the Private Attorneys General Act, Labor Code §2699, et seq. This release will be for the PAGA Period. (Exhibit 5 at Section I, Paragraph 31, Page 5).

In addition, Plaintiff agrees to a general release of his claims against Defendant. (Exhibit 5 at Section III, Paragraph 63, Pages 23-24).

c. The Class Members Support the Settlement – No Objections or Requests for Exclusion Have Been Received to Date – and 100% of the Settlement Funds Will Be Paid Out

On July 26, 2022, Defendant delivered to the Settlement Administrator a data file that contained names, last known mailing addresses, Social Security numbers, dates of employment, and workweeks for each Class Member during the periods from June 1, 2016 to June 10, 2022 ("Class Period") and from February 19, 2019 to June 10, 2022 ("PAGA Period"). Thereafter, the Settlement Administrator a National Change of Address ("NCOA") search in an attempt to update the class list of addresses as accurately as possible. (See Lee Dec. ¶¶ 3-4).

On August 11, 2022, the Settlement Administrator mailed via first-class regular U.S. Mail the Class Notice to all identified Class Members using the address information provided by Defendant and the results of the skip trace performed. (See Lee Dec. ¶ 5). To date, no Class Notices have been returned to the Settlement Administrator by the Post Office. As such, no Class Notices are deemed undeliverable. (See Lee Dec. ¶ 6).

Class Members had until September 10, 2022, to respond to the settlement. The settlement

has received overwhelming support from the Class Members. Not a single Class Member submitted an objection to the settlement or requested to be excluded from it. (*See* Lee Dec. ¶¶ 7-8). No Class Member submitted a dispute. (*See* Lee Dec. ¶ 9). Therefore, all 329 Class Members are participating in the settlement, meaning 100% of the Class Members are Participating Class Members.

d. Distribution of Funds

Defendant shall wire to the Settlement Administrator the Gross Settlement Amount no later than twenty (20) calendar days of the Effective Final Settlement Date. (Exhibit 5 at Section I, Paragraph 22, Page 3). Within fifteen (15) calendar days after Defendant wires the GSA to the Settlement Administrator, the Settlement Administrator shall disburse: (1) the Net Settlement Amount to be paid to Participating Class Members; (2) the Attorney Fee Award and Cost Award to Class Counsel for attorneys' fees and costs, as approved by the Court; (3) the Class Representative Enhancement Payment paid to the Class Representative, as approved by the Court; (4) the Administration Costs, as approved by the Court; (5) the PAGA Payment; and (6) Defendant's portion of payroll taxes as the Class Members' current or former employer. (Exhibit 5 at Section III, Paragraph 61(K)(i), Pages 21-22).

Participating Class Members and PAGA Aggrieved Employees must cash or deposit their Individual Settlement Share checks within one hundred and eighty (180) calendar days after the checks are mailed to them. If any checks are not redeemed or deposited within ninety (90) calendar days after mailing, the Settlement Administrator will send a reminder postcard indicating that unless the check is redeemed or deposited in the next ninety (90) days, it will expire and become non-negotiable, and offer to replace the check if it was lost or misplaced. If any checks remain uncashed or not deposited by the expiration of the 90-day period after mailing the reminder notice, the Settlement Administrator will, within two hundred (200) calendar days after the checks are mailed, cancel the checks. All funds associated with the Individual Settlement Share checks returned as undeliverable and funds associated with those checks remaining un-cashed, shall escheat to the State of California Controller's Office under the Unclaimed Property Statutes in the name of the Class Member. (Exhibit 5 at Section III, Paragraph 61(M), Pages 22-23).

1 **IV. ARGUMENT**

2 **a. The Settlement is Fair, Reasonable, and Adequate and Satisfies the Standard**
3 **for Final Approval**

4 California Rule of Court 3.769 requires court approval for class action settlements. Cal. R.
5 Ct. 3.769(g). California courts favor settlement. *Stambaugh v. Superior Court* (1976) 62 Cal. App. 3d
6 231, 236, *Potter v. Pacific Coast Lumber Co. of Cal.* (1951) 37 Cal. 2d 592, 602 (“[T]he law wisely
7 favors settlements”). Accordingly, the Court must give “[due] regard to what is otherwise a private
8 consensual agreement between the parties.” *Wershba v. Apple Computer, Inc.* (2001) 91 Cal. App.
9 4th 224, 245.

