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SUPERIOR COURT OF CALIFORNIA
COUNTY OF ALAMEDA

MARIO TINACO, on behalf of himself and all
others similarly situated,

Plaintiff,

vs.

QUIK STOP MARKETS, INC., and DOES 1-
100,

Defendants.

Case No. RG20061119

ASSIGNED FOR ALL PURPOSES TO THE
HON. EVELIO GRILLO, DEPT. 21

[CLASS ACTION]

**MEMORANDUM IN SUPPORT OF
PLAINTIFF'S MOTION FOR FINAL
APPROVAL OF CLASS ACTION
SETTLEMENT**

Date: June 14, 2022

Time: 10:00 a.m.

Judge: Hon. Evelio Grillo

Dept.: 21

Reservation No.: 198104169761

Complaint filed: May 14, 2020

Trial date: None set

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1 **I. INTRODUCTION**

2 Plaintiff Mario Tinaco, on behalf of the State of California, and on behalf of himself and all
3 others similarly situated (“Plaintiff”), seeks final approval of the settlement of this wage and hour
4 class action lawsuit against Defendant Quik Stop Markets, Inc. (“Defendant” or “Quik Stop”).¹
5 Plaintiff and his counsel have achieved an exceptional result for the members of the Class, who are
6 current and former employees of Defendant throughout the State of California. The Settlement
7 resolves nearly two thousand claims that almost certainly never would have been prosecuted as
8 individual actions, thereby providing an excellent benefit to the members of the Class, and the
9 response of the Class has been overwhelmingly positive.²

10 The basic terms of the Settlement are as follows: (1) the Gross Settlement Amount is
11 \$6,950,000.00; (2) no portion of the Gross Settlement Amount will revert to Defendant; (3) a Net
12 Settlement Amount of approximately \$4,514,076.33 will be available for distribution to
13 Participating Class Members³; (4) Plaintiff requests, and Defendant does not oppose, an individual
14 service award of \$15,000.00 for his efforts on behalf of the Class; (5) a sum of \$100,000.00 for
15 PAGA penalties⁴; (6) the actual costs and expenses of the Settlement Administrator, totaling
16 \$15,893.00⁵; (7) one-third of the Gross Settlement Amount, or \$2,316,666.67, for attorneys’ fees;
17 and (8) reimbursement of actual costs to Class Counsel, which equal \$14,657.00.

18 The average recovery for Class Members has gone up since preliminary approval
19 proceedings. During preliminary approval proceedings, the parties estimated there were 2,100
20 Class Members. This resulted in an estimated average gross settlement per class member of

21 ¹ A true and correct copy of the Amended Class Action Settlement Agreement (“Settlement” or
22 “Settlement Agreement”) is attached as **Exhibit A** to the February 1, 2022 Supplemental
23 Declaration of Carolyn Hunt Cottrell in Support of Plaintiff’s Motion for Preliminary Approval of
24 Class Action Settlement, Conditional Certification of Settlement Class, Approval of Notice of
25 Settlement, and Setting of Hearing or Final Approval (“Cottrell Suppl. Prelim. Approval Decl.”).

26 ² “[T]here is an overriding public interest in settling and quieting litigation ... particularly ... in
27 class action suits[.]” *Van Bronkhorst v. Safeco Corp.* (9th Cir. 1976) 529 F.2d 943, 950; *Bell v.*
28 *American Title Ins. Co.* (1991) 226 Cal.App.3d 1589, 1607 (noting a “strong public policy” in
favor of class action settlements).

³ Class Members who do not opt-out are designated as “Participating Class Members” under the
Settlement. Participating Class Members need not submit a claim form in order to receive payment
under the Settlement.

⁴ Of this amount, \$75,000.00 is to be paid to California Labor and Workforce Development
Agency (“LWDA”), while \$25,000.00 would be distributed to Participating Class Members as part
of the Net Settlement Amount.

⁵ The Parties selected Atticus Administration, LLC (“Atticus”) as the Settlement Administrator.

1 \$3,293.84, and an average estimated net recovery per Class Member of \$2,139.37 – amounts that
2 are *ten to fifteen* times greater than settlements routinely described as “good” in similar wage and
3 hour cases.

4 But as it turns out, this settlement is even better than Plaintiff originally thought. Once
5 Defendant provided the full list of Class Members to Atticus, there were only 1,949 Class
6 Members. See Declaration of Bryn Bradley, ¶ 3. Thus, the average gross recovery per Participating
7 Class Member is **\$3,569.59**, and the average net recovery per Participating Class Member is
8 **\$2,317.81** – nearly a ten percent across-the-board increase per class member. Because this
9 Settlement is so exceptionally strong, it is hardly surprising that the Class has overwhelmingly
10 responded favorably. There have been no objections, only two-opt outs,⁶ and only two disputes
11 regarding workweeks.⁷

12 The Settlement satisfies all the criteria for final settlement approval under California law
13 and far exceeds any standard of reasonableness. Accordingly, the Court should (1) finally approve
14 the proposed Settlement; (2) finally approve Plaintiff as Class Representative; (3) finally approve
15 Schneider Wallace Cottrell Konecky, LLP (“SWCK”) as Class Counsel; (4) certify the Class for
16 settlement purposes only⁸; (5) finally approve an allocation of \$100,000 for PAGA penalties; (6)
17 finally approve a service award of \$15,000.00 to Plaintiff; (7) finally approve an award of
18 attorneys’ fees to Class Counsel in the amount of \$2,316,666.67, plus reimbursement of Class
19 Counsel’s out-of-pocket expenses in the amount of \$14,657.73; (8) finally approve Atticus as
20 Settlement Administrator and approve the costs of settlement administration in the amount of
21 \$15,893.00; and (9) approve the proposed implementation schedule, set forth in the Notice of
22 Motion, for relevant dates and deadlines regarding the administration of the Settlement.

23 **II. RELEVANT FACTUAL BACKGROUND AND PROCEDURAL HISTORY**

24 **A. Factual Background**

25 Plaintiff and the Class Members are Defendant’s current and former non-exempt
26 employees who work or worked as cashiers and attendants at Defendant’s gas stations and
27 convenience stores throughout California. Second Amended Class Action Complaint (“SAC”),
28

⁶ One of whom, Hesperansa Hardesty, has her own lawsuit pending on these issues. Bradley Decl.,
¶ 8.

⁷ One of these disputes was resolved to the Class Member’s satisfaction, and the other remains
under review with Defendant’s counsel. Bradley Decl., ¶ 9, 10.

⁸ The Class is defined as all current and former non-exempt, hourly employees of Quik Stop
Markets, Inc. employed in California at any time from May 14, 2016 through August 17, 2021. See
Settlement Agreement, ¶¶ I.C., I.K.

¶ 3. Quik Stop Markets, Inc. is registered as an active corporation with the California Secretary of State and does business in the State of California. SAC, ¶ 16. Quik Stop Markets, Inc. operates fueling stations, convenience stores, and food marts in several of the United States of America, including California. *Id.*

In addition to serving customers as the store's cashiers, Plaintiff and Class Members' job duties include restocking shelves and coolers with goods, preparing and serving hot and cold food, counting register drawers, cleaning equipment and displays, mopping floors, taking trash to the dumpster, and generally keeping an orderly store and property. SAC, ¶ 25. Because many of Quik Stop's stores are open 24 hours and never close, Plaintiff and Class Members work shifts, often alone, around the clock at all hours of the day and night. *Id.*

Accordingly, Plaintiff and Class Members cannot leave the store or the cash register unattended, even to use the bathroom, if customers are present. SAC, ¶¶ 25-26. Without any relief, Plaintiff and Class Members cannot complete all the cleaning and food preparation duties until another employee arrives for the next shift. *Id.* The need to complete these tasks before leaving for the day results in either disciplinary action if left unfinished or substantial time worked beyond scheduled hours. *Id.* As a result, Plaintiff and Class Members work beyond the scheduled ending time of their shifts and yet, Defendant only pays Plaintiff and Class Members as if they had worked their scheduled hours. *Id.*

When this uncompensated time is factored in, Plaintiff and Class Members often work over eight hours per day, necessitating the payment of overtime compensation for some of the time that they work. SAC, ¶ 27. However, Defendant fails to pay Plaintiff and Class Members appropriate overtime premiums for such time. *Id.* Because Defendant only pays its employees an hourly rate at or just barely above the required minimum wage, such uncompensated time also yields a regular rate that is less than the minimum wage required by California law. SAC, ¶ 39.

