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Class Counsel
8

9 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

10 **FOR THE COUNTY OF STANISLAUS**

11
12 GEORGE PADILLA, on behalf of himself
and all "aggrieved employees" pursuant to
13 Labor Code § 2698 *et seq.*,

14 Plaintiff,

15 v.

16 SMITH CHEVROLET CO., INC. dba
SMITH COLLISION CENTER, a
17 California corporation, and DOES 1
through 10, inclusive,

18 Defendants.
19

CASE NO: CV-20-002683

Assigned to the Hon. Sonny S. Sandhu, Dept. 24

**SUPPLEMENTAL BRIEF IN SUPPORT OF
MOTION FOR PRELIMINARY APPROVAL
OF CLASS ACTION SETTLEMENT**

Date: April 27, 2021

Time: 8:30 a.m.

Dept.: 24

Complaint Filed: June 17, 2020

1 **I. INTRODUCTION**

2 Plaintiff George Padilla (“Plaintiff”) hereby files this supplemental brief in support of his
3 unopposed motion for an Order preliminarily approving the proposed class action settlement in the
4 above-captioned case, and specifically in support of Class Counsel’s request to be permitted to
5 request up to 40% of the Maximum Settlement Amount in attorneys’ fees, as set forth in the
6 Settlement Agreement. *See* Exhibit B to the Declaration of Daniel F. Gaines In Support of
7 Unopposed Motion for Preliminary Approval of Class Action Settlement and Seeking Leave to File
8 Second Amended Complaint, previously filed with the Court on February 23, 2021 (the “Settlement
9 Agreement”).

10 As an initial matter, Class Counsel has not yet made any request for attorneys’ fees and will
11 not make any request until the final approval stage, after class members have had the opportunity
12 to assess and comment upon the settlement. The settlement agreement does not require that the
13 Court award any set amount of attorneys’ fees; in fact, it sets a limit of 40% of the Maximum
14 Settlement Amount, but the Court holds the ultimate and final discretion to award a fair amount of
15 fees to Class Counsel. Settlement Agreement at § C (1)(g). In class action lawsuits, counsel
16 typically apply for attorneys’ fees at the conclusion of the case. *See generally*, 5 Newberg on Class
17 Actions § 15:9 (5th ed.) (Newberg discusses Federal Rule of Civil Procedure, Rule 23(h), which
18 governs fees in class suits and utilizes the procedures of Rule 54(d). Fed. R. Civ. P. 23(h)(1) (“A
19 claim for an award must be made by motion under Rule 54(d)(2) ...”), and Rule 54(d), which in
20 turn, mandates the filing of a fee petition “no later than 14 days after entry of judgment.” Fed. R.
21 Civ. P. 54(d)(2)(B)(i)).

22 In this supplemental brief, Plaintiff responds to the Court’s request set forth in its Ruling on
23 Plaintiff’s Motion for Preliminary Approval of Class Action Settlement and Seeking Leave to File
24 Second Amended Complaint dated April 6, 2021. *See* Supplemental Declaration of Daniel F.
25 Gaines (“Gaines Decl.”) at ¶ 2; Exhibit A thereto. In its Ruling, the Court requested a substantive
26 discussion of the factors supporting Class Counsel’s request for an award of attorney’s fees.
27 Plaintiff sets forth the requested support as follows.

1 **II. CLASS COUNSEL’S POTENTIAL REQUEST FOR AN AWARD UP TO**
2 **40% OF THE MAXIMUM SETTLEMENT AMOUNT IS SUPPORTED AND**
3 **ENDORSED BY CALIFORNIA AUTHORITY**

4 **A. Class Counsel’s Request Is Appropriate Under the Common Benefit**
5 **Doctrine**

6 This Settlement Agreement provides that Class Counsel may request no more than 40%
7 of the \$200,000 Maximum Settlement Amount achieved in this settlement as fees for counsel’s
8 work in this matter. Settlement Agreement at §C (1)(g). The maximum request is therefore
9 \$80,000, representing 40% of the settlement consideration under the “common fund” doctrine.
10 Courts have long recognized the “common fund” or “common benefit” doctrine, under which
11 attorneys who create a common fund or benefit for a group of persons may be awarded their fees
12 and costs to be paid out of the fund. *Serrano v. Priest* (“*Serrano III*”) (1977) 20 Cal.3d 25, 34,
13 quoting *D’Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1; *Glendale City Employees’*
14 *Association v. City of Glendale* (1975) 15 Cal.3d 328, 341 fn.19; *Quinn v. State of California*
15 (1995) 15 Cal.3d 162, 167; *see also Boeing Co. v. Van Gemert* (1980) 444 U.S. 472, 478; *Mills*
16 *v. Electric Auto-Lite Co.* (1970) 396 U.S. 375, 391-392.

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

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

1 of obtaining the recovery.