10 In deciding whether to approve a class settlement, a court evaluates whether the proposed
11 settlement is “fair, adequate, and reasonable.” *Dunk v. Ford Motor Co.* (1996) 48 Cal. App. 4th 1794,
12 1801 (citing *Officers for Justice v. Civil Serv. Comm’n of City & Cnty. of S.F.* (9th Cir. 1982) 688
13 F.2d 615, 625); *Cho v. Seagate Tech. Holdings, Inc.* (2009) 177 Cal. App. 4th 734, 742 43. A court
14 enjoys broad discretion in making this fairness determination. *Dunk, supra*, 48 Cal. App. 4th at 1801.
15 However, “a presumption of fairness exists where: (1) the settlement is reached through arm’s-length
16 bargaining; (2) investigation and discovery are sufficient to allow counsel and the court to act
17 intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of objectors is
18 small.” *Dunk, supra*, 48 Cal. App. 4th at 1802; accord *Wershba*, 91 Cal. App. 4th at 245. In addition,
19 a court should consider additional relevant factors, including the strength of the plaintiffs’ case
20 compared to the settlement amount; the risk, expenses, complexity, and likely duration of further
21 litigation; and the fair treatment of class members in relation to each other. *Dunk, supra*, 48 Cal. App.
22 4th at 1802; see also *In re Microsoft I-V Cases* (2006) 135 Cal. App. 4th 706, 723; see also *Boyd v.*
23 *Bechtel Corp.* (N.D. Cal. 1979) 485 F. Supp. 610, 617.

24 At the time of preliminary approval, the Court was provided with sufficient information to
25 satisfy three of the four *Dunk* factors, leaving the fourth factor, the number of objectors, unknown
26 until after the Class had an opportunity to respond to the settlement.⁹ Subject only to the Class’

27 ⁹ See Memorandum of Points and Authorities in Support of Preliminary Approval, pages 14-26.
28 In addition to the *Dunk* factors, Class Counsel also detailed the other factors such as the strengths

1 reaction to the settlement, the Court preliminarily presumed the settlement was fair, adequate and
2 reasonable. To date, not a single objection to the settlement has been submitted by any Class Member
3 to the Settlement Administrator. Thus, the settlement is entitled to the presumption that it is fair and
4 in all other respects proper, and the Court should grant final approval.

5 **b. The Court Should Approve the Requested Fees and Costs**

6 **i. The Court Should Approve the Requested Fees**

7 Trial courts have “wide latitude” in assessing the value of attorneys’ fees and their
8 decisions will “not be disturbed on appeal absent a manifest abuse of discretion.” *Lealao v.*
9 *Beneficial Cal., Inc.* (2000) 82 Cal.App.4th 19, 41; *Ketchum v. Moses* (2001) 24 Cal.4th 1122,
10 1132 (The “experienced trial judge is the best judge of the value of professional services rendered
11 in his court[.]”); *Cellphone Termination Fee Cases* (2009) 180 Cal.App.4th 1110, 1118.

12 California law provides that an attorneys’ fee award should be equivalent to fees paid in
13 the legal marketplace for the result achieved and risk incurred. *Id.* at 47-50; *Laffitte v. Robert Half*
14 *Int’l, Inc.* (2016) 1 Cal.5th 480, 503. In *Lealao*, the court held that when an action leads to a
15 recovery that can be “monetized” with a reasonable degree of certainty, the trial court should
16 “ensure that the fee awarded is within the range of fees freely negotiated in the legal marketplace
17 in comparable litigation.” *Lealao, supra*, 82 Cal.App.4th at 50. Fee awards that are too small will
18 “chill the private enforcement essential to the vindication of many legal rights and obstruct the
19 representative actions that often relieve the courts of the need to separately adjudicate numerous
20 claims.” *Lealao, supra*, 82 Cal.App.4th at 53. Therefore, fees in class and representative actions
21 should approximate the probable terms of a contingent fee contract negotiated by a sophisticated
22 attorney and client in comparable litigation. *Id.* at 48.

