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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN BERNARDINO

DEVIN SMITH, individually and on behalf of
all others similarly situated, and as a proxy for
the LWDA; MYRICA SMITH, individually
and on behalf of all others similarly situated;
and KEVIN OCHONMA, individually and on
behalf of all others similarly situated and as a
proxy for the LWDA,

Plaintiffs,
vs.

DI LOGISTICS, LLC, a California limited-
liability corporation; DI OVERNITE, LLC, a
Nevada limited liability company; DI
OVERNITE INVESTMENTS, LLC, a
California limited liability company,

Defendants.

Case No.: CIV DS 2011469

MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF MOTION
FOR ATTORNEYS' FEES, COSTS, AND
ENHANCEMENT PAYMENTS

Date: June 22, 2023
Time: 8:30 a.m.
Dept.: S-31
Judge: Hon. John M. Pacheco

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1 **I. INTRODUCTION.**

2 Plaintiffs Myrica Smith, Kevin Ochonma, and Devin Smith (collectively “Plaintiffs”) hereby
3 move the Court for an award of attorneys’ fees of 33% of the \$1,000,000 Maximum Settlement
4 Amount (“MSA”), or \$330,000, \$18,280.06 in litigation costs, and enhancement payments of \$5,000
5 each, or a combined 1.5 % of the MSA.¹ As set forth below, the amounts sought are consistent with
6 California Supreme Court precedent and recent awards in similar wage and hour class action
7 settlements, and fall well within the range of reasonableness. Further, ***not one of the 1,739 Class***
8 ***Members has objected to the requested awards since receiving the court-approved Class Notice.***²

9 The attorneys’ fee award should be approved under the common fund methodology because it
10 serves to spread the attorneys’ fees equally among all the beneficiaries of the fund, mimics the legal
11 market-place, and encourages competent counsel to take on complex contingency cases such as this,
12 and to seek an early settlement and avoid unnecessarily prolonging litigation. Further, the sought fee is
13 appropriate because Class Counsel have (1) obtained a significant monetary benefit for the Class (i.e.,
14 the \$1,000,000 MSA); (2) worked diligently and efficiently despite considerable risks faced in
15 prosecuting this litigation; and (3) carried the financial burden of representing Plaintiff and the Class on
16 a contingency basis. The \$18,280.06 requested for litigation costs is also reasonable, appropriate, and
17 nearly \$7,000 less than the Parties initially anticipated leaving more money for the Class.

18 Finally, the \$5,000 enhancement payments are appropriate because Plaintiffs helped procure
19 substantial monetary relief for the Class, assumed the considerable financial and reputational risk
20 serving as the class representatives, and spent significant time and had an impactful effect assisting
21 with the prosecution of this case. Further, the enhancement payments are within the range of those
22 granted by courts in similar settlements and, again, ***not a single Class Member has objected to them.***

23 ///

24 ///

25 _____
26 ¹ Capitalized terms herein shall have the same meaning as in the Joint Stipulation of Class and PAGA Action Settlement and
27 Release (“Settlement Agreement”, “Settlement”, or “SA”), a copy of which is attached as **Exhibit 1** to the Declaration of
Jenny D. Baysinger (“JDB Dec.”) filed concurrently herewith.

28 ² DI Logistics, LLC, DI Overnite, LLC, and DI Overnite Investments, LLC (“Defendants”, “DI”, or “DI Entities”) do not
oppose the fees, costs, or enhancement payments sought.

1 **II. SUMMARY OF THE CASE.**

2 **A. Factual and Procedural Summary.**

3 **1. Plaintiffs Myrica Smith and Kevin Ochonma**

4 On April 23, 2020, Plaintiff Myrica Smith filed a Class Action Complaint in the United States
5 District Court, Central District of California Case No. 2:20-CV-03734 (the “Federal Class Action”) asserting the Class Claims currently pending in the instant action. JDB Dec. ¶ 4. On June 17, 2022,
6 Plaintiff Kevin Ochonma provided written notice to the LWDA and the DI Entities identifying specific
7 provisions of the California Labor Code he contends Defendants violated as to him and other non-
8 exempt California employees. *Id.* ¶ 9. On June 25, 2020, a first amended complaint was filed in the
9 Federal Class Action adding Ochonma as a named Plaintiff and putative class representative. *Id.* ¶ 10.
10 On September 3, 2020, a second amended complaint was filed in the Federal Class Action adding a
11 claim to assess and collect civil penalties pursuant to the PAGA. *Id.* ¶ 12. The Federal Class Action
12 was again amended on January 4, 2022 in order to add DI Overnite, LLC and DI Overnite Investments,
13 LLC as specifically named Defendants. *Id.* ¶ 30. The Federal Class Action was ultimately dismissed
14 on April 5, 2022 by Judge Gutierrez to facilitate this Court’s review of the Settlement. *Id.* ¶ 37.

15 **2. Plaintiff Devin Smith and the Instant State Court Action**

16 On March 12, 2020, Plaintiff Devin Smith provided written notice to the LWDA and the DI
17 Entities identifying specific provisions of the California Labor Code he contends Defendants violated
18 as to him and other aggrieved employees. On June 11, 2020, Devin Smith filed a Representative
19 Action seeking to assess and collect civil penalties pursuant to the PAGA in the instant matter, Superior
20 Court of California, County of San Bernardino Case No. CIVDS2011469 (the “State Court Action”).
21 *Id.* ¶ 8. On October 31, 2022, in order to facilitate the Settlement and this Court’s review of its
22 propriety, and pursuant to stipulation, the operative First Amended Class Action Complaint was filed in
23 the State Court Action, adding Myrica Smith and Ochonma as named plaintiffs/class representatives
24 and effectively consolidating the claims from the Federal Class Action. *Id.* ¶¶ 38-39.