The same conditions and circumstances that require substantial work off-the-clock also prevent Plaintiff and Class Members from taking appropriate meal and rest breaks. SAC, ¶ 28. Because there are rarely other employees present to relieve Plaintiff and Class Members, they are unable to take duty-free breaks of any kind. *Id.* Even if they could, the workload is too great to take meal and rest breaks without further extending the workday beyond scheduled shifts. *Id.* Defendant does not pay missed break premiums to Plaintiff and the Class Members in lieu of missed or non-compliant breaks. *Id.*

Defendant also does not provide Plaintiff and Class Members with full payment of all wages owed at the end of employment. SAC, ¶ 30. Consequently, Defendant is subject to waiting

1 time penalties. *Id.* Moreover, Plaintiff and Class Members receive wage statements that do not
2 reflect all hours worked, premium pay for missed meal and rest breaks, nor applicable overtime
premiums. SAC, ¶ 29.

3 Defendant further fails to provide Plaintiff and Class Members with suitable seating. SAC,
4 ¶ 31. Plaintiff and Class Members spend a substantial portion of every shift working behind a
5 sales counter in Defendant's stores. SAC, ¶ 32. There is ample space behind each counter for the
6 presence and use of a stool or seat by Plaintiff and Class Members, yet Defendant does not allow
7 Plaintiff and Class Members to sit when it does not interfere with the performance of their duties.
8 SAC, ¶¶ 32-33.

9 As a result of these policies, Plaintiff has alleged class action and PAGA claims against
10 Defendant to challenge its alleged policies and practices of failing to compensate Class Members
11 for all hours worked, including at California minimum wage and overtime rates; failing to
12 authorize and permit Class Members to take duty-free meal and rest breaks and pay premium
13 compensation for missed breaks; failing to provide suitable seating; and related violations for
14 failing to provide Class Members accurate, itemized wage statements and failing to timely pay
Class Members wages owed upon the termination of employment. SAC, ¶ 2.

15 **B. Procedural History**

16 Plaintiff filed this action on May 14, 2020. Cottrell Decl., ¶ 18. The initial complaint
17 asserted claims individually and on behalf of the putative Class against Defendant Quik Stop for
alleged violations of California wage and hour laws. *Id.*

18 Plaintiff provided notice to the LWDA of his intent to pursue PAGA claims against
19 Defendant on March 19, 2020. *Id.*, ¶ 19.⁹ The LWDA did not issue a response. *Id.* On May 26,
20 2020, following the expiration of the 65-day PAGA notice period, Plaintiff filed an Amended
Class Action Complaint to add causes of action arising under the PAGA. *Id.*, ¶ 13.

21 Shortly after the case was filed, the Parties agreed to attend early mediation. *Id.*, ¶ 21. On
22 June 18, 2021, the Parties participated in mediation with Deborah Crandall Saxe, Esq., a respected
23 mediator in employment law. *Id.*, ¶ 22.

24
25
26 ⁹ True and correct copies of Plaintiff's March 19, 2020 PAGA Notice and October 12, 2021
27 amended PAGA Notice are attached as **Exhibits 4 and 5**, respectively, to the Declaration of
28 Carolyn Hunt Cottrell in Support of Plaintiff's Motion for Preliminary Approval of Class Action
Settlement, Conditional Certification of Settlement Class, Approval of Notice of Settlement, and
Setting of Hearing or Final Approval ("Cottrell. Prelim. Approval Decl.").

1 Before the mediation, Defendant provided informal discovery including timekeeping and
2 payroll information, as well as data concerning the entire Class including number of workweeks,
3 pay periods, and other information. Defendant also provided relevant written policies and
4 employee handbook information in use during the relevant Class Period, as well as paystubs for
5 Plaintiff. *Id.*, ¶ 23. Class Counsel used the timekeeping and payroll data produced by Defendant to
6 determine the size and scope of the Class and perform an in-depth analysis of Defendant's
7 exposure. The exposure analysis drove Plaintiff's negotiations with Defendant at mediation. *Id.*, ¶
8 24.

9 At the mediation, the Parties agreed to resolve all claims asserted and executed a Term
10 Sheet, which served as the basis of the Parties' Settlement Agreement. *Id.*, ¶ 25. On September 9,
11 2021, all Parties and their counsel fully executed the final long-form Settlement Agreement. *Id.*, ¶
12 26.

13 Pursuant to the terms of the Settlement Agreement, the Parties jointly stipulated to the
14 filing of a Second Amended Complaint alleging claims under the California Labor Code and
15 relevant Wage Orders for failure to provide suitable seating. *Id.*, ¶ 27. The Court entered the
16 Parties' joint stipulation on October 8, 2021. *Id.* On October 12, 2021, Plaintiff submitted an
17 amended PAGA notice to the LWDA adding allegations concerning Defendant's failure to
18 provide suitable seating. *Id.*, ¶ 28. Pursuant to the Parties' joint stipulation, Plaintiff filed his
19 Second Amended Complaint. *Id.*

20 On November 22, 2021, Plaintiff filed his Motion for Preliminary Approval of Class
21 Action Settlement. Concurrently, Plaintiff submitted the fully executed Settlement to the LWDA
22 along with his preliminary approval briefing. *Id.*, ¶ 29. Pursuant to the Court's January 7, 2022
23 Order on Plaintiff's Motion for Preliminary Approval of Class Action Settlement, the Parties
24 executed the operative Amended Class Action Settlement Agreement on February 1, 2022. *Id.*, ¶
25 30. Plaintiff filed the Amended Class Action Settlement Agreement with the Court on that date
26 (attached to the Cottrell Suppl. Prelim. Approval Decl.) and submitted it to the LWDA. *Id.* The
27 LWDA has not objected or otherwise disputed the terms of the Settlement. *Id.* On February 8,
28 2022, the Court granted the Motion for Preliminary Approval of Class Action Settlement.

29 **C. Notice of the Settlement**

30 On March 25, 2022, Atticus disseminated the Class Notice Packets via U.S. Mail to the
1,949 Class Members. Brindley Decl., ¶¶ 3-5. Prior to the initial mailing, Atticus completed
required data extraction and checked the addresses provided by Defendant through the National
Change of Address System. *Id.*, ¶¶ 4-5. The Class Notice informed Class Members of their rights

1 and options and the deadlines by which they were required to act on these options, the terms of
2 the Settlement, how their Settlement Shares would be calculated from the Net Settlement
3 Amount, and contact information for Class Counsel, Defense Counsel, and Atticus, among other
4 things. *Id.*, ¶ 5. The Class Notice was accompanied by a Notice of Estimated Settlement Award
5 that included each Class Member's number of Covered Workweeks on which their Settlement
6 Share would be calculated, and an estimated Settlement Share amount that assumed 100%
7 Settlement Class participation. *Id.* Additionally, the Notice packet included an IRS Form W-9 for
8 220 Class Members for whom Defendant was unable to locate and provide Social Security
9 Numbers ("SSNs"). *Id.*

10 Of the 1,949 Class Notice Packets mailed, 384 were returned to Atticus as undeliverable.
11 *Id.*, ¶ 6. One of the returned Packets included forwarding address information and it was promptly
12 remailed to the forwarding address. *Id.* 366 undeliverable records were sent to a professional
13 service for address tracing and 312 new addresses were received. *Id.* Class Notice Packets were
14 promptly remailed to the 312 new addresses received through trace. New address information was
15 not obtained for the other 54 records sent to trace. *Id.* 54 of the remailed Class Notice Packets
16 were returned to Atticus a second time. *Id.* 17 undeliverable records were not traced because the
17 associated Class Notice Packets were received by Atticus at or after the Class Member response
18 deadline. *Id.* These and any other undeliverable records will instead be traced prior to award
19 distribution following the Court's entry of a final approval order. *Id.* In total, Atticus successfully
20 disseminated Class Notice Packets to 1,824 Class Members, or 93.59% of the Class. *Id.*, ¶ 7.

21 Class Members who did not wish to participate in the Settlement were required to mail a
22 written and signed Election Not to Participate in Settlement to Atticus, postmarked no later than
23 May 9, 2022. Atticus received two timely and valid exclusion requests, from Susan Dodd and
24 Hesperansa Hardesty. *Id.*, ¶ 8. Class Members who wished to object to the Settlement were
25 required to provide a written and signed objection to Atticus, postmarked no later than May 9,
26 2022. Atticus did not receive any Settlement objections. *Id.*, ¶ 9. Class Members who disagreed
27 with the number of workweeks included on the Notice of Estimated Settlement Award enclosure
28 were provided the opportunity to explain why they disagreed with the information and provide
documentation to support their dispute. Dispute forms had to be sent to Atticus, postmarked no
later than May 9, 2022. Atticus received two timely disputes, one of which resulted in 35
additional Covered Workweeks for the disputing Class Member. The other dispute is currently
under review with Defendant and its counsel. *Id.*, ¶ 10.