23 “The ultimate goal . . . is the award of a ‘reasonable’ fee to compensate counsel for their
24 efforts, irrespective of the method of calculation.” *Consumer Privacy Cases* (2009) 175
25 Cal.App.4th 545, 557-58 (quoting *Apple Computer, Inc. v. Superior Court, supra*, 126 Cal.App.4th

26 _____
27 of Plaintiff’s case, risks and costs of further litigation, as well as the reasonableness of the GSA
28 amount in light of *Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116.

1 at 1270). It is not an abuse of discretion to choose one method over another as long as the method
2 chosen is applied consistently using percentage figures and/or rates that accurately reflect the
3 marketplace. In cases where class members present claims against a settlement amount and the
4 settlement agreement provides that the defendant agrees to paying the attorneys a percentage of
5 the same, use of that percentage method is appropriate. *Lealao, supra*, 82 Cal.App.4th at 32.

6 Historically, courts have awarded fees as high as fifty percent (50%) of the settlement,
7 depending on the circumstances of the case. Conte & Newberg, *Newberg on Class Actions* (4th
8 Ed., 2002) § 14.03; *see also In re Ampicillin Antitrust Litig.* (D.D.C. 1981) 526 F.Supp. 494
9 (awarding attorneys' fees in the amount of 45% of the settlement amount of \$7.3 million); *Beech*
10 *Cinema, Inc. v. Twentieth-Century Fox Film Corp.* (S.D.N.Y. 1979) 480 F.Supp. 1195 (awarding
11 approximately 53% of the settlement amount as attorneys' fees). California courts routinely
12 approve class action attorneys' fees awards "averag[ing] around one-third of the recovery."
13 *Chavez v. Netflix, Inc.* (2008) 162 Cal.App.4th 43, 66 n.11 (lower court found 20–40% range of
14 contingency fee in marketplace was appropriate in class actions).

15 In short, Class Counsel's fee request of \$599,940, which represents 33.33% of the GSA, is
16 in line with awards in similar cases in California and nationwide and demonstrates that Class
17 Counsel's fee request is consistent with market rates and is reasonable.

18 **ii. The Requested Fee Award is Fair and Reasonable, Calculated as a**
19 **Percentage of the Settlement Amount**

20 Class Counsel applies for an award of attorneys' fees in the sum of \$599,940 (33.33% of
21 the GSA) and litigation costs of \$17,492.36. (Mara Dec. ¶ 14, Exhibit 1). California state and
22 federal courts have recognized that an appropriate method for determining an award of attorneys'
23 fees is based on a percentage of the total value of benefits made available to Class Members by
24 the settlement, also known as the "common fund" method. *Serrano v. Priest* (1977) 20 Cal.3d 25,
25 34 (*Serrano III*); *Boeing Co. v. Van Gemert* (1980) 444 U.S. 472, 478; *Vincent v. Hughes Air West,*
26 *Inc.* (9th Cir. 1977) 557 F.2d 759, 769.¹⁰ Where the amount of a settlement is a "certain easily

27 ¹⁰ The California Supreme Court has urged trial courts to consider class action federal authority.
28 *Green v. Obledo* (1981) 29 Cal.3d 126, 146; *Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 821.

1 calculable sum of money,” California courts may calculate attorneys’ fees as a reasonable
2 percentage of the settlement. Weil & Brown, *California Practice Guide, Civil Procedure Before*
3 *Trial*, Chapter 14, § 14:145; *Dunk, supra*, 48 Cal.App.4th at 1808. The percentage-of-the-benefit
4 approach is preferred in class and representative actions because “it better approximates the
5 workings of the marketplace than the lodestar approach.” *Lealao, supra*, 82 Cal.App.4th at 49.
6 The purpose of the common fund/percentage approach is to “spread litigation costs proportionally
7 among all the beneficiaries so that the active beneficiary does not bear the entire burden alone.”
8 *Vincent, supra*, 557 F.2d at 769.