25 Through independent inquiry, research, and informal discovery, Class Counsel thoroughly and
26 diligently investigated and pursued the Class Claims. This process has included, but not been limited
27 to, (1) obtaining and reviewing Plaintiffs’ personnel files, payroll records, and time records; (2)
28

1 researching Defendants, the scope of their operations (both within and outside of California) and their
2 relationship with one another; (3) identifying, researching, and pleading the appropriate claims,
3 including amending the Lawsuit to assert additional claims and Defendants as they ripened and/or were
4 discovered; (4) exhausting administrative remedies; (5) identifying, requesting, securing, and reviewing
5 pertinent policies, practices, and procedures; (6) identifying, requesting, and securing the payroll and
6 time records for a statistically significant sampling of 20% of the 1,739 member Class; (7) propounding
7 formal and informal discovery to secure relevant policy documents and numerical information
8 regarding the size of the class and the scope of the claims, (8) retaining an expert to analyze the payroll
9 and time data provided by Defendants and personally conducting spot checks to ensure the accuracy of
10 the damages calculations; (9) researching and evaluating the scope of additional and/or previous actions
11 and their potential impact on the Class Claims; (10) creating a reliable damages model; (11) developing
12 and implementing a strategy for mediation and settlement; and (12) reviewing and evaluating financial
13 documents provided by Defendants with an internal expert. JDB Dec. ¶ 14.

14 At all times, the Parties' negotiations were adversarial, non-collusive, and at arms' length. JDB
15 Dec. ¶ 36. Between August 2020 and execution of the SA in August 2022, Defendants provided
16 thousands of pages of documents and more than 40,000 line items of data relating to the time and
17 payroll records of a 20% sampling of the Class. *Id.* ¶ 17. In conjunction with those same negotiations,
18 the Parties spoke at length about the strengths and weaknesses of each sides' claims and defenses,
19 including Defendants' contentions Class Members executed arbitration agreements with valid and
20 enforceable class waivers, the DI Entities had lawful time-keeping and wage payment policies, that
21 they had lawful meal/rest period policies, that all "non-discretionary" bonuses were included in the
22 regular rate of pay and additional remuneration not included was discretionary and appropriately
23 excluded, that Class Members actually took meal periods and thus auto-deduction was appropriate (and
24 fully compensated Class Members for time actual time worked), that mileage reimbursement at less
25 than the IRS rate compensated for all costs reasonably incurred by Class Members, that derivative wage
26 statement claims did not cause harm, . *Id.* ¶¶ 78-79, 83-93. On July 30, 2021, the Parties participated
27 in an all-day mediation with Mr. Rotman, but were unable to reach an agreement. At the mediation
28 Defendants first raised the issue of their limited financial resources. *Id.* ¶ 25. After an additional eight

(8) months of negotiations, Defendants’ provision of extensive financial documentation for evaluation, and multiple discussions, the Parties were able to reach an agreement in principle and execute a Memorandum of Understanding. *Id.* ¶¶ 34. Following additional negotiation, a long-form settlement agreement was executed in August 2022. *Id.* ¶ 35, Exh. 1.

B. Distribution of the Notice.

On March 22, 2023, the Class Notice was mailed via First Class mail to the 1,739 Class Members. Prior to the mailing the Administrator performed its due diligence including, processing every person on the Class List against the National Change of Address database, maintained by the United States Postal Service. Declaration of ILYM Group, Inc. ¶ 6-7 (“Admin. Dec.”). In accordance with the Court’s instructions, the Class Notice informed Class Members about the terms of the Settlement, including the fact Plaintiffs would request: (1) an award of attorney’s fees of \$330,000, (2) reimbursement of up to \$20,000 in litigation costs, and (3) Service Payments of \$5,000. See Class Notice; Exhibit A to the Admin. Dec. To date, Class Counsel has spoken to numerous Class Members and none has expressed any concern regarding the requested fees, costs or Service Payments. ***In fact, not one of the 1,739 Class Members have objected in any way, to any degree, to the terms of the Settlement including Class Counsel’s requested award of fees and costs or Plaintiffs’ requested enhancement payments and only 1 individual even elected to opt-out of the Settlement.*** Admin. Dec. ¶ 11-12. The overwhelmingly positive reaction of the Class is a clear indication of its approval of the Settlement and the sought fees, costs and enhancement payments.

III. LAW AND ARGUMENT

A. The Court Should Apply the Common Fund Methodology to Award Plaintiffs’ Attorneys’ Fees Under the Settlement.

“[A] litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to reasonable attorneys’ fees from the fund as a whole.” *Boeing Co. v. Van Gemert* (1980) 444 U.S. 472, 478. Recently, the California Supreme Court clarified its stance on common fund cases, ruling –

“We join the overwhelming majority of federal and state courts in holding that when class action litigation established a monetary fund for the benefit of the class members, and the trial court in its equitable powers awards class counsel a fee out of that fund, the court may

1 determine the amount of a reasonable fee by choosing an appropriate percentage of the fund
2 created.”

3 *Laffitte v. Robert Half Int’l., Inc.* (2016) 1 Cal.5th 480, 503. Explaining its ruling, the Court further
4 held that “[t]he recognized advantages of the percentage method – including relative ease of
5 calculation, alignment of incentives between counsel and the class, a better approximation of market
6 conditions in a contingency case, and the encouragement it provides counsel to seek an early settlement
7 and avoid unnecessarily prolonging litigation – convince us the percentage method is a valuable tool
8 that should not be denied by our trial courts.” *Id.*; see also *Vizcaino v. Microsoft Corp.* (9th Cir. 2002)
9 290 F.3d 1043, 1047.

