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Attorneys for Plaintiff Jun Dong
on behalf of herself and all others
similarly situated

**SUPERIOR COURT OF THE STATE OF CALIFORNIA**

**FOR THE COUNTY OF SAN BERNARDINO**

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| JING DONG ZHANG, an individual California resident on behalf of himself and all others similarly situated,<br><br>Plaintiff,<br><br>vs.<br><br>CA FAN TUAN INC., a California corporation; and DOES 1-10, inclusive,<br><br>Defendant. | Case No. CIVSB2026778<br><br>**MEMORANDUM IN SUPPORT OF MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND AWARD FOR ATTORNEYS' FEES, COSTS, AND CLASS REPRESENTATIVE ENHANCEMENT**<br><br>Date: October 4, 2022<br>Time: 10:00 a.m.<br>Judge: Hon. David Cohn<br>Dept.: S-26<br><br>Action Filed: December 14, 2020<br>Trial Date: None |

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## I. INTRODUCTION

Plaintiff Jun Dong[1] ("Plaintiff") seeks final approval of the $725,000.00 class action settlement (the "Settlement")[2] with defendant CA Fan Tuan, Inc. ("Defendant" or "Fan Tuan"). On May 3, 2022, the Court granted preliminary approval of the class action Settlement. The Settlement resolves all of the claims of Plaintiff and the Class Members against Defendant based upon the factual allegations in the class and PAGA action described below.

The Settlement satisfies all of the criteria for final approval and falls well within the range of approval. It has been met with overwhelming support by the Class, which is evidenced by the fact **that there were only 5 opt-outs out of 1351 Class Members and no Class Member has objected to the Settlement**. (Islas Decl. ¶¶11-12, Favarote Decl. ¶4.) The class has 1,346[3] members. (Islas Decl. ¶13, Favarote Decl. ¶23.) If the Court awards all amounts sought, the average Class Member will receive $299.37, plus a PAGA average penalty payment of approximately $4.63, for a total projected average payment of $304.00 per Class Member, which represents more than 633 deliveries per Class Member ($.48 per delivery), and the highest gross payment to a Class Member would be $7,327.62. (Islas Decl. ¶14, Favarote Decl. ¶23.)

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| **Gross Settlement Fund**: | $725,000.00; |
| Class Counsel Fees (35%): | $253,750.00; |
| Class Counsel Expenses: | $12,000.00; |
| Enhancement Award: | $10,000.00; |
| ILYM Group Fees: | $19,800.00; |
| LWDA PAGA Payment (75%): | $18,750.00; |
| Aggrieved Employees' PAGA Amount (25%): | $6,250.00; |
| **Net Settlement Fund** | $404,450.00 |

[1] Plaintiff Jun Dong replaced former representative Jing Dong Zhang ("Zhang") as lead plaintiff on March 14, 2022, after Mr. Zhang declined to move forward with the case.

[2] A copy of the fully executed Settlement Agreement, including its exhibits, is attached as Exhibit 1 to the Favarote Declaration.

[3] There were originally 1,351 Class Members, however with the 5 opt-outs, there are now 1,346 Class Members.

Accordingly, Plaintiff requests that the Court grant final approval of the Settlement and approve the Class Representative Enhancement in the amount of $10,000, and Class Counsel's request for attorney's fees of $253,750 (35% of the Settlement) and costs up to $12,000.

## II. BACKGROUND

### A. Factual Background and Procedural History

Plaintiff Jun Dong worked as a "Driver" or "Courier" for Defendant starting in October of 2020 and performed delivery services for Defendant. (Jun Dong Decl. ¶2.) Plaintiff alleges that while Plaintiff and the Class worked for Defendant, they were not paid for all of the time they spent working for Defendant, including from the time they signed in on Defendant's App at the start of their "shift" until they got their first delivery assignment, as well as all the time spent waiting between delivery assignments during their shift. (See Favarote Decl.in Support of the Motion for Preliminary Approval ¶¶16-17.) Plaintiff and the Class Members were instead paid based on a formula or algorithm that the Defendant developed which only paid the Drivers a flat fee and the mileage between the pickup location and designated delivery location. (Id. at ¶¶ 16-20.) Plaintiff also alleges that she and the Class Members were never provided with itemized wage statements, as they could only check their earnings in Defendant's mobile application, which did not provide all of the statutorily required information (*e.g.,* rate of pay, hours worked, etc.). (Id.) Plaintiff also alleged that Defendant did not provide any of the Class Members with statutory meal periods or rest breaks. (Id.) Finally, Plaintiff alleged that she and the Class were not reimbursed for necessary business expenses, including use of their personal cellular phones which were mandatory equipment to perform delivery services for Defendant. (Id.)