Atticus took extra efforts to ensure Class Members received notice, and provided ample access for Class Members to contact Atticus about the Settlement process. Atticus implemented a toll-free call center on March 25, 2022 in conjunction with the Class Notice Packet mailing. *Id.*, ¶ 11. The toll-free number was printed in the Class Notice and is answered by live customer service representatives during Atticus' normal business hours of 8 a.m. to 4 p.m. Central Time, Monday through Friday. *Id.* Class Members have the opportunity to leave a voicemail message and receive a return call if representatives are unavailable and for calls placed after hours. *Id.* Atticus has answered 17 live inbound calls, received 11 voicemail messages, and placed 10 outbound return calls to date. *Id.* Eight Class Members, out of the 220 for whom Defendant was unable to locate valid SSNs, returned the IRS Form W-9. Those Class Members who do not return a completed W-9 prior to distribution of the Settlement Shares will be subject to 24% backup withholding mandated by the IRS. *Id.*, ¶ 12.

D. Final Approval of the Settlement

If final approval is granted, the Effective Date of the Settlement will occur when the Court enters the Order Granting Final Approval of Class Action Settlement and Entering Final Judgment (assuming that no objections or appeals have been filed to contest final approval). Settlement Agreement, ¶¶ I.P, I.R. After the Effective Date, Defendant will fund the Settlement according to the implementation schedule. *Id.*, ¶ III.F.10. Atticus will mail Settlement Share checks to Participating Class Members and pay the LWDA Payment, the Class Representative Service Payment to Plaintiff, and any award of fees and costs to Class Counsel pursuant to the implementation schedule. *Id.*

Settlement checks will be negotiable for 180 days following issuance. *Id.*, ¶ III.F.11. Atticus will issue a reminder postcard to any Participating Class Member whose Settlement Share check is not cashed within 120 days after mailing. *Id.* Any funds from uncashed checks will be redistributed to those Class Members who cash their checks and/or distributed to California Rural Legal Assistance Fund as the proposed *cy pres* beneficiary, if the amount is less than \$100,000 or if there are funds leftover from the redistribution. *Id.*

III. CLASS-ACTION SETTLEMENT APPROVAL PROCEDURE

A class action may not be dismissed, compromised, or settled without the approval of the court. See California Civil Code § 1781(f); California Rule of Court 3.769; *see also* Federal Rule of Civil Procedure 23(e). California Rule of Court 3.769 describes three distinct steps for approval of class action settlements by California courts: (1) preliminary approval of the proposed settlement after submission of a motion for preliminary approval, the proposed class action

1 settlement, and the proposed class notice; (2) mailing of notice of the settlement to all affected
2 members of the settlement class; and (3) a final settlement approval hearing at which members of
3 the settlement class may be heard regarding the settlement, and at which evidence and argument
4 concerning the fairness, adequacy, and reasonableness of the settlement is presented. This
5 procedure is similar to the procedure and criteria for approval of class actions under federal law.¹⁰

6 Here, the Court has already granted preliminary approval, notice has been mailed to the
7 Class, and the Class has responded favorably. With this Motion, Plaintiff requests that the Court
8 take the final step in the settlement approval process by granting final approval of the Settlement,
9 the LWDA Payment, the Class Representative Service Payment, and Plaintiff's application for
10 payment of Class Counsel's attorneys' fees and costs.

11 **IV. THE COURT SHOULD GRANT FINAL APPROVAL OF THE SETTLEMENT**

12 **A. Final Approval of the Settlement is Appropriate**

13 The decision to approve or reject a proposed settlement is committed to a court's broad
14 discretion. *Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 234-35; *Dunk v. Ford*
15 *Motor Co.* (1996) 48 Cal.App.4th 1794, 1801. "As long as the Court has sufficient information
16 about the nature and magnitude of the claims being settled, as well as impediments to recovery, the
17 Court should be able to make an independent assessment of the reasonableness of the terms to
18 which the parties have agreed. *Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 133.
19 Plaintiff provides an abundance of information regarding the claims being settled, and recognizes
20 and appreciates the risks of continued litigation.

21 **1. The best practicable notice was provided to the Class in accordance with 22 the Court-approved notice process**

23 The Parties successfully administered notice to the overwhelming majority of the Class.
24 The notice must be the best "practicable under the circumstances including individual notice to all
25 members who can be identified through reasonable effort." *Torrison v. Tucson Elec. Power Co.*
26 (9th Cir. 1993) 8 F.3d 1370, 1374; *Wershba*, 91 Cal.App.4th at 251 (the standard is whether the
27 notice has a reasonable chance of reaching a substantial percentage of the class members).
28 "[N]otice mailed by first class mail has been approved repeatedly as sufficient notice of a

¹⁰ It is also endorsed by the nation's leading class action commentator, Professor Herbert Newberg, for safeguarding class members' procedural due process rights and enabling the court to fulfill its role as the guardian of the interests of the class. See *Newberg on Class Actions*, § 11:24 (4th Ed. 2002); *Manual for Complex Litigation*, § 21:63 (4th Ed. 2006).

proposed settlement.” *Langford v. Devitt* (S.D.N.Y. 1989) 127 F.R.D. 41, 45; *Grunin v. International House of Pancakes* (8th Cir. 1975) 513 F.2d 114, 121.

Atticus followed all the procedures set forth in the Court-approved notice plan. Pursuant to the Court’s preliminary approval order, the Class Notice Packet was mailed to the Class in accordance with the terms of the Settlement. Cottrell Decl., ¶¶ 46-49. The Class Notice provides a description of the case and the proposed Settlement, informs Class Members of their Covered Workweeks and estimated Settlement Share, explains how Class Members could receive payment under the Settlement or exercise their right to opt-out, object, or dispute their workweek amount, and identifies Class Counsel. *Id.*, ¶ 49. With these measures, reasonable steps have been taken to ensure that all members of the Class received the Class Notice Packets. Accordingly, the notice process satisfies the “best practicable notice” standard.

2. The terms of the proposed Settlement are fair, reasonable, and adequate.

For final approval, courts must ensure that “the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned.” *Hanlon v. Chrysler Corp.* (9th Cir. 1998) 150 F.3d 1011, 1027. A presumption of fairness exists where: (1) the settlement is reached through arm’s-length bargaining; (2) investigation and 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. *Dunk*, 48 Cal.App.4th at 1802. All four of these conditions are satisfied here.

A review of the Settlement reveals the fairness of its terms. See *id.*, ¶ 63. The estimated Net Settlement Amount of \$4,512,782.60, derived from a Gross Settlement Amount of \$6,950,000.00, will result in fair and just relief to the Class Members. *Id.* The average gross recovery per Participating Class Member is **\$3,569.59**, and the average net recovery per Class Member is **\$2,317.81**. *Id.*, ¶¶ 33, 38. The per-Class Member recovery in this case far exceeds the achievements of similar cases.

This is a relatively ordinary wage and hour case dealing with non-exempt employees who typically are compensated at or near the minimum wage. In cases such as this this, courts routinely approve settlements where the average payout is less than \$200 dollars per person. See, e.g., *Rivas v. BG Retail, LLC* (N.D. Cal. Jan. 16, 2020) 2020 U.S. Dist. LEXIS 8712, 2020 WL 264401, at *15-16 [“the average recovery in this case (\$170.59) is comparable to other wage and hour class action settlements approved by courts in California”]; *Miceli v Intern. Coffee & Tea, LLC* (Cal. Super. May 31, 2017) No. BC557239, 2017 WL 2840618, at *4 [approving settlement where average settlement payment was \$113.03]; *Schiller v. David's Bridal, Inc.* (E.D. Cal. June 11,

2012) 2012 U.S. Dist. LEXIS 80776, 2012 WL 2117001, at *17 [report and recommendation adopted, 2012 U.S. Dist. LEXIS 187697, 2012 WL 13040405] [describing average class recovery of \$198.80 as “good” in wage-and-hour case, compared to similar cases with average recoveries of \$50-60 per class member]; *Roberts v. Marshalls of CA, LLC* (N.D. Cal. Jan. 23, 2018) 2018 U.S. Dist. LEXIS 10884, 2018 WL 510286, at *9 [approving settlement where the average gross payment to class members was \$66.75]; *Perez v. CVS Health Corp.* (E.D. Cal. June 11, 2021) 2021 U.S. Dist. LEXIS 110216, 2021 WL 2402950, at *26 [“In particular, plaintiff notes that the recovery for class members in this action (\$315.67 on average, with \$768.41 as the highest payment) compare favorably to other class action settlements in wage and hour cases, which provided average recoveries in the range of \$90-\$155.”].