10 Based on this rationale, the California Supreme Court in *Laffite* affirmed a fee award
11 representing one-third of the fund and rejected the objections of putative class members to this award.
12 *Laffitte*, 1 Cal.5th at 506. Further, this was based on a lodestar amount that required a multiplier of
13 2.13. *Id.* at 487. As the Court held, only when the multiplier is “extraordinarily high or low [should]
14 the trial court [] consider whether the percentage method should be adjusted so as to bring the imputed
15 multiplier within a justifiable range.” *Id.* at 505. Moreover, in the *Laffitte* intermediate court decision,
16 the court observed that “33 1/3 percent of the common fund is consistent with, and in the range of,
17 awards in other class action lawsuits.” *Laffitte v. Robert Half Int’l., Inc.* (2014) 231 Cal.App.4th 860,
18 871.

19 Class Counsel has created an ascertainable fund, the MSA, which will substantially benefit the
20 Class and from which reasonable attorneys’ fees can be easily calculated and awarded.

21 **B. An Award of Attorneys’ Fees to Class Counsel of 33% of the MSA is Reasonable**
and Should Be Approved.

22 Plaintiffs seek an attorneys’ fee award of 33% of the MSA, or \$330,000. This fee is to be
23 distributed \$214,500 to Mayall Hurley and \$115,500 to the Law Offices of Ian Pancer and Thomas D.
24 Rutledge. The requested fee award should be approved because: (1) it is consistent with recent Federal
25 and California court awards in similar wage and hour class settlements; (2) the Class has responded
26 positively to the requested award; (3) it is reasonable in light of the substantial monetary benefit
27 conferred on the Class; (4) it achieves the dual purposes of a common fund award by spreading the
28 litigation costs among those who benefited from the settlement while rewarding and encouraging

competent counsel to handle complex, contingency, class action cases like this; and (5) the lodestar cross-check, while not required, nevertheless confirms its reasonableness.

1. The Requested Fee is Supported by Awards in Similar Cases.

It is well recognized that awarding one-third of the common fund to class counsel is appropriate in wage and hour class action settlements. *Laffitte*, 1 Cal.5th at 506. Indeed, 30-50% is commonly awarded in modest common fund cases. See Rubenstein, Conte and Newberg, *Newberg on Class Actions* at § 14:6. Review of California cases “reveals that courts usually award attorneys’ fees in the 30-40% range in wage and hour class actions that result in recovery of a common fund under \$10 million.” *Cicero v. DirecTV, Inc.* (C.D. Cal. 2010) 2010 WL 2991486 *6. Fee awards in the range of one-third are appropriate in such cases because they do not implicate megafunds where a smaller percentage recovery may be more suitable. See also *Vandervort v. Balboa Capital Corp.* (C.D. Cal. 2014) 8 F.Supp.3d 1200, 1209-10.³

In smaller wage-hour class actions like this one, both state and federal courts routinely award attorneys’ fees of percentages equal to or greater than that sought by Plaintiffs in this action.⁴ When viewed in the light of the foregoing authorities, the reasonableness of Plaintiffs’ requested fee award is undeniable.

2. The Overwhelmingly Positive Reaction of the Class Supports Approval.

It is well settled that positive reactions by class members support settlement approval. *7-Eleven Owners for Fair Franchising v. Southland Corp.* (2000) 85 Cal.App.4th 1135, 1152-53. The absence of disapproval constitutes strong evidence of the reasonableness of the requested fee award. See *In re*

³“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.” *Chavez v. Netflix, Inc.* (2008) 162 Cal.App.4th 43, 66 n.11 (quoting *Shaw v. Toshiba Am. Info. Sys., Inc.* (E.D. Tex. 2000) 91 F.Supp.2d 942, 972; see also *Knight v. Red Door Salons, Inc.* (N.D. Cal. 2009) 2009 WL 248367, at *6 (“fee awards in class actions average around one-third of the recovery”) (quoting Newberg on Class Actions § 14.6 (4th ed. 2007))).

⁴ See, e.g., *Barrett v. The St. John Cos.* (L.A. Cnty. Super. Ct. July 9, 2009) No. BC354278 (one-third award of \$1.1 million settlement in wage and hour class action); *Tokar v. GEICO* (San Diego Cnty. Super. Ct. July 9, 2004) No. GIC 810166 (award of one-third of recovery); *Davis v. The Money Store, Inc.* (Sacramento Cnty. Super. Ct. Decl. 26, 2000) No. 99AS01716 (one-third of \$6,000,000 settlement); *Big Lots Overtime Cases*, (San Bernardino Cnty. Super. Ct., JCC Proceeding No. 4283, Feb. 4, 2004) (one-third fee recovery). See, e.g., *Wren v. RGIS Inventory Specialists* (N.D. Cal. 2011) 2011 WL 1230826 *29 (approving fee award of 42% in wage and hour class and collective action); *Quezada v. Con-Way Freight, Inc.* (N.D. Cal. 2017) 2017 WL 6949286 *1 (awarding one-third of \$2 million settlement in wage and hour class action); *Singer v. Becton Dickinson and Co.* (S.D. Cal. 2010) 2010 WL 2196104 *8 (approving fee award of one-third as similar to awards in other cited wage and hour class action cases where fees ranged from 30% to 40%); *Cicero*, 2010 WL 2991486, at *6 (noting that fees of one-third are common in wage and hour settlements below \$10 million).