### B. Defendant Settles Directly with Some Class Members Following the Filing of This Lawsuit.

After plaintiff Zhang initiated this action, in early 2021, Defendant began a campaign to try to directly settle with the Class Members -- a process that was theoretically approved of in *Chindarah v. Pick Up Stix*, 171 Cal. App. 4th 796 (2009) ("Pick-up Stix"). In Defendant's campaign, it not only sought to settle all of the claims at issue in this matter but also any and all claims that the Class Members had against the Defendant. Defendant's proposed settlement included a general release of all claims, including those for sexual harassment, discrimination, or personal injury. According to Defendant, it obtained signed settlement agreements and releases from approximately 458 Class Members covering approximately 485,000 deliveries. The total amount paid by Defendant in these individual settlements was approximately $111,899.40 (approximately $.23 per delivery made). (See Favarote Decl. ¶¶ 30, 31, Exhibit 2 and Exhibit 3 in Support of the Motion for Preliminary Approval.)

### C. Discovery and Investigation of Facts Prior to Settlement.

Class Counsel has conducted significant investigation since the inception of the action as detailed in the concurrently filed declarations of Torey Joseph Favarote and Joseph R. Becerra (collectively referred to as "Class Counsel"). Class Counsel's investigation as to the class claims included the exchange of substantial information and data pursuant to formal and informal discovery methods, including multiple days of the deposition of the original named plaintiff Zhang, deposition of Defendant's person most knowledgeable ("PMK") over two days, 25 special interrogatories, 58 requests for production of documents, and 18 requests for admissions. Defendant provided a random sampling of delivery records and pay data for Class Members, totaling nearly 11,000 pages of documents and representing approximately 20% of the Class and consisting of millions of data points. The records were furnished in electronic format, so they could be examined to determine Defendant's level of compliance with the provisions of the California Labor Code that are subject to the claims in the action.

In addition, Class Counsel spent more than 100 hours interviewing Class Members as part of their investigation. (Favarote Decl. ¶16.) Class Counsel represents that they have thoroughly reviewed all of the produced data, records, testimony of Class Members, and information provided by Defendant and the Class and thoroughly investigated Plaintiff's class and representative claims against Defendant. (Favarote Decl. ¶¶16-18, Becerra Decl. ¶¶5, 11.)

## III. THE SETTLEMENT

The following is a summary of the material elements of the Settlement.

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### A. Principal Terms

Fan Tuan will pay $725,000.00 (the "Gross Settlement Amount") to settle the Action on a class-wide basis for the approximately 1,346 participating Class Members. (Favarote Decl. ¶¶10, 23, Exhibit 1, Settlement, § 1.16.) The number of Class Member deliveries settled totals 847,855. The Class was conditionally certified as:

> **All individuals who used Defendant's online platform to perform delivery services as a courier or a contractor in California at any time from July 1, 2019 through December 31, 2021. (the "Class")**

(Settlement, § 1.6; Favarote Decl. ¶10.)

From the Gross Settlement Amount will be paid (i) a payment of $25,000.00 for PAGA penalties with 75% ($18,750.00) going to the LWDA for its share of the civil penalties; (ii) all Individual Net Settlement Payments to be paid to all Class Members except those who elected not to participate in the Settlement (no claim form is required for Class Members to receive their Individual Net Settlement Payment); (iii) Class Representative Payment to Plaintiff in the amount of $10,000.00 (as approved by the Court) to compensate her for her services to the Class in pursuing the Action and the risk she assumed on behalf of the absent Class Members; (iv) Class Counsel Attorneys' Fees of $253,750.00 (35% of the Gross Settlement Amount as approved by the Court[4]) to compensate them for their services to the Class in prosecuting the Action and securing the Settlement, and Class Counsels' litigation expenses up to $12,000.00 (as approved by the Court); (v) a payment to the Settlement Administrator for its reasonable fees and expenses incurred in administering the Settlement, which are $19,800.00; (vi) any other fees or expenses (other than attorneys' fees and expenses) incurred in implementing the terms and conditions of Settlement and securing the judgment from the Court pursuant to the Settlement. None of the Gross Settlement Amount will revert to Fan Tuan. (Favarote Decl. ¶¶10-11, Exhibit 1, Settlement, §§ 1.16, 4.7.) The Individual Net Settlement Payments will be distributed to all Class Members who did not opt