9 In *Quinn v. State of California* (1995) 15 Cal.3d 162, 167, the Court stated: “[O]ne who
10 expends attorneys’ fees in winning a suit which creates a fund from which others derive benefits
11 may require those passive beneficiaries to bear a fair share of the litigation costs.” Similarly, in
12 *City and County of San Francisco v. Sweet* (1995) 12 Cal.4th 105, 110, the California Supreme
13 Court recognized that the percentage-of-the-benefit approach has been applied “consistently in
14 California when an action brought by one party creates a fund in which other persons are entitled
15 to share.” The reasons for applying this equitable doctrine include: “...fairness to the successful
16 litigant, who might otherwise receive no benefit because his recovery might be consumed by the
17 expenses; correlative prevention of an unfair advantage to the others who are entitled to share in
18 the fund and who should bear their share of the burden of its recovery; encouragement of the
19 attorney for the successful litigant, who will be more willing to undertake and diligently prosecute
20 proper litigation for the protection or recovery of the fund if he is assured that he will be properly
21 and directly compensated should his efforts be successful.” *Id.*

22 Courts have consistently recognized that class action litigation is increasingly necessary to
23 protect the rights of individuals whose injuries and/or damages are too small to economically
24 justify legal action on an individual basis. Accordingly, in determining a reasonable fee award,
25 courts award fees to serve as an economic incentive for lawyers to pursue such litigation in order
26 to achieve increased access to the judicial system for meritorious claims and to enhance deterrents
27 to wrongdoing. This is especially true in situations where multiple similar alleged wrongs would

not be economically feasible to pursue individually, such as here. *See* A. Conte, *Attorney Fee Awards* (2d Ed., 1993) 104, at 6.

When the lawsuit was originally filed, the prospect of a long, drawn-out battle with a defendant represented by experienced counsel was almost a certainty. By taking on this “battle” on a contingency basis, Class Counsel risked substantial economic loss if the results were not successful. This substantial risk is the reason that the courts approve the use of the percentage method when a settlement is obtained by the efforts of class counsel. *See Vizcaino v. Microsoft* (9th Cir. 2002) 290 F.3d 1043, 1048-49 (quotations omitted) (discussing the risks of engaging in litigation without certainty of compensation).

Under the terms of the Settlement Agreement, Defendant will pay a Gross Settlement Amount of \$1,800,000. An award of attorneys’ fees is to be calculated as a percentage of the total value of benefits made available to the Class Members under the settlement. In light of Class Counsel’s prosecution and resolution of the case, the requested attorneys’ fees are appropriate and reasonable.

Compensating class counsel in class litigation on a percentage basis makes good sense because: (1) it is consistent with the private marketplace where contingent fee attorneys are customarily compensated on such a basis; (2) it aligns the interests of class counsel and absent class members in achieving the maximum possible resolution of the case; and (3) it encourages the most efficient and expeditious resolution of the litigation by providing an incentive for early, yet reasonable, settlement. The requested attorneys’ fees in this matter satisfies all of those factors and should be approved on a percentage basis.

Further, Class Counsel has obtained a substantial recovery on behalf of Plaintiff and the Class. Thus, the requested Attorney Fee Award is appropriate.

iii. A Lodestar Cross-Check with a Modest Multiplier Confirms the Reasonableness of the Requested Fee

Class Counsel’s fee request is reasonable when calculated using the lodestar method. Under the lodestar method, a base fee amount is calculated from a compilation of time reasonably spent

1 on the case and the reasonable hourly compensation of the attorney. *Serrano v. Priest* (1977) 20
2 Cal. 3d 25, 48. The court then enhances this lodestar figure by a “multiplier” to account for a range
3 of factors, such as the novelty and difficulty of the case, its contingent nature, and the degree of
4 success achieved. *Id.* at 49; see also *Ketchum v. Moses* (2001) Cal.4th 1122, 1132-36; *PLCM*
5 *Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1096; *Thayer v. Wells Fargo Bank* (2001) 92
6 Cal.App.4th 819, 834, (“[t]here is no ... rule limiting the factors that may justify an exercise of
7 judicial discretion to [adjust the] lodestar”).