2 The percentage-of-the-fund approach appears to be the preferred method of awarding fees
3 in traditional common fund cases, such as this case. Where the settlement amount is a “certain
4 or easily calculable sum of money,” use of the percentage-of-the-fund method is appropriate.
5 *Serrano III*, 20 Cal. 3d at 35.

6 The California Supreme Court has confirmed the validity of this position in the context
7 of a similar wage and hour class action settlement:

8 [U]se of the percentage method to calculate a fee in a common fund
9 case, where the award serves to spread the attorney fee among all the
10 beneficiaries of the fund, does not in itself constitute an abuse of
11 discretion. We join the overwhelming majority of federal and state
12 courts in holding that when class action litigation establishes a
13 monetary fund for the benefit of the class members, and the trial court
14 in its equitable powers awards class counsel a fee out of that fund,
15 the court may determine the amount of a reasonable fee by choosing
16 an appropriate percentage of the fund created. The recognized
17 advantages of the percentage method—including relative ease of
18 calculation, alignment of incentives between counsel and the class, a
19 better approximation of market conditions in a contingency case, and
20 the encouragement it provides counsel to seek an early settlement
21 and avoid unnecessarily prolonging the litigation – convince us the
22 percentage method is a valuable tool that should not be denied our
23 trial courts.

24 *Laffitte v. Robert Half Intern. Inc.*, *supra*, 1 Cal.5th at 503 (internal citations omitted).

25 Historically, courts have awarded fees as high as fifty percent (50%) of the settlement,
26 depending on the circumstances of the case. *See Conte & Newberg, Newberg on Class Actions* (4th
27 Ed., 2002) § 14.03; *see also In re Ampicillin Antitrust Litig.* (D.D.C. 1981) 526 F. Supp.
28 494 (awarding attorneys’ fees in the amount of 45% of the settlement amount of \$7.3
million); *Beech Cinema, Inc. v. Twentieth-Century Fox Film Corp.* (S.D.N.Y. 1979) 480 F. Supp.
1195 (awarding approximately 53% of the settlement amount as attorneys’ fees). California courts
routinely approve class action attorneys’ fees awards “averag[ing] around one-third of the
recovery.” *Chavez v. Netflix, Inc.* (2008) 162 Cal.App.4th 43, 66 n.11 (lower court found 20 to 40
percent range of contingency fee in marketplace was appropriate in class actions). The California
Supreme Court has explained that “percentage of the fund method more accurately reflects the
results achieved.” *Laffitte*, 1 Cal. 5th at 439.

1 As the cases cited above demonstrate, attorneys' fee awards in the amount requested here
2 are well-established by California law and practice, as Class Counsel's request to seek up to 40%
3 of the settlement in fees falls well within the percentages awarded in other class action litigation by
4 this Court and numerous California trial courts. *See e.g., Crandall v. U-Haul International, Inc.*,
5 LASC Case No. BC178775 (40% award); *Albrecht v. Rite Aid Corp.*, San Diego Super. Ct. Case
6 No. 729219 (35% award).

7 **B. The Requested Fees Are Also Justified Under A Lodestar Analysis**

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

13 In cases where a common fund analysis is not used, once the court establishes the lodestar
14 amount, it should adjust the fee award by a multiplier in order to make an appropriate fee award.
15 *Serrano III, supra*, 20 Cal.3d at 48. In applying the multiplier, *Newberg on Class Actions* states
16 that "[m]ultiples ranging from one to four frequently are awarded in common fund cases when
17 the lodestar method is applied. A large common fund award may warrant an even larger
18 multiplier." 4 *Newberg on Class Actions* 4th (4th ed. 2002) § 14.6. If the class members paid the
19 fees that the market would bear, they would pay a fee of anywhere from one-third to forty percent
20 of any recovery. Since this is the market rate, the lodestar calculation should be enhanced to
21 reflect what the class members would pay on the open market. *Lealao v. Beneficial California,*
22 *Inc.* (2000), 82 Cal.App.4th 19, at 47-48.

23 In *Lealao*, the court held that trial courts should award lodestar fees by examining the
24 percentage-of-the-benefit and adjusting the lodestar calculation accordingly. *Id.* at 49, 53. The
25 court indicated that this is an upward adjustment and should be akin to a contingency fee
26 recovery; the court stated, "[a]n adjustment reflecting the amount of the class recovery is not
27 significantly different from an adjustment reflecting a percentage of that amount; and California
28 courts have evaluated a lodestar as a percentage of the benefit." *Id.* at 46. The *Lealao* method

1 appears particularly appropriate because class actions generally are contingency fee cases for
2 plaintiffs – and the class action clients do not expect to pay an hourly fee.

3 The rationale of *Lealao* comports with the purpose of the multiplier. The multiplier is
4 “primarily to compensate the attorney for the prevailing party at a rate reflecting the risk of
5 nonpayment in contingency cases.” *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1138. The *Lealao*
6 court reasoned:

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

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

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

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

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

23 *Id.* at 49-50.