[4] Defendant paid out an additional $111,899.40 in "Pick-Up Stix" settlement monies to individual Drivers after this case was filed by Zhang. The "true" Settlement amount and benefit conferred upon the driver class is actually $836,899.40. 33.3%, the benchmark for attorneys' fees in wage/hour class actions, on the true settlement value is $278,938.57, which is less than the requested 35% ($253,750.00) in this case. (Favarote Decl. ¶¶36, 39.)

out of the Settlement. (Favarote Decl. ¶12.)

Before individual payroll taxes, and before PAGA penalties, the average Individual Net Settlement Payment to Class Members is expected to be approximately $299.37,[5] plus the average PAGA group member payment of approximately $4.63, for a total of approximately $304.00 per Class Member on average.[6] (Favarote Decl. ¶23; Islas Decl. ¶14.)

Once the judgment becomes final, Class Members who do not opt out of the Settlement will release their respective claims against Fan Tuan and its related entities, under California law that were raised or that could have been raised in the Action based on the facts alleged in the Action during the Class Period but will have released fewer claims than those who signed a general release in the "Pick Up Stix" settlement. (Favarote Decl. ¶27, Exhibit 1, Settlement, § 1.34.)

## IV. <u>THE SETTLEMENT ADMINISTRATION</u>

The parties selected, and the Court approved, ILYM Group, Inc. ("ILYM" or "Settlement Administrator") as the settlement administrator. Lluvia Islas with ILYM was the designated Claims Administrator for the administration of this class action/PAGA settlement. (Islas Decl. ¶1.)

On May 5, 2022, ILYM received the Court approved text for the Notice of Class Action Settlement ("Class Notice") from Counsel for Plaintiff. (Islas Decl. ¶4). A draft of the Class Notice, in English and Chinese, was prepared by ILYM and approved by the parties. (Islas Decl. ¶3, Attached as Exhibit A to the Islas Declaration is a copy of the final Class Notice.)

On May 23, 2022, counsel for Fan Tuan provided ILYM with a mailing list containing Class Members' names, last known addresses, social security numbers, delivery ID, and total number of applicable covered deliveries ("Class Members' Data"). (Islas Decl. ¶5.) The Class Members' Data contained data for 1,351 Class Members.

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[5] There are approximately 1,351 individuals who made approximately 1.3 Million Covered Deliveries during the Class Period. Defendant entered into individual settlement agreements (i.e. *Pick-up Stix* settlements) with 458 Class Members who made and settled approximately 485,000 Covered Deliveries during the Class Period, however this did not settle deliveries performed by these individuals after their individual settlement agreements were signed. (Favarote Decl. ¶ 38.)

[6] 25% of $25,000.00 PAGA Allocation = $6,250.00; $6,250.00 ÷ 1,351 PAGA group members = $4.63.

On June 15, 2022, Class Notices were mailed to the 1,351 Class Members contained in the Class Member Data via First Class mail. (Islas Decl. ¶7.) The Class Notice advised Class Members that they could opt-out of the class action by July 29, 2022, or submit an objection postmarked by July 29, 2022. (Islas Decl. ¶7, Exhibit A.) 134 Class Notice Packets were returned as undeliverable as of August 30, 2022. ILYM performed computerized skip traces for the 134 Class Members returned Notice Packets that did not have a forwarding address, in an effort to obtain an updated address for purposes of re-mailing the Notice Packet. (Islas Decl. ¶8.) Of the 134 skip traces performed, 67 updated addresses were obtained, and the Notice Packet was promptly re-mailed to those Settlement Class Members, via U.S. First Class Mail. (Islas Decl. ¶9.) Of the 134 address traces performed, 67 Notice Packets have been deemed undeliverable as no updated address was found notwithstanding the skip tracing. (Islas Dec. ¶10.)

ILYM received 5 requests for exclusion and has not received any objections to the Settlement. (Islas Decl. ¶¶11-12.)

## V. FINAL APPROVAL OF THE CLASS SETTLEMENT IS WARRANTED.

The process for approving a settlement is set forth in Rule 3.769, California Rules of Court. The decision of whether a settlement is fair, reasonable, and adequate is made at the final approval stage, after notice of the settlement has been given to the class members and they have had an opportunity to voice their views of the settlement or to exclude themselves from the settlement. See Cal. R. Ct. 3.769(g).