1 *Heritage Bond Litig.* (C.D. Cal. 2005) 2005 WL 1594403 * 21 (“The absence of objections or
2 disapproval by class members to Class Counsel’s fee request further support finding the fee request
3 reasonable.”). Here, the fact that ***not one of the 1,739 Class Members has objected*** to the fee award
4 underscores its reasonableness.

5 **3. An Award of 33% of the MSA Is Fair and Reasonable in Light of the Substantial**
6 **Monetary Benefit Obtained and the Risks Faced by Class Counsel.**

7 In addition to equity and market considerations, courts look to: (1) the results achieved; (2) the
8 riskiness of prosecuting the litigation; (3) the skill and high quality of work by counsel; and (4) the
9 financial burden carried by Class Counsel in prosecuting the case on a contingency basis in evaluating a
10 common fund fee award. *Serrano v. Priest* (1977) 20 Cal. 3d 25, 49; *Lealao v. Beneficial Cal., Inc.*
11 (2000) 82 Cal. App. 4th 19, 26; see also *Vizcaino*, 290 F.3d at 1048-50 (internal quotation and citation
12 omitted). Each of these factors supports the fee request.

13 **a. The fee request is justified by the positive results achieved.**

14 The ultimate reasonableness of the fee “is determined primarily by reference to the level of
15 success achieved by the plaintiff.” *McCown v. City of Fontana* (9th Cir. 2009) 565 F.3d 1097, 1102.
16 Here, Class Counsel achieved an excellent result and obtained significant monetary relief for the Class.
17 Participating Class Members (i.e., those that did not opt-out) will receive a share of the MSA
18 (\$551,719.94 even after subtracting the fees and costs of class counsel, the enhancement payments, and
19 the significant administrative costs associated with a settlement of this size). Admin Dec. ¶ 14. It is
20 estimated that the *average* payment to each Participating Class Member will be \$317.44 with the
21 highest payment topping out at more than \$1,340. Admin. Dec. ¶ 14. This represents substantial
22 monetary relief for the Class given the complexity of the issues, the risk and uncertainty inherent in
23 class action litigation, the myriad defenses advanced by Defendants, and Defendants’ precarious
24 fiances.

25 **b. The risks associated with this litigation justify the fee request.**

26 Class counsel has taken considerable risk in litigating this case—not just because it was done on
27 a wholly contingency basis, but also because complex, representative wage-and-hour litigation is an
28 ever-emerging area under the law. As set forth in greater detail in Plaintiffs’ Motion for Final

1 Approval, while Class Counsel believes evidence exists from which the trier of fact could
2 conclude Defendants engaged in a pattern and practice of violating the law, continued litigation is
3 guaranteed to be costly, time consuming and uncertain. Defendants asserted and would have continued
4 to assert legal and factual grounds to defend itself including, but not limited the existence of allegedly
5 enforceable arbitration agreements with class waivers, Defendants' financial difficulties, and the
6 substantive challenges to both certification and ultimate liability facing the Class Claims. Appellate
7 proceedings would only further delay and jeopardize recovery by the Class. By contrast, the proposed
8 Settlement ensures timely and substantial recovery for the Class. JDB Dec. ¶¶ 81, 83-95.

9 **c. Class Counsel's skill and the quality of their work justifies the fee request.**

10 Class counsel has demonstrated substantial skill, diligence, and high quality of work in
11 orchestrating the Settlement and creating a MSA of \$1,000,000. The Settlement, and the substantial
12 monetary benefit it confers, was obtained efficiently and effectively without wasted effort or years of
13 needless, costly litigation. As a result of the skill and tremendous effort of Class Counsel, Plaintiffs
14 were well-positioned to reach a favorable settlement for the Class, which itself required significant
15 expertise, a mediation, and protracted negotiations to achieve.

16 **d. The contingent nature of the fee and financial burden carried by class**
17 **counsel justifies the fee request.**

18 A law firm that prosecutes class action cases does not get paid in every case. Sometimes, it gets
19 nothing or is awarded fees equal to only a small percentage of the amount it actually worked. Where
20 plaintiffs' counsel does succeed, therefore, it is appropriate to compensate the firm for the risks the firm
21 regularly undertakes. As the California Supreme Court has explained:

22 "[A] contingent fee must be higher than a fee for the same legal services paid as they are
23 performed. The contingent fee compensates the lawyer not only for the legal services he
24 renders but for the loan of those services. The implicit interest rate on such a loan is higher
25 because the risk of default (the loss of the case, which cancels the debt of the client to the
26 lawyer) is much higher than that of conventional loans. 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."

27 *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1132-33 (internal citation and quotation omitted).

28 Accordingly, courts have recognized that "[i]t is an established practice in the private legal market to

1 reward attorneys for taking the risk of non-payment by paying them a premium over their normal
2 hourly rates for winning contingency cases.” *Fischel v. Equitable Life Assurance Soc’y of U.S.* (9th
3 Cir. 2002) 307 F.3d 997, 1008.

4 In this case, Class Counsel have worked diligently on this case since March 2020, and in effect
5 have loaned their legal services to the Class since that time. Class Counsel prosecuted this case wholly
6 on a contingency basis, at great risk of never receiving any compensation due to the uncertain nature of
7 class action litigation in general, and also due to the numerous factual and legal defenses of Defendant.
8 Class Counsel took a tremendous risk by taking on this case, and persevered to attain the Settlement on
9 behalf of the Class. To date Class Counsel has spent \$18,280.06 in litigation costs and expended more
10 than 522 hours of time, with significant additional work remaining to be done, without receiving any
11 compensation at all. Meanwhile, all of this entailed passing on other lucrative cases. JDB Dec. ¶ 126;
12 Declaration of Ian Pancer ¶ 45 (“Pancer Dec.”); Declaration of Thomas Rutledge ¶ 44 (“Rutledge
13 Dec.”).