8 Courts “routinely enhance[] the lodestar to reflect the risk of non-payment in common fund
9 cases.” *Vizcaino v. Microsoft Corp.* (9th Cir. 2002) 290 F.3d 1043, 1051; *Graham v.*
10 *DaimlerChrysler Corp.* (2004) 34 Cal.4th 553, 579 (“One of the most common fee enhancers [...]”
11 is for contingency risk.”). Such an enhancement “mirrors the established practice in the private
12 legal market of rewarding attorneys’ fees for taking the risk of nonpayment by paying them a
13 premium over their normal hourly rates for winning contingency cases.” *Vizcaino*, 220 F.3d at
14 1051. A risk multiplier also serves to bring the financial incentives for enforcing important rights
15 “into line with incentives [attorneys] have to undertake claims for which they are paid on a fee-
16 for-service basis.” *Ketchum*, 24 Cal.4th at 1132. In determining whether or not to enhance or
17 reduce the lodestar, California courts take into account multiple factors, including: the time and
18 labor required; the skill requisite to perform the legal services properly; the preclusion of other
19 employment by the attorney due to the acceptance of the case; the contingent nature of the fee; the
20 amount involved and results obtained; the experience, reputation, and ability of the attorney; and
21 awards in similar cases. *Cates v. Chiang* (2013) 213 Cal. App. 4th 791, 822.

22 Class Counsel has worked 623 hours to date on this case and has calculated the lodestar
23 fee on those hours at \$441,050 at rates reflecting those currently earned in the marketplace. (Mara
24 Dec. ¶¶ 22, 25; Exhibit 1, Summary of Time and Costs). All of the work and tasks performed by
25 Class Counsel were reasonable and necessary to the prosecution of this case and are reflected in
26 the result achieved. (Mara Dec. ¶ 16).

27 This was a highly contested matter which required a significant amount of time and labor.

1 Class Counsel had to investigate and analyze documents and data for Plaintiff and a sampling of
2 Class Members. The litigation also required a considerable amount of time interviewing class
3 members about their experiences. (Mara Decl. ¶ 18).

4 In addition, as part of the above investigation and analysis, Plaintiff had to marshal the
5 evidence in a manner in which it could be adjudicated on a class-wide basis. So often, lawyers
6 unskilled in the class action aspect of wage and hour cases do not pay attention to or put the work
7 into how the evidence must be presented for class-wide adjudication. Strong class-wide cases
8 perish in the hands of inexperienced counsel because the case has not been worked up to succeed
9 at certification. Class Counsel here has considerable experience in class litigation and, from the
10 beginning of the case, is marshalling the evidence with a sharp focus on class-wide proof needed
11 for the matter to get certified. This case was no different. Throughout the matter, as evidence was
12 being gathered through documents and witness interviews, Class Counsel was reducing the data
13 to a “living class certification motion.” This filtering of voluminous evidence into class-wide proof
14 while keeping an eye on the merits of the litigation required a considerable amount of attorney
15 time and skill. (Mara Decl. ¶ 19).

16 Most importantly, all services were performed by Class Counsel on a contingent basis.
17 Both California and federal courts recognize that attorneys should be compensated for taking on
18 such contingent risks and provided with financial incentives to enforce important rights and
19 protections like those at issue in this case. See, e.g., *Vizcaino*, 290 F.3d at 1051; *Ketchum*, *supra*,
20 24 Cal.4th at 1132-33. Here, Class Counsel bore the risk that, in spite of all of their efforts and
21 skill employed, there may be no recovery. (Mara Dec. ¶ 19).

22 Class Counsel respectfully requests a fee of \$599,940, which, based on the total attorney
23 hours expended and rates, would require a modest 1.36 multiplier to raise the generated fees of
24 \$441,050 to the requested amount. Far greater multipliers have been awarded in similar cases, and
25 the total amount of fees sought by Class Counsel is also reasonable compared to fees awarded in
26 like cases. Courts routinely enhance lodestar amounts based on multipliers that “range from 2 to 4
27

or even higher.”¹¹ Thus, consideration of the lodestar method as a cross-check to the percentage figure sought strongly supports the reasonableness of the requested fee award. Class Counsel moves for and respectfully requests that the Court grant attorneys’ fees in the amount of \$599,940.