At the final fairness hearing, "[t]he trial court has broad discretion to determine whether the settlement is fair." *Rebney v. Wells Fargo Bank* (1990) 220 Cal. App. 3d 1117, 1138. It should consider relevant factors, such as the strength of plaintiff's case, the risk, expense, complexity and likely duration of further litigation, the risk of maintaining class action status through trial, the amount offered in settlement, the extent of discovery completed and the stage of the proceedings, the experience and views of counsel, the presence of a governmental participant, and the reaction of the class members to the proposed settlement. *7-Eleven Owners for Fair Franchising v. Southland Corp*, (2001) 85 Cal. App. 4th 1135, 1146.

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In granting the preliminary approval motion, the Court reviewed the nature of the case, the history of the litigation, and the legal requirements for approval of a class settlement. The proposed settlement clearly satisfies the standard for final approval as it is well within the range of possible approval and there are no grounds to doubt its fairness as evidenced by the fact that there were only 5 requests for exclusions out of 1,351 Class Members and no one in the Class objected to the Settlement. (Islas Decl. ¶¶11-12.)

### A. The Settlement Resulted From Arm's Length Negotiations

There is an initial presumption that a proposed settlement is fair and reasonable when it is the result of arm's length negotiations. *See Williams v. Vukovich*, 720 F.2d 909, 922-23 (6th Cir.1983) ("The court should defer to the judgment of experienced counsel who has competently evaluated the strength of his proofs"); *In re Excess Value Ins. Coverage Litig.*, No. M-21-84 (RMB) 2004 U.S. Dist. LEXIS 14822, at *34 (S.D.N.Y. July 30, 2004) ("Where 'the Court finds that the settlement is the product of arm's length negotiations conducted by experienced counsel knowledgeable in complex class litigation, the settlement will enjoy a presumption of fairness'"); *In re Inter-Op Hip Prosthesis Liab. Litig.*, 204 F.R.D. 330, 351 (N.D. Ohio 2001) (granting preliminary settlement approval) ("when a settlement is the result of extensive negotiations by experienced counsel, the Court should presume it is fair"); *see also* 2 Herbert Newberg & Alba Conte, Newberg on Class Actions, § 11.41 at 90 (4th Ed. 2002).

Here, the Settlement was reached following arms' length negotiations following extensive discovery. Class Counsel's investigation as to the class claims included the exchange of substantial information and data pursuant to formal and informal discovery methods, including multiple days of deposition of plaintiff Zhang, deposition of Defendant's person most knowledgeable ("PMK") over two days, 25 special interrogatories, 58 requests for production of documents, and 18 requests for admissions. Defendant provided a random sampling of delivery records and pay data for Class Members, totaling nearly 11,000 pages of documents and representing approximately 20% of the class and consisting of millions of data points. (Favarote Decl. ¶¶9, 16, Becerra Decl. ¶5.) The records were furnished in electronic format, so they could be examined to determine Defendant's level of compliance with the provisions of the California Labor Code that are subject to the claims in the action. Defendant also provided, confidential financial records to support that the Settlement is fair, reasonable, and in the best interests of the Class Members. (Favarote Decl. ¶18, Becerra Decl. ¶10.) In addition, Class Counsel spent more than 100 hours interviewing Class Members as part of their investigation. (Favarote Decl. ¶16.)

On September 22, 2021, Plaintiff filed a motion for class certification and noticed the motion for a hearing on November 9, 2021, which was later continued to December 17, 2021, by the Court. (Favarote Decl. ¶20.) Plaintiff's motion for class certification was supported by a compendium of evidence of nearly 300 pages of, *inter alia*, cited deposition testimony, declarations, and Defendant's policy documents in addition to a Class Action Trial Plan. (Id.) On October 26, 2021, Defendant filed its opposition to Plaintiff's motion for class certification, which was also supported by a compendium of evidence of nearly 300 pages of evidence, declarations, and cited deposition testimony. (Id.)

On December 10, 2021, the parties reached a settlement and executed a Memorandum of Agreement. As a result of the Settlement, Plaintiff vacated the motion for class certification without prejudice. (Favarote Decl. ¶20.)