14 **4. The Requested Fee Award Fairly Spreads the Litigation Costs Among the**
15 **Settlement Beneficiaries.**

16 The percentage-of-the-fund approach is an appropriate method for reviewing attorneys’ fees
17 here because it allows Plaintiffs and Class Counsel to create “a fund from which others will benefit
18 [and] to require those other beneficiaries to bear their fair share of the litigation costs.” *Nw. Energetic*
19 *Servs., LLC v. Cal. Franchise Tax Bd.* (2008) 159 Cal.App.4th 841, 878 (citing *Serrano*, 20 Cal. 3d at
20 35). This approach ensures that the class members, who have accepted the benefits from a common
21 fund recovery, also accept their fair *pro rata* responsibility to contribute towards the attorneys’ fees and
22 costs that created the fund in the first place. *Earley v. Sup. Ct.* (2000) 79 Cal.App.4th 1420, 1436. In
23 other words, “[t]hose who benefit from the creation of the fund should share the wealth with the
24 lawyers whose skill and effort helped create it.” *In re Wash. Pub. Power Supply Sys. Sec. Litig.* (9th
25 Cir. 1994) 19 F.3d 1291, 1300. Based on the above principles, the attorneys’ fees to be awarded are to
26 be calculated based on a percentage of the entire settlement fund. *Boeing Co.*, 444 U.S. at 478; *Six (6)*
27 *Mexican Workers v. Az. Citrus Growers* (9th Cir. 1990) 904 F.2d 1301, 1311. Accordingly, the
28

percentage-of-the-fund approach is appropriate here and supports Class Counsel’s request for an award of a percentage of the common fund (i.e., 33% of the \$1,000,000 MSA).

In addition to spreading the litigation costs among all the beneficiaries, common fund fee awards are essential to furthering the important societal goal of attracting competent counsel to handle these often-complex contingency cases “who will be more willing to undertake and diligently prosecute proper litigation for the protection or recovery of the fund if [attorneys are] assured that [they] will be promptly and directly compensated should [their] efforts be successful.” *Melendres v. City of L.A.* (1975) 45 Cal.App.3d 267, 273. “Given the unique reliance of our legal system on private litigants to enforce substantive provisions of law through class and derivative actions, attorneys providing the essential enforcement services must be provided incentives roughly comparable to those negotiated in the private bargaining that takes place in the legal marketplace, as it will otherwise be economic for defendants to increase injurious behavior.” *Lealao*, 82 Cal. App. 4th at 47. Without such incentives, meritorious class actions such as this would not be brought and thus the private enforcement of important statutory rights would be undermined.

California courts further recognize “the amount of attorney fees typically negotiated in comparable litigation should be considered in the assessment of a reasonable fee in representative actions in which a fee agreement is impossible.” *Ibid.* By doing so, courts can ensure that the awarded fee approximates the legal marketplace by being comparable to what clients and counsel would have likely negotiated at the outset of the matter. Notably, the typical contingency fee contract ranges from 20 to 40 percent of the total recovery—leaving Plaintiffs’ requested attorneys’ fee near the bottom of the spectrum. *Chavez*, 162 Cal.App.4th at 64-65.

Here, Plaintiffs’ requested fee award constitutes a fair charge in light of the substantial monetary relief obtained for the Class. Because each Class Member who did not opt-out will receive compensation, equity requires each also contribute to the attorneys’ fees that netted them this positive result. Moreover, the requested fee is equal to or less than 1) typical fees awarded in small wage and hour class actions like this one, 2) most contingency fee retainer agreements, and 3) the fee that Class Counsel would have expected if they had negotiated individual retainer agreements with each Class Member. *Ibid.*; see also JDB Dec. ¶ 122. The requested award ensures that Class Counsel receive an

appropriate fee award for the actual benefit conferred to the Class, particularly where it would be impossible *ex ante* to enter a fair fee arrangement with each Class Member.

5. The Lodestar Cross-Check Confirms the Reasonableness of the Requested Fee.

The California Supreme Court has held that trial courts have discretion to award fees as a percentage of the common fund, with or without conducting a lodestar cross-check. *Laffitte*, 1 Cal. 5th at 506 (“We further hold that trial courts have discretion to forgo a lodestar cross-check and use other means to evaluate the reasonableness of a requested percentage fee.”). Although not required, courts may perform a “lodestar cross-check” as a means of determining whether the requested percentage is reasonable in relation to the amount and value of the time expended by counsel. See *Lealao*, 82 Cal.App.4th at 47-50. The goal under either the percentage or lodestar approach is to award a reasonable fee to compensate counsel for their efforts.⁵ *Laffitte*, 1 Cal.5th at 504.

This cross-check starts with the basic lodestar calculation but may then “evaluate the lodestar as a percentage of the recovery and adjust it accordingly if it can be determined that the lodestar is significantly different from the range of percentage fees freely negotiated in comparable litigation.” *Lealao*, 82 Cal.App.4th at 821. Under the first step of the cross-check, the “lodestar” figure is calculated by multiplying “the number of hours [the prevailing party] reasonably expended on the litigation [] by a reasonable hourly rate.” See *Hensley v. Eckerhart* (1983) 461 U.S. 424, 433; *Press v. Lucky Stores, Inc.* (1983) 34 Cal.3d 311, 322.