1. The Fees Requested Represent a Reasonable Hourly Rate of Compensation in Light of Class Counsel’s Efforts and Experience

Class Counsel’s hourly rates are between \$550 and \$850 and are in line with rates typically approved in wage and hour class action litigation and which rates have been approved by courts in California in the Los Angeles, Sacramento, San Francisco, Alameda, Orange and San Diego County Superior Courts. (Mara Dec. ¶ 21; Exhibit 2, Westlaw Court Express’s Legal Billing Report, Volume 14, Number 3, California Region for December 2012; Exhibit 3, 2014 Declaration of Richard M. Pearl in *Hohnbaum v. Brinker Restaurant Corp.* SDSC GIC834348; Exhibit 4, 2012 National Law Journal Survey of Hourly Billing Rates for Partners and Associates).

A reasonable hourly rate is the prevailing rate charged by attorneys of similar skill and experience in the relevant community. *PLCM Group, Inc* (2000) 22 Cal. 4th 1084, 1095; *Hopson v. Hanesbrands Inc.* (N.D. Cal. Apr. 3, 2009) 2009 U.S. Dist. LEXIS 33900. When determining a reasonable hourly rate, courts may consider factors such as the attorney’s skill and experience, the nature of the work performed, the relevant area of expertise and the attorney’s customary billing rates. *Flannery v. California Highway Patro* (1998) 61 Cal. App. 4th 629, 632.

Class Counsel’s skill and experience support its hourly rates. Class Counsel’s practice is limited exclusively to litigation, focusing on the representation of employees in wage and hour class action matters. (Mara Dec. ¶¶ 3-8). As leading attorneys in the field of wage and hour class action litigation, Class Counsel continually monitor the prevailing market rates charged by both defense and plaintiff law firms and set the billing rates of its attorneys and paralegals/law clerks

¹¹ *Wershba v. Apple Computer, Inc.*, 91 Cal.App.4th 224, 255 (2001); *see, e.g., Vizcaino*, 290 F.3d at 1051 (approving multiplier of 3.65); *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 123 (2d Cir. 2005) (approving multiplier of 3.5); *Craft v. County of San Bernardino*, 624 F. Supp. 2d 1113, 1125 (C.D. Cal. 2008) (awarding multiplier of 5.2 and collecting cases with cross-check multipliers ranging from 4.5 to 19.6); *Glendora Community Redevelopment Agency v. Demeter*, 155 Cal.App.3d 465, 479-80 (1984) (approving fee award with multiplier of 12).

to be consistent with the prevailing market rates in the private sector for attorneys and staff of comparable skill, qualifications, and experience. Other wage and hour attorneys working as class counsel before California courts charge comparable – if not higher – rates. (Mara Dec., Exhibit 2, Westlaw Court Express’s Legal Billing Report, Volume 14, Number 3, California Region for December 2012; Exhibit 3, 2014 Declaration of Richard M. Pearl in *Hohnbaum v. Brinker Restaurant Corp.* SDSC GIC834348; Exhibit 4, 2012 National Law Journal Survey of Hourly Billing Rates for Partners and Associates). Therefore, as they are in line with those of the relevant community, Class Counsel’s hourly rates are reasonable.

2. Class Counsel’s Total Hours are Reasonable

In determining a lodestar fee, reasonable hours include, in addition to time spent during litigation, the time spent before the action was filed, including time spent interviewing clients, investigating the facts and law, and preparing the pleadings. *See New York Gaslight Club, Inc. v. Carey* (1980) 447 U.S. 54, 62; *Vo v. Las Virgenes Municipal Water Dist.* (2000) 79 Cal.App.4th 440, 447. Further, the fee award should include fees incurred to establish and defend the attorneys’ fee claim. *Serrano v. Priest* (1982) 32 Cal.3d 621, 639 (“*Serrano IV*”). Under California law, counsel is entitled to compensation for every hour reasonably spent on the matter. *Id.* at 1133.