Here, the average gross recovery per Class Member is **\$3,569.59**. Even after deducting all litigation costs, service awards, administrator costs, and the like, and assuming a one-third attorney fee award, the average net recovery per Class Member is **\$2,317.81**. Simply, the Settlement in this case provides an average class member recovery that is between *ten and fifteen times greater* than what courts have described as a “good” settlement in similar wage and hour cases. In sum, there no objective basis for concluding that the settlement in this case is anything short of exceptional.

a. The Settlement was reached after extensive investigation, discovery, and analysis of the class claims.

California courts recognize that “a presumption of fairness exists where ... [a] settlement is reached through arm’s-length bargaining.” *Wershba*, 91 Cal.App.4th at 245. Here, the proposed Settlement was reached after a full mediation session with Deborah Crandall Saxe, Esq., a respected mediator in employment law. Cottrell Decl., ¶ 66.

Class Counsel investigated the applicable law and the facts in this case and extensively analyzed the potential damages that might be recovered following the exchange of documents and information with Defendant. *Id.*, ¶ 67. Defendant provided informal discovery including timekeeping and payroll information, as well as data concerning the entire Class, including number of workweeks, pay periods, and other information. *Id.* Defendant also provided relevant written policies and employee handbook information in use during the relevant Class Period, as well as paystubs for Plaintiff. *Id.* Class Counsel used the timekeeping and payroll data produced by Defendant to determine the size and scope of the Class and perform an in-depth analysis of Defendant’s exposure. *Id.*, ¶ 68. The exposure analysis drove Plaintiff’s negotiations with Defendant at mediation. *Id.*

1 Through discovery analysis, Plaintiff estimates that the Class Members worked a total of
2 approximately 54,527 workweeks, or approximately 215,722 shifts. *Id.*, ¶ 69. The vast majority of
3 the shifts were longer than 5 hours. *Id.* The average rate of pay was approximately \$12.36. *Id.* On
4 average, the Class Members worked for Defendant for approximately 47 pay periods (same as
workweeks). *Id.*

5 Applying these inputs and further data points to Defendant's policies, Plaintiff prepared a
6 damages analysis that provided the estimated recovery for each cause of action. *Id.*, ¶ 70. The
7 input variables in the analysis can be adjusted to reflect differing assumptions for the level of
8 violations that Plaintiff could prove. *Id.* Assuming that Plaintiff and the Class fully prevail on the
9 off-the-clock claims and prove that they are owed for 15 minutes of unpaid time per each shift,
10 Plaintiff estimates the total damages for off-the-clock work at approximately \$666,581. *Id.*, ¶ 71.
11 Assuming that Plaintiff and the Class fully prevail on the meal and rest break claims and prove
12 that they are owed premium pay for meal and rest break violations on every shift of a length
13 triggering the requirement to provide and/or authorize such breaks, Plaintiff estimates the total
14 premium pay damages at approximately \$4,656,160. *Id.* Totaling these amounts provides total
damages for substantive (non-derivative, non-penalty) violations of approximately \$5,322,741,
based on the aggressive assumptions presented here. *Id.*

15 Plaintiff assesses Defendant's exposure for derivative violations (waiting time penalties
16 and wage statement penalties) at approximately \$6,469,836. *Id.*, ¶ 72. Defendant's total exposure,
17 for both substantive and derivative claims, as well as civil penalties under the PAGA, is estimated
18 at approximately \$31,020,551. *Id.* These figures provided benchmarks for Plaintiff and Class
19 Counsel to gauge settlement offers, compared to a hypothetical maximum that assumes complete
20 success on every claim and overcoming each of Defendant's defenses. *Id.*, ¶ 73.

21 The \$6,950,000 Gross Settlement Amount accounts for **over 100%** of Plaintiff's estimates
22 of Defendant's exposure for substantive violations (\$5,322,741). The \$6,950,000 Gross
23 Settlement Amount accounts for 59% of Defendant's total exposure for all Class claims,
24 including derivative penalty claims (\$11,792,577). Indeed, even when looking at the maximum
25 amount of PAGA penalties – ignoring, for the moment, the fact that courts routinely reduce even
26 successfully proven PAGA penalties by 90%, see *Carrington v. Starbucks Corp.* (2018) 30
27 Cal.App.5th 504, 517 – the Settlement still reflects over 22.4% of what could be recovered as a
28 theoretical matter (no matter how improbable). In short, the Settlement is objectively exceptional
even without considering the risks of continued litigation. When considering the risks of
continued litigation, the Settlement is extraordinary.

1 **b. Litigation of this action not only would delay recovery, but**
2 **would be expensive, time-consuming, and would involve**
3 **substantial risk.**

4 If this case were to go to trial as a class action, it is estimated that Class Counsel's fees and
5 costs would easily exceed \$1,000,000.00. *Id.*, ¶ 75. Litigating the class claims in this action would
6 require substantial additional preparation and discovery and ultimately would involve the
7 depositions of Class Members and experts, the presentation of percipient and expert witnesses at
8 trial, as well as the consideration, preparation, and presentation of voluminous documentary
9 evidence and the preparation and analysis of expert reports. *Id.* In contrast to the risk and
10 uncertainty of continued litigation, the Settlement will yield a prompt, certain, and substantial
11 recovery for Class Members. Such a result will benefit the Parties and the court system. *Id.*, ¶ 76.

12 **c. Defendant would continue to contest liability on all issues.**

13 The reasonableness of the Settlement is further underscored by the fact that Defendant has
14 legal and factual grounds available to defend this Action. *Id.*, ¶ 77. Defendant takes the position
15 that this case is not suitable for class or representative treatment and that it fully complied with its
16 obligations regarding payment of wages and provision of meal and rest breaks, among other
17 defenses. *Id.* In particular, Defendant vigorously disputed at mediation that Class Members were
18 required to work off-the-clock at all. *Id.*, ¶ 78. In addition, Defendant asserts that Plaintiff and
19 Class members were subject to on-duty meal period agreements. *Id.* Defendant further contends
20 that it maintains written policies and procedures relating to wage and hour issues that are facially
21 compliant with California law, and disputes that Plaintiff and the Class Members are entitled to
22 damages, penalties, or other relief sought. *Id.*

23 **d. Additional risks Plaintiff considered.**

24 Plaintiff would face other significant risks if the litigation were to proceed to trial. *Id.*, ¶ 79.
25 Before such merits inquiries, however, Plaintiff would have to file a Motion for Class
26 Certification. *Id.*, ¶ 80. This would require extensive investigation and outreach efforts by Class
27 Counsel to obtain supporting evidence, and would likely be vigorously contested by Defendant
28 with significant risk that the motion would be denied. *Id.* In the experience of Class Counsel,
putative class actions for off-the-clock claims have traditionally been difficult to certify.¹¹ *Id.*

¹¹ See, e.g., *In re AutoZone, Inc., Wage & Hour Employment Practices Litig.* (N.D. Cal. 2012) 289
F.R.D. 526, 539, *aff'd*, No. 17-17533, 2019 WL 4898684 (9th Cir. Oct. 4, 2019); *Kilbourne v.*
Coca-Cola Co. (S.D. Cal. July 29, 2015) No. 14CV984-MMA BGS, 2015 WL 5117080, at *14;

1 Plaintiff's theory of off-the-clock work is based in large part on indirect pressures to work unpaid
2 time, driven by the overtime approval policy and efficiency requirements of single-staffed shifts
3 or locations. *Id.*, ¶ 81. Such pressures may be found to vary from worker to worker or location to
4 location. *Id.* Plaintiff would face considerable risk that the Court would find that individual issues
5 predominate over common questions of law and fact. *Id.* Indeed, not only would such an outcome
6 doom the Class's claims, but it may very well have resulted in the dismissal of the PAGA claim
7 for "manageability" reasons. See *Wesson v. Staples the Office Superstore, LLC* (2021) 68
8 Cal.App.5th 746, 772-775.

9 Even assuming that the motion is granted, Plaintiff would then have to establish Class-wide
10 liability, and prove up various issues regarding damages and penalties. Cottrell Decl., ¶ 82.
11 Proving liability and damages issues would also be complicated by any individualized differences
12 in wage and hour experiences across the Class, and would be vigorously disputed by Defendant.
13 *Id.* In particular, Plaintiff and Class Counsel would be confronted with a lack of documentary
14 evidence regarding off-the-clock time, as the amounts of time were rarely logged or tracked. *Id.*
15 Obtaining class certification, establishing liability, and proving damages would likely take years,
16 and would necessitate expert witness testimony and significant additional litigation. *Id.*

17 Additionally, Plaintiff's derivative claims regarding waiting time penalties and wage
18 statements rise and fall with Plaintiff's other wage payment claims. *Id.*, ¶ 83. For example,
19 Plaintiff would recover nothing under § 203 if he was unable to prove the underlying claims or
20 defeat a "good faith" dispute defense. See Cal. Code Regs. Tit. 8, § 13520 [good faith dispute,
21 based in law or fact, precludes award of waiting time penalties]. Cottrell Decl., ¶ 84. While
22 Plaintiff believes that he would have prevailed on these issues and others, Plaintiff recognizes the
23 risk that a fact finder may have found for Defendant on one or more of these issues and or found
24 damages to be significantly less than what Plaintiff claims. Cottrell Decl., ¶ 85.