24 Should the Court use a lodestar cross-check to assess the fairness of the fee request, Class
25 Counsel has spent approximately 48 hours litigating this case to date. Gaines Decl., ¶ 3. Counsel
26 reasonably anticipates working at least 40 more hours on this matter, and perhaps more, to
27 administer the settlement, communicate with class members, defense counsel, and the
28 Administrator to facilitate that process, prepare the final approval paperwork, attend the final

1 approval hearing, and close the file. . Gaines Decl., ¶ 4. Based thereon, Class Counsel estimates
2 its total billable hours will approximate \$50,000, which will be presented to the Court in detail
3 by timekeeper at the final approval stage. Gaines Decl., ¶ 5. With a \$50,000 lodestar, a 40% fee
4 award of \$80,000 would represent a multiplier of 1.6, which is well within an accepted range for
5 California fee awards. Gaines Decl., ¶ 6. *See In re Lugo*, (2008) 164 Cal.App.4th 1522, 1546 (It
6 was no abuse of discretion for the lower court to award a 2.13 multiplier given that the multiplier
7 can range from 2 to 4 or even higher.).

8 Accordingly, Class Counsel's request to be permitted to seek up to 40% of the settlement
9 consideration as attorneys' fees is fair and reasonable and is consistent with the awards typically
10 made by courts in California. In any case, the Court should defer any ruling regarding the
11 appropriateness of a fee award until the final approval stage, when Class Counsel will present
12 thorough evidence and law in support of its requested fee award and the Court will have the
13 opportunity to reflect on the request with the input of Class Members after notice of the proposed
14 request has been given.

15 DATED: April 20, 2021

Respectfully submitted,

17 GAINES & GAINES,
18 A Professional Law Corporation

19 By: Daniel F. Gaines

20 DANIEL F. GAINES

21 ALEX P. KATOFISKY

22 Attorneys for Plaintiff George Padilla and Proposed
23 Class Counsel
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1 **PROOF OF SERVICE AND CERTIFICATION**

2 I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to
3 the within action. My business address is 27200 Agoura Road, Suite 101, Calabasas, CA 91301.

4 _____ (For messenger) my business address is:

5 On April 20, 2021, I served the foregoing document described as **(1) DECLARATION OF DANIEL F. GAINES IN**
6 **SUPPORT OF SUPPLEMENTAL BRIEF FOR MOTION FOR PRELIMINARY APPROVAL OF CLASS**
7 **ACTION SETTLEMENT and (2) SUPPLEMENTAL BRIEF IN SUPPORT OF MOTION FOR**
8 **PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT** on the interested parties in this action by
9 placing a true copy thereof enclosed in sealed envelopes addressed as follows:

10 **Kevin Holloway, Esq.**
11 **Fine, Boggs & Perkins LLP**
12 **Landmark Square**
13 **111 West Ocean Blvd., Suite 2400**
14 **Long Beach, California 90802**

15 **Labor & Workforce Development Agency**
16 **(Service via Online Submission to www.dir.ca.gov)**

17 On the above date:

18 ☒ (BY ☒ U.S. MAIL/ BY ☐ CERTIFIED MAIL, RETURN RECEIPT REQUESTED) The sealed envelope was
19 mailed with postage thereon fully prepaid. I am "readily familiar" with the firm's practice of collection and processing
20 correspondence for mailing. It is deposited with United States postal service on that same day in the ordinary course of
21 business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage
22 meter date is more that one day after date of deposit for mailing in affidavit.

23 _____ (BY FEDERAL EXPRESS OR OTHER OVERNIGHT SERVICE) I deposited the sealed envelope in a box or
24 other facility regularly maintained by the express service carrier or delivered the sealed envelope to an authorized
25 carrier or driver authorized by the express carrier to receive documents.

26 _____ (BY FACSIMILE TRANSMISSION) On April 20, 2021, at _____ a.m./p.m., at Calabasas, California, I
27 served the above-referenced document on the above-stated addressee by facsimile transmission pursuant to Rule 2008
28 of the California Rules of Court. The telephone number of the sending facsimile machine was (818)703-8984 and the
telephone number(s) of the receiving facsimile machine was (____) ____-____. A transmission report was properly
issued by the sending facsimile machine, and the transmission was reported as complete and without error. Copies of
the facsimile transmission cover sheet and the transmission report are attached to this proof of service.

_____ (BY PERSONAL DELIVERY) By causing a true copy of the within document(s) to be personally hand-
delivered to the office(s) of the addressee(s) set forth above, on the date set forth above.

22 ☒ (BY ELECTRONIC SERVICE) The above-stated document was submitted for service by electronic
23 transmission via email on the counsel of record listed above.

24 I certify that the above document was printed on recycled paper.

25 I declare under penalty of perjury that the foregoing is true and correct.

26 Executed on April 20, 2021, at Calabasas, California.

27 *Amelia Booth*
28 AMELIA BOOTH