Class Counsel has expended a total of 468 hours on this case. The work performed by Class Counsel in order to achieve a settlement that will provide valuable consideration to the Class, averaging a \$3,310.44 settlement payment per Class Member, with the highest estimated award being \$18,731.91, is outlined by Class Counsel in the declaration submitted herewith. (Mara Dec. ¶¶ 22, 25). Class Counsel have been actively involved in this case, prior to the commencement of this action and all the way up to the present, and Class Counsel’s dedication to providing representation in the case has precluded other employment. Here, Class Counsel’s many tasks, in summary form, included the following: pre-filing investigation and legal research; communicating with the Class Representative; interviewing and meeting with Class Members; researching and investigating California’s ever-evolving wage and hour laws regarding compensation, overtime, meal and rest periods, itemized wage statements, waiting time penalties, and California’s Unfair

1 Competition Law; conducting investigation into Defendant's pay-structures, policies for its non-
2 exempt employees; drafting and filing pleadings; making appearances at Court proceedings;
3 engaging in numerous conferences with Defense Counsel regarding a variety of issues throughout
4 the litigation and settlement negotiations; analyzing records produced by Defendant; drafting the
5 mediation brief and performing mediation damages and exposure models; preparing for and
6 attending mediation; drafting, negotiating, and revising the settlement agreement and the Class
7 Notice; drafting preliminary approval papers; working with the Settlement Administrator on the
8 Class Notice process; reviewing, revising, and proofing Class Notice papers from the Settlement
9 Administrator; reviewing weekly status reports from the Settlement Administrator regarding Class
10 participation; reviewing and editing the Settlement Administrator's declaration; drafting final
11 approval papers, and preparing for and appearing at the Final Approval Hearing. (Mara Dec. ¶¶
12 22, 25).

13 Class Counsel bore the risk that, despite all of their efforts and skills employed, there may
14 be no recovery. All of the work performed was reasonable and necessary to the prosecution of this
15 case. The work performed was particularly justified, in light of the result achieved which provides
16 Class Members with an average payment of \$3,310.44 and a high payment of \$18,731.91.

17 **c. Costs of Litigation**

18 Class Counsel seeks reimbursement of the litigation costs and expenses of \$18,424.51.
19 (Mara Dec. ¶ 27, Exhibit 1). These costs were all reasonable and necessary to the prosecution of
20 this case and the results achieved and are fair and reasonable.

21 **V. THE CLASS REPRESENTATIVE ENHANCEMENT PAYMENT IS REASONABLE**

22 Class Counsel seeks approval of the Class Representative Enhancement Payment to the
23 named Plaintiff in the sum of \$7,500, which represents 0.4% of the \$1,800,000 settlement. It
24 should be noted that when the Class Notices were mailed and published, the Class was informed
25 that the Class Representative would apply for this payment and, to date, no Class Members have
26 objected.

1 There are also other factors supporting the request that Plaintiff receive \$7,500. The
2 requested Class Representative Enhancement Payment is also reasonable in light of the benefits
3 Plaintiff has conferred upon the entire Class, resulting in payments averaging \$3,310.44 and
4 highest payment of \$18,731.91. The requested enhancement is appropriate and reasonable based
5 upon Plaintiff's time and effort expended on this case, the risks he faced, and the outcome of this
6 case. Plaintiff has submitted a declaration detailing the efforts and time he expended on behalf of
7 the Class in order to advance this case to its successful conclusion. There is no question that this
8 case would not have reached the same result but for Plaintiff's involvement and input at all stages
9 of the litigation.

10 Courts routinely approve service payments, or incentive awards, to compensate named
11 plaintiffs for the services they provide and the risks they incur during class litigation. See *In re*
12 *Cellphone Fee Termination Cases* (2010) 186 Cal. App. 4th 1380, 1393; *see also Bell v. Farmers*
13 *Ins. Exch.* (2004) 115 Cal. App. 4th 715, 725-26 (upholding service payments to class
14 representatives); Manual § 21.62 n.971 (noting that service payments are warranted); *Cook v.*
15 *Niedert*, 142 F.3d 1004, 1015 (7th Cir. 1998); *Roberts v. Texaco*, 979 F. Supp. 185 (S.D.N.Y.
16 1997) ("present or past employee whose present position or employment credentials or
17 recommendation may be at risk by reason of having prosecuted the suit, who therefore lends his
18 or her name and efforts to the prosecution of litigation at some personal peril, a substantial
19 enhancement award is justified"); *Thornton v. East Texas Motor Freight*, 497 F.2d 416, 420 (6th
20 Cir. 1974) ("We also think there is something to be said for rewarding those drivers who protect
21 and help to bring rights to a group of employees who have been the victims of discrimination.").
22 There are few individuals that are willing to act as class representative and provide the work,
23 diligence, and willingness to assume a substantial financial risk should Defendant have prevailed
24 in this case. Plaintiff risked a potential judgment against him for attorneys' fees and costs if this
25 matter had not been successfully concluded. Case law holds that a losing party is liable for the
26 prevailing party's costs, *Early v. Superior Court*, 79 Cal.App.4th 1420, 1433 (2000), and in some
27 wage and hour actions, pursuant to California Labor Code § 218.5, for attorneys' fees as well.