25 Defendant, represented by experienced employment lawyers, raised the above arguments,
26 and more, in mediation and would have done so in continued litigation. *Id.*, ¶ 86. Despite
27 Plaintiff's confidence in his ability to prove his claims on a Class-wide basis, any one of the
28 above defenses, if decided in favor of Defendant, could have reduced or even eliminated any
potential damages award. *Id.*

York v. Starbucks Corp. (C.D. Cal. Nov. 23, 2011) 2011 U.S. Dist. LEXIS 155682, 2011 WL 8199987, at *30.

Moreover, courts have considerable discretion to reduce PAGA penalties. *Thurman v. Bayshore Transit Mgmt., Inc.* (2012) 203 Cal.App.4th 1112, 1135; see also Cal. Lab. Code § 2699(e)(2) [providing that "a court may award a lesser amount than the maximum civil penalty amount specified by this part if, based on the facts and circumstances of the particular case, to do otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory"].) And courts typically exercise that discretion to reduce PAGA awards considerably. *Carrington*, 30 Cal.App.5th at 517 [reducing PAGA penalties to \$5 per pay period]; *Magadia v. Wal-Mart Assocs., Inc.* (N.D. Cal. 2019) 384 F.Supp.3d 1058, 1100 [court awarded "36% of the original amount of PAGA penalties Plaintiffs requested," in a case involving systematic failure to provide accurate wage statements and no viable defense]; *Kaanaana v. Barrett Bus. Servs., Inc.* (2018) 29 Cal.App.5th 778, 788 [review granted on other grounds] [noting that the trial court "exercised its discretion to reduce the [PAGA] penalties to 13 percent of the full amount"]; *Fleming v. Covidien Inc.* (C.D. Cal. Aug. 12, 2011) 2011 U.S. Dist. LEXIS 154590, 2011 WL 7563047, at *4 [reducing penalties to 27% of potential recovery, following bench trial.]

e. Class Counsel are experienced class action litigators.

Class Counsel are experienced and respected class action litigators. See *Id.*, ¶¶ 5-8, 88. Based on Class Counsel's knowledge and expertise in this area of law, Class Counsel believes this Settlement will provide an excellent benefit to the Class Members. *Id.*, ¶ 88.

f. The proposed Settlement is well within the range of reasonableness.

The Settlement calls for a Net Settlement Amount of approximately \$4,512,782.60 for all Class Members. *Id.*, ¶ 89. This amount will be available to the approximately 1,947 Participating Class Members, exclusive of attorneys' fees and costs, administrative costs and other expenses, and the service award. *Id.* This amount provides an average gross recovery of \$3,569.59, and an average net recovery of \$2,317.81. *Id.*

Discussed above, this recovery far exceeds what courts have deemed "reasonable" and even "good." Compare *Rivas*, 2020 U.S. Dist. LEXIS 8712, at *15-16 ["the average recovery in this case (\$170.59) is comparable to other wage and hour class action settlements approved by courts in California."]; *Miceli*, 2017 WL 2840618, at *4 [approving settlement where average settlement payment was \$113.03]; *Schiller*, 2012 U.S. Dist. LEXIS 80776, at *17 [describing average class recovery of \$198.80 as "good" in wage-and-hour case]; see also *In Re Mego Fin. Corp. Sec. Litig.* (9th Cir. 2000) 213 F.3d 454, 459 ["It is well-settled law that a cash settlement amounting to only a fraction of the potential recovery does not per se render the settlement inadequate or unfair."].

1 Cottrell Decl., ¶ 90. It is equally well-settled that a proposed settlement is not to be measured
2 against a hypothetical ideal result that might have been achieved. *See, e.g., 7-Eleven Owners for*
3 *Fair Franchising v. Southland Corp.* (2000) 85 Cal.App.4th 1135, 1150 [quoting *Linney v.*
4 *Cellular Alaska Partnership* (9th Cir. 1998) 151 F.3d 1234, 1242 with approval: “This court has
5 aptly held that ‘it is the very uncertainty of outcome in litigation and avoidance of wasteful and
6 expensive litigation that induce consensual settlements. The proposed settlement is not to be
7 judged against a hypothetical or speculative measure of what might have been achieved by the
8 negotiators.”]. The excellent result easily satisfies any standard for evaluating the fairness of a
9 class action settlement.

10 The response of the Class has also been overwhelmingly positive. Cottrell Decl., ¶ 90. The
11 deadline for Class Members to opt-out or submit written objections has passed, and to date, there
12 are no objections, two opt outs, and two disputes. The lack of objections shows widespread support
13 for the Settlement among Class Members, and give rise to a presumption of fairness. *See Dunk*, 48
14 Cal.App.4th at 1801.

15 **B. The Service Award to Plaintiff for His Efforts on Behalf of the Class Is**
16 **Reasonable**

17 Courts award service payments to advance public policy by encouraging individuals to
18 come forward and perform their civic duty in protecting the rights of the class, as well as to
19 compensate class representatives for their time, effort and inconvenience. *In Re California Indirect*
20 *Purchases* (1998) 1998 WL 1031494, *11. It is well-established that representative plaintiffs are
21 eligible for reasonable incentive payments to compensate them for the expense or risk they have
22 incurred in conferring a benefit on other members of the class. *Munoz v. BCI Coca-Cola Bottling*
23 *Co. of Los Angeles* (2010) 186 Cal.App.4th 399, 412.

24 Plaintiff Mario Tinaco took the significant risk of coming forward to represent the interests
25 of his fellow employees. Declaration of Mario Tinaco, ¶¶ 9-10. He has subjected himself to risk
26 with regards to future employment opportunities and his reputation in the community by his
27 participation in this action. *Id.* His service as the named Plaintiff in a wage and hour class action
28 lawsuit may be discerned by potential employers and members of the community, creating a very
real risk of future repercussions, particularly with respect to his future job opportunities. *Id.*

Throughout this litigation, Plaintiff worked with Class Counsel and assisted in the
development of the case. *Id.*, ¶¶ 11-17. He provided detailed and extensive information during
Class Counsel’s initial investigation and the preparation of the pleadings. *Id.* Moreover, he
provided important information during the lead-up to mediation, including detailed background

1 regarding his understanding of Defendant’s policies, procedures, and timekeeping systems. *Id.*;
2 Cottrell Decl., ¶ 93. Plaintiff remained on call during the mediation to provide Class Counsel with
3 timely and important information. *Id.*; Cottrell Decl., ¶ 94. Plaintiff has taken part in the
4 Settlement decision and remained apprised of the case at all times during Class Counsel’s pre-suit
5 investigation of these claims and during two years of litigation. *Id.*; Cottrell Decl., ¶ 95.

6 As a result of Plaintiff’s efforts and his willingness to step forward, the Class Members will
7 receive significant recoveries if the Settlement is approved. On the other hand, if Plaintiff did not
8 serve as a Class Representative or assist in the prosecution of this case, the matter would never
9 have been brought on a class basis. The Class Members would not be getting any recovery, and
10 Defendant’s alleged conduct would have gone unchecked. Plaintiff has committed his time to this
11 case and assumed significant risk to obtain the favorable result. Moreover, the requested
12 \$15,000.00 Class Representative Service Payment is just 0.22% of the Gross Settlement Amount.
13 Payment to the Plaintiff in the amount of \$15,000.00 is reasonable in light of the efforts he made
14 and the risks he took in filing and prosecuting this action to obtain this \$6,950,000.00 Settlement.