Class Counsel, to date, have expended more than 522 hours to bring this settlement to the brink of finalization. These hours reflect time reasonably spent litigating this case, which Class Counsel sought to efficiently manage, staff, assign, and divide the work between their respective attorneys and to avoid duplication of effort. JDB Dec. ¶ 124; Rutledge Dec. ¶ 45. Class Counsel also spent additional time responding to Class Member inquiries, and will spend further time preparing for and

⁵ The common fund method is a better fit for this situation due to the creation of the MSA to benefit the Class and its encouragement of better incentives regarding attorney billing practices that actually serve a plaintiff class. Courts have also acknowledged the merits of awarding attorneys’ fees under the common fund approach “[b]ecause the benefit to the class is easily quantified in common-fund settlements” and it avoids the “often more time-consuming task of calculating the lodestar.” *In re Bluetooth v. Headset Prods. Liab. Litig.* (9th Cir. 2011) 654 F.3d 935, 942; *Staton v. Boeing Co.* (9th Cir. 2003) 327 F.3d 938, 967; see also *Elliot v. Rolling Frito-Lay Sales, LP* (C.D. Cal. 2014) 2014 WL 2761316 at *9 (“There are significant benefits to the percentage approach, including consistency with contingency fee calculations in the private market, aligning the lawyers’ interests with achieving the highest award for the class members, and reducing the burden on the courts that a complex lodestar calculation requires”).

1 attending the Final Approval Hearing, overseeing the administration of the Settlement, and reporting to
2 the Court. JDB Dec. ¶ 129. Class Counsel's customary hourly rate in plaintiff's employment class
3 action cases ranges from \$733/hr (shareholder with 11 years' experience litigating plaintiffs'
4 employment cases) to \$997/hr (senior partner with nearly 40 years of experience) and have been
5 approved by numerous courts across the state. *Id.* at ¶ 125.^{6, 7} Applying the appropriate hourly rates to
6 the number of hours worked yields a lodestar of \$443,312.30. This reasonable lodestar is supported by
7 detailed and contemporaneous billing records maintained by Class Counsel. Summaries of these billing
8 records are attached to and described in Class Counsel's declaration for the Court's review. JDB Dec.
9 ¶ 124-126, Ex. 7, Pancer Dec. ¶ 27, 41-45, Ex. 1, Rutledge Dec. ¶ 41-44, Ex. 2.

10 Under the second step of the analysis, the reasonableness of the requested fee award is
11 confirmed by the application of a modest multiplier. In wage and hour actions, California and Ninth
12 Circuit courts both approve reasonable multipliers on the class counsel's lodestar, which range from 2
13 to 4 times, to reward counsel for accepting the contingent risk of the litigation or obtaining excellent
14 results. See, e.g., *Laffitte*, 1 Cal.5th at 506 (approving one-third fee award with multiplier between 2.03
15 and 2.13); see also *Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 255 (noting that
16 multipliers can range from 2 to 4 or higher); *Glendora Cmty. Redev. Agency v. Demeter* (1984) 155
17 Cal.App.3d 465, 479-481 (affirming multiplier of 12); *Contreras v. Bank of Am., N.A.* (S.F. Cnty.
18 Super. Ct. Sept. 3, 2010) No. CGC-07-467749 (approving one-third of common fund fee award, which
19 was 2.73 multiplier of lodestar).⁸

21 ⁶These rates are based upon the Adjusted Laffey Matrix for the District of Columbia, a matrix that has been used by
22 California district courts in determining reasonable hourly rates. *Chanel, Inc. v. Doan* (N.D. Cal. 2007) 2007 WL 781976
23 *6-7; *Garnes v. Barnhardt* (N.D. Cal. 2006) 2006 WL 249522 *7; *Viveros v. Donahoe* (C.D. Cal. 2013) 2013 WL 1224848,
24 *5-6. Moreover, the prevailing rate is to be determined with respect to the forum in which the court sits, which in this case
is the Northern California/Sacramento area. *Sirrod v. Dir., OWCP* (9th Cir. 2015) 809 F.3d 1082, 1086. Similar and higher
rates are commonly approved in the Northern California/Sacramento region. See e.g., *In re Magsafe Apple Power Adapter*
Litig. (N.D. Cal. 2015) 2015 WL 428105 * 12.

25 ⁷ Calculating the lodestar using Class's Counsel's current rates is appropriate given the deferred nature of counsel's
26 compensation. See *LeBlanc-Sternberg v. Fletcher* (2d Cir. 1998) 143 F.3d 748, 764 ("[C]urrent rates, rather than historical
27 rates, should be applied in order to compensate for the delay in payment . . .") (citing *Missouri v. Jenkins* (1989) 491 U.S.
28 274, 283-84); *In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d at 1305.

⁸ See also, *Vizcaino*, 290 F.3d at 1051 & n.6 (affirming lodestar multiplier of 3.65 in light of complexity and risk of case and
surveying 34 class common fund settlements to find that 83% of multipliers were in the 1 to 4 range); *Vandervort*, 8
F.Supp.3d at 1210 (awarding one-third of fund, which was 2.52 multiplier of lodestar); *Boyd v. Bank of Am. Corp.* (C.D.
Cal. 2014) 2014 WL 6473804 *11 (awarding one-third of fund, which was 2.58 multiplier of lodestar); *Hopkins v. Stryker*
Sales Corp. (N.D. Cal. 2013) 2013 WL 496358 *6 (approving fee award that represented a multiplier of 2.76 as falling