1 Though the fee agreement provides that Class Counsel would pay such costs, Plaintiff would
2 nevertheless have had a cost bill entered against him leaving him potentially liable in the
3 unexpected possibility that Class Counsel did not meet their obligation to cover those costs.

4 Additionally, it is common knowledge that the modern-day work force is quite mobile,
5 with employees holding several jobs in a career during their lifetime. It is also true that prospective
6 employers in this computer, high-tech age “Google” and/or do extensive background checks and
7 have access to court databases to see if applicants have ever filed a lawsuit or have ever been sued.
8 Here, Plaintiff stepped forward to pursue not only his own rights but also, those of the similarly
9 situated individuals, all of whom will now receive settlement payments due to the initiation of this
10 action. Such conduct will not be lost on a prospective employer who has to choose between an
11 applicant who has never sued an employer and one who has done so.

12 Based on the foregoing, the \$7,500 enhancement payment to the named Class
13 Representative is fair, appropriate, and justified in light of the work performed pursuing this case
14 and assisting Class Counsel in this action, risks undertaken for payment of fees and costs if this
15 case had not been successfully concluded, potential detriment to future employment opportunities,
16 and the benefits gained for all Participating Class Members.

17 **VI. THE ADMINISTRATION COSTS ARE REASONABLE**

18 The Court-approved Settlement Administrator was responsible for formatting, printing,
19 and mailing and emailing the Class Notices. The Settlement Administrator was responsible for
20 responding to Class Member inquiries, providing weekly status reports, answering questions from
21 counsel for the Parties, and providing a declaration to document its duties and responsibilities
22 under the settlement. Plaintiff now requests that the Court finally approve the Administration Costs
23 in the amount of \$10,000 to Phoenix for services rendered and to be rendered for the notice and
24 settlement administration process. (Lee Dec. ¶ 15).

25 Following the grant of final approval, the Settlement Administrator’s duties will continue
26 in order to calculate and mail the individual Settlement Payments to Participating Class Members,
27 perform tax reporting obligations, disburse other payments as ordered by the Court, and perform

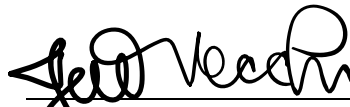
1 such other duties as set forth in the Class Action Settlement Agreement. Administration Costs in
2 the amount of \$10,000 to Phoenix for services rendered and to be rendered are fair and reasonable
3 and should be granted.

4 **VII. CONCLUSION**

5 Based on the foregoing, Plaintiff respectfully requests the Court grant final approval of the
6 \$1,800,000 non-reversionary fund settlement and award: Class Counsel attorneys' fees in the sum
7 of \$599,940 and litigation expenses of \$18,424.51; a Class Representative Enhancement Payment
8 in the sum of \$7,500 to Plaintiff; Administration Costs in the amount of \$10,000 to Phoenix; and
9 a payment to the LWDA in the amount of \$56,250 (which is 75% of \$75,000 allocated to Plaintiff's
10 claims under PAGA). Plaintiff further requests the Court enter final judgment in this matter which
11 would resolve and extinguish all claims released by the Settlement Agreement, against Defendant
12 and the Released Parties, as those terms are defined in and by the terms of the Settlement
13 Agreement.

14
15 Dated: November 21, 2022

MARA LAW FIRM, PC

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17 
18 David Mara, Esq.
19 Jill Vecchi, Esq.

20 Representing Plaintiff ERIK MARTINEZ on behalf
21 of himself, all others similarly situated, and on
22 behalf of the general public.
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