15 **C. The Proposed Payment of Attorneys’ Fees and Costs Is Reasonable and Should**
16 **Be Finally Approved**

17 Plaintiff seeks reasonable attorneys’ fees and expenses on a common fund basis. Cottrell
18 Decl., ¶ 98. Pursuant to the terms of the Settlement, Class Counsel seek an award of one third of
19 the Gross Settlement Amount, or \$2,316,666.67. *Id.*

20 **1. California courts routinely approve attorneys’ fees awards of one third of**
21 **the common fund**

22 The California Supreme Court has “join[ed] the overwhelming majority of federal and state
23 courts in holding that when class action litigation establishes a monetary fund for the benefit of the
24 class members, ... the court may determine the amount of a reasonable fee by choosing an
25 appropriate percentage of the fund created.” *Laffitte v. Robert Half Int’l Inc.* (2016) 1 Cal.5th 480,
26 503. The object of a common fund award is to set a fee that approximates the probable terms of a
27 contingent fee contract negotiated by a sophisticated lawyer and client in comparable commercial
28 litigation, as evidenced by awards in other cases, in an amount intended to “mimic” the market.
Lealao v. Beneficial Cal., Inc. (2000) 82 Cal.App.4th 19, 47-50.

In *Laffitte*, the Court approved the award of attorneys’ fees in the amount of one third of the
gross \$19 million settlement (e.g., an award of \$6.33 million) under the common fund theory in a
wage and hour action. 1 Cal.5th at 503. By awarding counsel a percentage of the total recovery,
rather than fees based on hours worked, the common fund method encourages attorneys to

1 efficiently litigate to achieve the best results possible for the class. See *Laffitte*, 1 Cal.5th at 492-
2 494. Indeed, “the percentage method is generally favored in common fund cases because it allows
3 courts to award fees from the fund in a manner that rewards counsel for success and penalties it for
4 failure.” *Id.* at 493 (quoting *In re Rite Aid Corp. Securities Litig.* (3d Cir. 2005) 396 F.3d 294, 300
(internal quotations omitted)).¹²

5 In California State Courts, one-third of the global fund is the standard benchmark for
6 attorney fee awards. See *Chavez v. Netflix, Inc.* (2008) 162 Cal.App.4th 43, 66, fn. 11. California
7 state and federal courts routinely uphold attorneys’ fees equaling one third of the common fund.
8 See, e.g., *id.*; *Laffitte*, 1 Cal.5th at 506 (“33 1/3 percent of the common fund is consistent with, and
9 in the range of, awards in other class action lawsuits”); Eisenberg & Miller, Attorney Fees in Class
10 Action Settlements: An Empirical Study, J. of Empirical Legal Studies, Vol. 1, Issue 1, 27-78,
11 March 2004, at 35 (independent studies of class action litigation nationwide conclude that fees
12 representing one third of the total recovery are consistent with market rates). Countless California
13 Superior Courts have granted attorneys’ fees in this range.¹³ Moreover, federal courts and
14 secondary sources confirm that attorneys’ fees in this range are reasonable.¹⁴ These authorities

15 ¹² See also *In re Capacitors Antitrust Litig.* (N.D. Cal. Sept. 21, 2018) No. 3:17-md-02801-JD,
16 2018 WL 4790575, at *2 (“Indeed, the percentage of the fund method is *preferred* when counsel’s
17 efforts have created a common fund for the benefit of the class”) (collecting cases); *Fleury v.*
18 *Richemont N. Am., Inc.* (N.D. Cal. Apr. 14, 2009) No. C-05-4525 EMC, 2009 WL 1010514, *3
19 (“Contingent fees that may far exceed the market value of the services if rendered on a non-
20 contingent basis are accepted in the legal profession as a legitimate way of assuring competent
21 representation...; [i]f this ‘bonus’ methodology did not exist, very few lawyers could take on the
22 representation of a class client given the investment of substantial time, effort, and money,
23 especially in light of the risks of recovering nothing”) (internal citation omitted); *Swedish Hosp.*
24 *Corp. v. Shalala* (D.C. Cir. 1993) 1 F.3d 1261, 1271 (“a percentage of the fund method is the
25 appropriate mechanism for determining the attorney fees award in common fund cases.”).

26 ¹³ See, e.g., *El Pollo Loco Wage and Hour Cases* (Orange County Super. Ct., JCCP No. 4957, Jan.
27 31, 2020) (approving 33.3% fee award in wage and hour class action); *Asalati v. Intel Corp.* (Santa
28 Clara Super. Ct., No. 16cv302615, Oct. 29, 2018) (approving 33.3% fee award); *Ochoa v.*
Haralambos Beverage Co. (Los Angeles Super. Ct., No. BC319588, Feb. 1, 2007) (approving
33.3% fee award); *Big Lots Overtime Cases* (San Bernardino Super. Ct., JCCP No. 4283, Feb. 4,
2004) (approving 33.3% fee award); *Barela v. Ralph’s Grocery Company* (Los Angeles Super. Ct.,
No. BC070061, June 5, 1998) (same).

¹⁴ See, e.g., *Marshall v. Northrop Grumman Corp.* (C.D. Cal. Sep. 18, 2020) No. 16-CV-6794 AB
(JCx), 2020 U.S. Dist. LEXIS 177056, at *23 (“An attorney fee of one third of the settlement fund
is routinely found to be reasonable in class actions.”); *McGrath v. Wyndham Resort Dev. Corp.*
(S.D. Cal. Jan. 30, 2018) No. 15cv1631 JM (KSC), 2018 U.S. Dist. LEXIS 16095, at *21; *Beaver*
v. Tarsadia Hotels (S.D. Cal. Sept. 28, 2017) No. 11-CV-01842-GPC-KSC, 2017 U.S. Dist.
LEXIS 160214, at *28 (“California courts routinely award attorneys’ fees of one-third of the

1 establish that Class Counsel’s request for one third of the Gross Settlement Amount is within the
2 range customarily approved by courts in California and should be approved.

3 In its tentative ruling preliminarily approving the Settlement, this Court made two
4 statements with which, respectfully, Plaintiff disagrees. The first was that the “benchmark for fees
5 is 30% of a total fund.” See Cottrell Decl., Exh. A at p. 2. Plaintiff respectfully submits this is
6 incorrect. In California Courts, the benchmark for attorney’s fees in a class action settlement is
7 33.33% of the total fund. Indeed, this Court correctly cited the California Supreme Court’s
8 decision in *Laffitte* as the decision that provides the standard, but *Laffitte* provides 33 and 1/3% of
9 the total fund as the benchmark, not 30%. See *Laffitte*, 1 Cal.5th at 506. California Courts of
10 Appeal agree that 33 and 1/3% of a total fund is the benchmark that drives the Court’s attorney fee
11 analysis. See *Diaz v. Grill Concepts Servs.* (Oct. 19, 2018) 2018 Cal.App.Unpub.LEXIS 7156
12 [recognizing that “the standard one-third fee” is the “benchmark”]; *Chavez*, 162 Cal.App.4th at 66,
fn. 11 [“Empirical studies show that, regardless whether the percentage method or the lodestar
method is used, fee awards in class actions average around one-third of the recovery.”].

13 A second statement made in the Court’s order preliminarily approving the Settlement was
14 that “[w]hen considering the risk, the court considers there is less risk in a case with fee shifting
15 statutes because counsel’s potential fees are not limited by and coupled to the monetary recovery.
16 Cottrell Decl., Exh. A at p. 3. But as applied to this case, this statement is incorrect as a matter of
17 fact and law. As is true in virtually every other wage and hour class action, Class Counsel took this
18 case on a contingency basis. Cottrell Decl., ¶ 100. In other words, if Class Counsel did not obtain a
19 monetary recovery for the Class, it stood to recover nothing – no matter how much time and
20 resources Class Counsel poured into the case. *Id.* California Courts of Appeal uniformly reject the
21 proposition that the presence of a fee-shifting statute lessens the risk of taking a case on a
22 contingency basis. See *Missakian v. Amusement Industry, Inc.* (2021) 69 Cal.5th 630, 645 [“both
23 contingency fee arrangements and cases pursued under fee-shifting statutes pose some level of
24 ‘contingent risk,’ referring to ‘the risk an attorney voluntarily assumes by agreeing to base the
25 payment of fees on the successful outcome of the case, and not simply the risk of nonpayment,
which exists in every representation of a client by an attorney’”] [quoting *Chodos v. Borman*
(2014) 227 Cal.App.4th 75, 95, fn. 9].

26
27 common fund.”); Newberg on Class Actions, §11:24 (4th Ed. 2002); Manual for Complex
28 Litigation, §14:6.

1 And as a matter of fact, even if a fee shifting statute applied here – explained below, it
2 largely does not – the presence of a fee shifting statute does not lessen the risk of taking and
3 prosecuting a case. It is factually wrong to suggest that in a case such as this, “counsel’s potential
4 fees are not limited by and coupled to the monetary recovery.” Plaintiff’s counsel’s potential fees
5 are *absolutely* coupled to succeeding in the litigation, or as this Court put it, “monetary recovery.”
6 This case, like any representative wage and hour case brought by a plaintiffs’ attorney, is taken on
7 a contingency basis. Whether there is a fee shifting statute or not, Class Counsel takes on the risk
8 of spending millions of dollars in fees to litigate a case, with the potential outcome of receiving
9 absolutely nothing for their efforts if they do not succeed.