1 Where Class Counsel are able to obtain a settlement prior to overcoming certain hurdles, such
2 as class and collective certification motions, courts recognize they should not be penalized by use of a
3 straight lodestar in determining the reasonableness of requested fees. See *Vizcaino*, 290 F.3d at 1050
4 n.5 (“We do not mean to imply that class counsel should necessarily receive a lesser fee for settling a
5 case quickly; in many instances, it may be a relevant circumstance that counsel achieved a timely result
6 for class members in need of immediate relief.”); *In Re Activision Secs. Litig.* (N.D. Cal. 1989) 723
7 F.Supp. 1373, 1378 (noting “Where attorneys must depend on a lodestar approach there is little
8 incentive to arrive at an early settlement.”). Here, a multiplier to Class Counsels’ lodestar is justified
9 based on the substantial monetary and non-monetary results obtained through a timely Settlement and
10 the contingent risk assumed by Counsel, who agreed to represent Plaintiffs and the Class with no
11 guarantee of payment. Indeed, a district court “*must* apply a risk multiplier to the lodestar ‘when (1)
12 attorneys take a case with the expectation they will receive a risk enhancement if they prevail, (2) their
13 hourly rate does not reflect that risk, and (3) there is evidence that the case was risky. Failure to apply a
14 risk multiplier in cases that meet these criteria is an abuse of discretion.” *Stetson v. Grissom* (9th Cir.
15 2016) 821 F.3d 1157, 1166, quoting *Stanger v. China Elec. Motor, Inc.* (9th Cir. 2016) 812 F.3d 734,
16 741 (emphasis in original, internal quotation marks omitted). In this matter, Class Counsel took on this
17 matter with an expectation that at least a modest risk enhancement would be applied to any fee request.
18 The hourly rates cited are based on the Adjusted Laffey Matrix without any adjustment for risk despite
19 the fact this case involved substantial risk. Accordingly, a risk multiplier is appropriate.

20 Here, no multiplier is required because Class Counsel’s current lodestar, \$443,312.30, exceeds
21 the \$330,000 in fees sought by more than \$113,000. Accordingly, a negative multiplier (i.e., less than
22 1) is necessary to reach the amount of fees Class Counsel is actually requesting (.744). This is well
23 below the “3-4 range [that] are common in lodestar awards for lengthy and complex class action
24 litigation” (*Van Vranken v. Atlantic Richfield Co.*, 901 F.Supp. 294, 298 (C.D. Cal. 1995) and well
25 below within the 1.9 to 5.1 typically approved (4 NEWBERG ON CLASS ACTIONS § 14.7). The fees
26 requested are entirely reasonable. See *Carlin v. DairyAmerica, Inc.*, 380 F.Supp.3d 998, 1023 (E.D.

27
28 within the “majority” range for risk multipliers); *Buckingham, et. al. v. Bank of Am.* (N.D. Cal.), Case No. 3:15-cv-06344-
RS, Docket No. 103 (approving lodestar multiplier of 5.31).

1 Cal. 2019) (recognizing that a negative multiplier “strongly” supports the reasonableness of a fee
2 request). Because the lodestar cross-check confirms the common fund fee request is reasonable and
3 appropriate, it should be approved.

4 **C. Class Counsel’s Out-of-Pocket Expenses Are Reasonable.**

5 The Settlement allows Class Counsel to request reimbursement for up to \$25,000 of out-of-
6 pocket expenses incurred during this litigation. Reimbursement of these expenses is appropriate for the
7 same reason attorneys’ fees should be paid out of the fund: all beneficiaries should bear their fair share
8 of the costs of the litigation that counsel traditionally bill to paying clients. See *Serrano*, 20 Cal. 3d at
9 35 (common fund doctrine permits class counsel to recover attorneys’ fees and costs); *Rider v. Cty. of*
10 *San Diego* (1992) 11 Cal.App.4th 1410, 1423 n.6; *Earley*, 79 Cal.App.4th 1436; see also *Harris v.*
11 *Marhoefer* (9th Cir. 1994) 24 F.3d 16, 19.

12 To date, Class Counsel have incurred \$18,280.06 in actual out-of-pocket expenses which
13 consist of routine litigation costs typically charged to fee-paying clients, including filing fees, copying,
14 postage, the cost of the mediator, etc. JDB Dec. ¶ 131-133; Exhibit 7, Pancer Dec. ¶ 72; Rutledge Dec.
15 ¶ 58-59, Ex. 3. These costs were necessarily incurred, are reasonable in relation to the size and scope of
16 the case, and should be reimbursed.

17 **D. The Enhancement Payments to the Class Representatives is Reasonable.**

18 The Court should also approve the \$5,000 enhancement payments to Plaintiffs because they are
19 just, fair, and reasonable. Courts regularly approve incentive awards so that class representatives can
20 “be compensated for the expense or risk they have incurred in conferring a benefit on other members of
21 the class.” *In re Cellphone Fee Termination Cases* (2010) 186 Cal.App.4th 1380, 1394 (quoting *Clark*
22 *v. Am. Residential Servs. LLC* (2009) 175 Cal.App.4th 785, 806; see also *Bell v. Farmers Ins. Exch.*
23 (2004) 115 Cal.App.4th 715, 725-26 (upholding service payments to class representatives); *Munoz v.*
24 *BCI Coca-Cola Bottling Co. of L.A.* (2010) 186 Cal. App.4th 399, 412 (upholding incentive awards to
25 plaintiffs that, when added to their individual recoveries, amounted to more than twice as much as the
26 average payment to class members).