10 Simply, the presence of a fee shifting statute is irrelevant to the amount of fees Plaintiff’s
11 counsel should receive, because the “risk” in taking the case pivots around the nature of
12 contingency-based litigation, not whether a statute provides for compensation miles down the road
13 if (and only if) the attorney succeeds. If the law were different and plaintiffs’ counsel could only
14 receive their lodestar or some small multiplier thereon, wage and hour class actions – and
15 consumer class actions, and any number of other contingency cases that are designed to protect the
16 public and individuals who surely cannot pay hundreds of thousands or millions of dollars in
17 attorney’s fees – would cease to exist. No rational economic actor – no sane attorney – would ever
18 take a case where there is a significant possibility she would receive nothing for her efforts, and
19 the *most* she could receive is reimbursement for what she put into the case, i.e., her lodestar. This
20 is precisely what the California Supreme Court explained over twenty years ago:

21 As we explained in *Rader v. Thrasher* (1962) 57 Cal.2d 244, 253 [18 Cal. Rptr.
22 736, 368 P.2d 360]: “[a] contingent fee contract, since it involves a gamble on the
23 result, may properly provide for a larger compensation than would otherwise be
24 reasonable.” The purpose of a fee enhancement, or so-called multiplier, for
25 contingent risk is to bring the financial incentives for attorneys enforcing important
26 constitutional rights ... into line with incentives they have to undertake claims for
27 which they are paid on a fee-for-services basis.

28 The economic rationale for fee enhancement in contingency cases has been
explained as follows: "A contingent fee must be higher than a fee for the same legal
services paid as they are performed. The contingent fee compensates the lawyer not
only for the legal services he renders but for the loan of those services. The implicit
interest rate on such a loan is higher because the risk of default (the loss of the case,
which cancels the debt of the client to the lawyer) is much higher than that of
conventional loans." (Posner, *Economic Analysis of Law* (4th ed. 1992) pp. 534,
567.) "A lawyer who both bears the risk of not being paid and provides legal
services is not receiving the fair market value of his work if he is paid only for the
second of these functions. If he is paid no more, competent counsel will be reluctant
to accept fee award cases." (Leubsdorf, *The Contingency Factor in Attorney Fee*

1 Awards (1981) 90 Yale L.J. 473, 480; see also Rules Prof. Conduct, rule 4-
2 200(B)(9) [recognizing the contingent nature of attorney representation as an
3 appropriate component in considering whether a fee is reasonable]; ABA Model
4 Code Prof. Responsibility, DR 2-106(B)(8) [same]; ABA Model Rules Prof.
5 Conduct, rule 1.5(a)(8).)

6 Such fee enhancements are intended to compensate for the risk of loss generally in
7 contingency cases as a class. (*Beasley v. Wells Fargo Bank* (1991) 235 Cal.App.3d
8 1407, 1419 [1 Cal. Rptr. 2d 459].) ... “[M]ost lawyers of this quality do seem to
9 consider the prospects of success and the fee recoverable before adding to their
10 crowded calendars a case in which payment is contingent.” (Leubsdorf, *The*
11 *Contingency Factor in Attorney Fee Awards*, supra, 90 Yale L.J., at p. 501.)

12 *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1132-33.

13 The Court did not cite any authority for its view of “risk” in contingency-based litigation
14 vis-à-vis fee shifting statutes. Plaintiff could not locate any to support the proposition. To the
15 contrary, all available case law on the subject confirms the opposite: fee enhancements in lodestars
16 and percentage-of-fund cases are warranted due to the risks associated with contingency-based
17 litigation, not whether a fee shifting statute exists. See, e.g., *Missakian*, 69 Cal.5th at 645;
18 *Ketchum*, 24 Cal.4th at 1132-33; *Graham v. DaimlerChrysler Corp.* (2004) 34 Cal.4th 553, 579-
19 80; *Chodos*, 227 Cal.App.4th at 93.¹⁵

20 In any event, the presence of a fee-shifting statute has little role in this case. While it is true
21 that some of the claims Plaintiff pursued could benefit from a fee-shifting statute if the case were
22 litigated all the way through trial to a judgment, the most critical claims are not subject to a fee
23 shifting statute. Those claims are the meal and rest break claims. In Plaintiff’s view, the strongest
24 claims in this case – both in terms of certification potential and the merits of the claims – were the
25 on-duty meal and rest period theories of liability. Cottrell Decl., ¶ 104. In short, because Class
26 Members were often working alone – particularly during overnight shifts – Plaintiff posits that it is

27 ¹⁵ Indeed, even where there is a paying client for part of litigation and the remainder of the
28 litigation is contingent, the risk of contingency-based litigation always warrants enhancement.
See, e.g., *Sonoma Land Trust v. Thompson* (2021) 63 Cal.App.5th 978, 986-87 [“The Thompsons
contend that the trial court abused its discretion by relying on contingent risk because the litigation
was only partially contingent. As discussed above, the Trust’s insurance policy covered the first
\$500,000 in legal fees regardless of the outcome of the litigation. According to the Thompsons,
this meant that the Trust “bore no risk” for the first two years of the litigation, before their billings
hit the \$500,000 cap. The fact that a case is partially contingent does not eliminate contingent risk
as a factor. It only mitigates the risk. The trial court may apply a multiplier after “consider[ing]
whether, and to what extent, the attorney and client have been able to mitigate the risk of
nonpayment, e.g., because the client has agreed to pay some portion of the lodestar amount
regardless of outcome.”] [citing *Ketchum*, 24 Cal.4th at 1132–1134, 1138–1139].

1 logically impossible for their meal and rest breaks to ever be fully off duty. *Id.* Plaintiff believes
2 these were the strongest claims, and these claims fundamentally drove the exceptional settlement
3 in this case. Yet, case law is clear that there is no fee-shifting statute for meal and rest break claims
4 – even when successfully prosecuted. *Kirby v. Immoos Fire Protection, Inc.* (2012) 53 Cal.4th
1244, 1252-59.

5 It is, therefore, incorrect to say that a fee shifting statute was meaningfully at play here. It is
6 entirely possible this Court would have determined that the meal and rest break claims should be
7 certified, but not the off-the-clock claims. If that had happened, Plaintiff could not have benefited
8 from a fee shifting statute. And because the meal and rest break claims drove the successful
9 outcome in this case, it is incorrect to say that the presence of a fee shifting statute lessened the
10 risks in this case (even assuming it ever could, which, as a matter of law, it cannot).

11 **2. A fee of one third of the Gross Settlement Amount is fair and reasonable
12 in light of the excellent result and the risks inherent in this Action**

13 Among the factors considered in determining whether the requested fee percentage is
14 reasonable are: (1) the results achieved; (2) the risk of further litigation; (3) the skill required of
15 plaintiff’s counsel and the quality of work performed by plaintiff’s counsel; (4) the contingent
16 nature of the fee and the financial burden carried by the plaintiff; and (5) awards made in similar
17 cases. *Vizcaino v. Microsoft Corp.* (9th Cir. 2002) 290 F.3d 1043, 1048-50. All these factors
18 support an award here of one third of the common fund.

19 First, Class Counsel’s efforts resulted in an exceptional \$6,950,000.00 common fund
20 settlement for the Class Members in this Action. Cottrell Decl., ¶¶ 63-65. As Plaintiff has pointed
21 out through this brief, the per-class member recovery is *ten to fifteen* times greater than what
22 courts routinely describe as a “good” wage and hour settlement. The Settlement is all the more
23 exceptional when considering the fact that Class Members are gas station attendants who typically
24 make only the minimum wage (as opposed to cases dealing with, for example, nurses or computer
25 programmers, who may earn \$50-100 an hour). It is an excellent settlement for these 1,947
26 Participating Class Members. And it is an especially good result in light of the challenges the
27 Plaintiff and Class Counsel would face in litigating the claims on a representative basis. *Id.*, ¶¶ 80-
81. This result was achieved by the work and success of Class Counsel, who negotiated the
28 Settlement after extensive review and substantial negotiations. *Id.*, ¶¶ 66-73. Notably, no Class
Members have objected to the requested fee award, though it was fully disclosed in the Class
Notice. *Id.*, ¶ 53.