27 In deciding whether to approve an incentive award, a court should consider: “(1) the risk to the
28 class representative in commencing suit, both financial and otherwise; (2) the notoriety and personal

1 difficulty encountered by the class representative; (3) the amount of time and effort spent by the class
2 representative; (4) the duration of the litigation and; (5) the personal benefit (or lack thereof) enjoyed
3 by the class representative as a result of the litigation.” *In re Cellphone Fee Termination Cases*, 186
4 Cal.App.4th at 1394-95 (internal quotation marks omitted); see also *Van Vranken v. Atlantic Richfield*
5 *Co.* (N.D. Cal. 1995) 901 F. Supp. 294, 299 (applying similar factors to determine reasonableness of
6 service payments). All of the aforementioned factors support the Service Payments requested here.
7 The \$5,000 enhancement payments sought by Plaintiffs are (a) in line with those commonly awarded
8 by courts in similar wage and hour class actions, (b) identical to the Ninth Circuit benchmark, (c)
9 collectively just 1.5% of the MSA, and (d) fair, reasonable and appropriate under the circumstances.

10 Here, Plaintiffs took on substantial risk in bringing this class action and exposed themselves to
11 notoriety and personal difficulties from serving as the named Plaintiffs in this lawsuit. First, Plaintiffs
12 bore the significant financial risk of Defendants’ costs in the event they lost at trial. This financial risk,
13 in a complex employment class action involving more than 1,700 current and former employees, could
14 easily total tens, if not hundreds of thousands of dollars. Plaintiffs also risked damage to their
15 professional reputation. It is well established that plaintiffs in the employment context “face[] the risk
16 that new employers would learn that they were class representatives in a lawsuit against their former
17 employer and take adverse action against them. Moreover, each time they change jobs, they will risk
18 retaliation in the hiring process.” *Asare v. Change Grp. of N.Y., Inc.* (S.D.N.Y. 2013) 2013 WL
19 6144764 *15. Plaintiffs, who worked diligently with Class Counsel throughout this entire litigation,
20 including participating in discovery and the Parties’ informal information exchange, taking numerous
21 calls with Class Counsel, and participating telephonically in the mediation, should be rewarded for
22 taking the initiative to pursue these claims on behalf of their coworkers, and for their role in reaching a
23 substantial settlement providing for valuable relief to the Class. Plaintiffs’ commitment is further
24 underscored by the fact that, had the Settlement not been reached, their participation may well have
25 been required for several more years. JDB Dec. ¶ 114-118; Pancer ¶ 65-71. Additionally, Plaintiffs
26 receive no special treatment under the terms of the Settlement. Moreover, by actively pursuing this
27 action, Plaintiffs have furthered the twin California public policy goals of enforcing the Labor Code
28

1 and making appropriate use of the class action device. See *Sav-on Drug Stores, Inc. v. Sup. Ct.* (2004)
2 34 Cal.4th 319, 340.

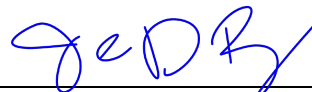
3 The reasonableness of the requested enhancement payments is further confirmed by the fact that
4 combined they represent just 1.5% of the MSA and ***not one Class Member has objected to it.*** Admin.
5 Dec. ¶ 11-12. The requested enhancement payments are also consistent with, and actually lower than,
6 awards approved by courts in other similar wage and hour cases.⁹ Accordingly, all of the
7 aforementioned factors support the approval of the \$5,000 service payments.

8 **IV. CONCLUSION**

9 For the foregoing reasons, the Court should grant final approval to the Parties' proposed class
10 action Settlement, award Class Counsel attorneys' fees in the amount of \$330,000, costs of \$18,280.06,
11 and awards of \$5,000 to each Plaintiff for their service as Class Representatives.

12 **DATED:** May 30, 2023

MAYALL HURLEY P.C.

13
14 By 
15 ROBERT J. WASSERMANN
16 JENNY D. BAYSINGER
17 Attorneys for Plaintiffs and the Putative Class
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19
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21
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23
24

25 ⁹ See e.g. *Bond v. Ferguson Enterprises, Inc.* (E.D. Cal. 2011) 2011 WL 2648879 (approving \$11,250 service award each to
26 two representatives in a meal break class action); *Vasquez v. Coast Valley Roofing, Inc.* (E.D. Cal. 2010) 266 F.R.D. 482,
27 493 (approving service awards of \$10,000 each from a \$300,000 settlement in a wage and hour class action); *Castellanos v.*
28 *Pepsi Bottling Group, Inc.* (Alameda Cnty. Sup. Ct., March 11, 2010) No. RG07332684 (approving incentive award of
\$12,500 in a wage and hour class action); *Louie v. Kaiser Found. Health Plan, Inc.* (S.D. Cal. 2008) 2008 WL 4473183 *2
(approving "\$25,000 incentive award for each Class Representative" in wage an hour settlement); *Garner v. State Farm*
Mut. Auto. Ins. Co. (N.D. Cal. 2010) 2010 WL 1687832 *17 n.8 ("Numerous courts in the Ninth Circuit and elsewhere have
approved incentive awards of \$20,000 or more where, as here, the class representative has demonstrated a strong
commitment to the class").

PROOF OF SERVICE

I, the undersigned, certify and declare as follows:

I am over the age of eighteen years and not a party to this action. My business address is 112 S. Church Street, Lodi, California 95240 that is located in the county where the mailing and/or delivery below took place.

On May 30, 2023, I served the following document:

**DMEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR
ATTORNEYS' FEES, COSTS, AND ENHANCEMENT PAYMENTS**

addressed to:

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(thomasrutledgelaw@gmail.com)
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☒ **BY EMAIL:** In accordance with Code of Civil Procedure, Section 1010.6, on the date specified below, I caused a copy of the document(s) described above to be sent to the person(s) at the e-mail address(es) listed above. My business e-mail address is lriley@mayallaw.com. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

☒ **BY PERSONAL SERVICE:** I caused such envelope to be delivered by hand to the offices of the addressee.

I certify and declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on May 30, 2023, at Lodi, California.


LINDSAY RILEY SHIELDS