Second, Class Counsel faced significant risks going forward with the litigation. Cottrell

Decl., ¶ 77-86. Defendant has always contended that it properly paid Class Members and that it maintained compliant policies and practices. *Id.*, ¶ 77-78. If litigation proceeded, Plaintiff and Class Counsel faced significant risks in litigating on a representative basis, and any class certification motion would have been vigorously opposed. *Id.*, ¶ 80. While Plaintiff believed his on-duty meal and rest period theories make a strong case for certification, at the end of the day, they are not based on policies or any written materials, and would have risen and fallen on little more than anecdote and what Plaintiff believes to be common sense. But what may seem common sense to Plaintiff is by no means necessarily common sense to this Court. Defendant certainly does not share Plaintiff’s view of “common sense” as it pertains to his meal and rest period theories. And as for the off-the-clock claims – again, based not on written policy, but anecdote and class member testimony – these claims are notoriously difficult to certify.

Assuming Plaintiff could get the case past these procedural hurdles, Plaintiff would still need to overcome Defendant’s substantive arguments challenging the viability of the claims. *Id.*, ¶¶ 77-85. Even ignoring the myriad merits arguments Defendant would raise, Plaintiff would also face evidentiary issues in proving up liability and damages, given that the alleged off-the-clock work and meal and rest period issues were not logged or tracked. *Id.* Defendant, represented by skillful and experienced Counsel, would undoubtedly raise all of its defenses in certification proceedings and at trial. *Id.*, ¶ 86. Accordingly, Class Counsel faced serious risks in moving forward with the case, and it would have taken several more years to realize any recovery (if a recovery could be attained at all). *Id.*

Third, Class Counsel are experienced representative action litigators. See Cottrell Decl., ¶¶ 5-8. The excellent result achieved in the face of considerable risks confirms the considerable skill that Class Counsel brought to bear. This skill, expertise, and experience, combined with the high quality of work performed in this case, resulted in the Settlement achieved. *Id.*, ¶ 105.

Fourth, Class Counsel have been representing Plaintiff and the Class Members in this matter strictly on a contingency basis. Cottrell Decl., ¶ 100. Class Counsel had to forego opportunities to litigate other cases and incurred the risk of non-recovery after a substantial investment of time, money, and resources—and have done so since the inception of the Action without any payment or compensation. *Id.*, ¶¶ 101-103. This is no easy burden for any firm. *Id.* If, despite these hardships and risks, Class Counsel are paid only basic hourly rates multiplied by the number of hours worked on the case, they are not fairly compensated for the hardships and serious risks they incurred. See Posner, *Economic Analysis of the Law*, 534, 567 (4th ed. 1992) [“A contingent fee must be higher than a fee for the same legal services paid as they are performed ... because the

1 risk of default (the loss of the case, which cancels the debt of the client to the lawyer) is much
2 higher than that of conventional loans.”]. More generally, plaintiff’s attorneys would not be
3 incentivized to take on similar representative cases in the future.

4 Fifth, as discussed above, the request for attorneys’ fees in the amount of one third of the
5 common fund falls well within the range accepted by state and federal courts in California in
6 comparable class actions. Again, the award of a one third fee recovery under the common fund
7 doctrine was approved by the California Supreme Court in *Laffitte*, 1 Cal.5th at 503.

8 For all of these reasons, a fee award in the amount of one third of the common fund created
9 by Plaintiff and Class Counsel is fair and reasonable.

10 **3. A lodestar cross-check confirms the reasonableness of the fee award**

11 The trial court may use an abbreviated lodestar “cross-check” for common fund awards if
12 the court considers it useful, and Class Counsel’s lodestar in this Action confirms that the
13 requested fee is reasonable. *Laffitte*, 1 Cal.5th at 504-05. Under *Laffitte*, the cross-check is not
14 meant to displace the percentage analysis, but rather to act as a backstop. Indeed, the Supreme
15 Court expressly instructed that “the lodestar calculation, when used in this manner, does not
16 override the trial court’s primary determination of the fee as a percentage of the common fund and
17 thus does not impose an absolute maximum or minimum on the fee award.” *Id.* at 505.

18 The Court in *Laffitte* emphasized that only where the “multiplier calculated by means of a
19 lodestar cross-check is extraordinarily high or low” should the court “consider whether the
20 percentage should be adjusted so as to bring the imputed multiplier within a justifiable range.” *Id.*
21 Multipliers on the lodestar cross-check “can range from 2 to 4 or even higher.” *Wershba*, 91
22 Cal.App.4th at 255. When the cross-check multiplier is within a normal range, the lodestar cross-
23 check does not provide a basis for a court to adjust the fee award. Furthermore, in conducting a
24 lodestar cross-check, the court is not “required to closely scrutinize each claimed attorney-hour.”
25 *Laffitte*, 1 Cal.5th at 505. An evaluation may be done by reviewing “counsel declarations
26 summarizing overall time spent.” *Id.*

27 In conducting a lodestar cross-check, the Court first determines a lodestar value for the fees
28 by multiplying the time reasonably spent by plaintiffs’ counsel on the case by reasonable hourly
rates. *In re Consumer Privacy Cases* (2009) 175 Cal.App.4th 545, 556-57. To determine whether
the requested rate is reasonable, courts look to the prevailing rate for similar work in the pertinent
geographic region. *PLCM Group v. Drexler* (2000) 22 Cal.4th 1084, 1096-97 (using prevailing
hourly rate in community for comparable legal services even though party used in-house counsel).
Here, Class Counsel’s hourly rates are comparable to, or less than, those charged by other class

1 action plaintiffs’ counsel and the firms defending class actions, and have been approved by
2 numerous federal and state courts.¹⁶

3 Class Counsel’s aggregate lodestar is currently estimated at approximately \$804,619.00
4 based on approximately 1,140 hours of attorney and staff time. *Id.*, ¶ 107. This results in a
5 reasonable multiplier of approximately 2.88. *Id.* Class Counsel’s lodestar will increase as a result
6 of preparation for and attendance at the Final Approval Hearing and the settlement administration
7 process. The multiplier confirms that the one third fee award is very reasonable. See, e.g.,
8 *Wershba*, 91 Cal.App.4th at 255; *Vizcaino*, 290 F.3d at 1047 (multipliers “ranging from one to
9 four are frequently awarded ... when the lodestar method is applied”; affirming fees where the
10 cross-check multiplier is 3.65); *Kim v. Space Pencil, Inc.* (N.D. Cal. Nov. 28, 2012) 2012 U.S.
11 Dist. LEXIS 169922, 2012 WL 5948951, at *20-21 (the “customary range” for multipliers in class
12 action lawsuits includes multipliers up to 4 times class counsel’s lodestar).

13 Courts routinely accept significant multipliers when utilizing a lodestar cross-check. See,
14 e.g., *Johnson v. Fujitsu Tech. & Bus. of Am., Inc.* (N.D. Cal. May 11, 2018) 2018 U.S. Dist.
15 LEXIS 80219, 2018 WL 2183253 at *20 (finding multiplier of 4.37 to be reasonable); *In re NCAA*
16 *Ath. Grant-In-Aid Cap Antitrust Litig.* (N.D. Cal. Dec. 6, 2017) 2017 U.S. Dist. LEXIS 201108,
17 2017 WL 6040065, at *21 (finding multiplier of 3.66 to be “well within the range of awards in
18 other cases.”). Indeed, courts following *Laffitte* have reaffirmed that significant positive multipliers
19 are reasonable and warrant judicial approval. See, e.g., *Spann v. J.C. Penney Corp.* (C.D. Cal.
20 Sept. 30, 2016) 211 F.Supp.3d 1244, 1265 (finding that a 3.07 multiplier is “well within the range
21 for reasonable multipliers” under *Laffitte*).

22 Here, the fee award requested represents a reasonable multiplier of Class Counsel’s lodestar.
23 The one third fee award is a reasonable and fair payment to Class Counsel, and should be
24 approved.
25

26 ¹⁶ In particular, the hourly rates for SWCK were recently found to be reasonable for purposes of a
27 lodestar crosscheck by Judge William Q. Hayes of the Southern District of California in *Amaraut*
28 *v. Sprint/United Mgmt. Co.* (S.D. Cal. Aug. 5, 2021) No. 19-cv-411-WQH-AHG, 2021 WL
3419232, 2021 U.S. Dist. LEXIS 147176, at *18 [approving a one third fee award, and in August
2021, finding that “the fee award is further supported by a lodestar crosscheck, whereby it finds
that the hourly rates of Schneider Wallace Cottrell Konecky LLP ... are reasonable, and that the
estimated hours expended are reasonable.”]. Judge Hayes found that Class Counsel “has
significant experience in class action and wage and hour litigation and has demonstrated
significant skill during this contentious litigation.” Judge Laurel Beeler found SWCK’s rates
reasonable in *Villafan v. BROADSPECTRUM Downstream Services, Inc., et al.* (N.D. Cal. Apr. 8, 2021)
Case No. 3:18-cv-06741-LB, ECF 150.

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