**B. The Settlement Has No Obvious Deficiencies**

It is well settled that the Court may appropriately infer that a class action settlement is fair and reasonable when, among other reasons, few class members object to it. *7-Eleven Owners for Fair Franchising, supra* (2000) 85 Cal.App.4th at 1153 (noting the "overwhelming positive" class member response to the settlement and the small number of objectors (9 out of 5,454 class members)). Here, there have been only 5 requests for exclusions and no objections to the Settlement. (Islas Decl. ¶¶11-12.) Each participating Class Member will receive an average estimated Settlement Share of $304.00 before employment taxes. (Favarote Decl. ¶¶4, 23.) This is a favorable result. (Id.)

**C. The Settlement Falls Well Within the Range of Possible Approval.**

The Settlement represents a fair and reasonable resolution given the substantial risks of expense and delay of continued litigation versus the certain and immediate recovery for the Class Members. Indeed, if the matter were to proceed to trial, there are numerous uncertainties associated with trial and the apparent strength of the case is no guarantee that the Class would receive a favorable verdict as to liability or damages.

Fan Tuan maintains that resolution of each claim would require highly individualized analysis of the facts and circumstances of each Class Member's individual agreement, what each Class Member was told regarding their job duties, and the application of Proposition 22 to each Class Member's independent contractor classification and status. (See the Declaration of Torey Favarote in Support of the Motion for Preliminary Approval ¶¶18-19.) Fan Tuan argued, in opposition to Plaintiff's Motion for Class Certification, that "individual issues predominate the Proposition 22 inquiries" and that Plaintiff has "no evidence to support any common theory of proof to show couriers are not independent contractors under Proposition 22." (Id. at 18.) Accordingly, while Plaintiff believes this is a strong case for certification and on the merits, there is always risk and significant expenses associated with class certification proceedings and appeals, especially where, as here, the law in question, Proposition 22, was just recently enacted and has not been fully litigated through the California appellate courts and Supreme Court. (Id. at 19, 31-33.) Decertification motions and reversals following trial are also a legitimate risk in light of the U.S. Supreme Court decision in *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349-50 (2011).

These uncertainties, along with the financial viability of a new start-up company such as Defendant, bore heavily on the negotiations leading to the Settlement. In the face of these legal and financial uncertainties, the parties agreed to a compromise Settlement of $725,000.00. A settlement is not judged *solely* against what might have been recovered had a plaintiff prevailed at trial, nor does a settlement have to provide 100% of the damages sought to be fair and reasonable. *See Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 246, 250 (2001) ("Compromise is inherent and necessary in the settlement process ... [E]ven if the relief afforded by the proposed settlement is substantially narrower than it would be if the suits were to be successfully litigated, this is no bar to a class settlement because the public interest may indeed be served by a voluntary settlement in which each side gives ground in the interest of avoiding litigation.") (internal quotation marks and citation omitted); *Officers for Justice*, 688 F.2d 615 (9th Cir. 1982) at 628 ("It is well-settled law that a cash settlement amounting to only a fraction of the potential recovery will not . . . render the settlement inadequate or unfair.”).

**D. The Amount Allocated to the Class is Fair and Favorable**

The Class consists of 1,346 individuals who worked for Fan Tuan. (Favarote Decl. ¶¶4, 23.) Each participating Class Member will receive an average settlement of $304.00 before employment taxes. (Id.) These numbers compare favorably with other settlements. See, e.g., Rhom v. Thumbtack, Inc., 2017 WL 4642409 (N.D. Cal. Oct. 17, 2017) (granting final approval of claims-made settlement where 66,676 class members shared in $225,000.00 settlement, amounting to $3.30 gross per class member); Aceves v. AutoZone, Inc., No. 5:14-CV-02032 [ECF 58] (C.D. Cal. Nov. 18, 2016) (granting final approval where 206,650 class members shared in $5,700,000.00 settlement - $27.58 gross and approximately $20.00 net per class member); Feist v. Petco Animal Supplies, Inc., No. 3:16-cv-01369-H-DHB [ECF 48] (S.D. Cal. 2018) (granting final approval; 37,279 class members shared in $1,200,000 settlement- $32.00 gross and approximately $20.00 net per class member).

## VI. CLASS COUNSEL'S EFFORTS.

Class Counsel has collectively spent 1,045.1 hours in the Action and have incurred $599,973 in legal fees and $13,848.63 in costs. (Favarote Decl. ¶¶31-32, Becerra Decl. ¶14.) Prior to agreeing to settle the case, Class Counsel conducted significant investigation as detailed in the concurrently filed declarations of Torey Joseph Favarote and Joseph R. Becerra.

Class Counsel's investigation as to the class claims included the exchange of substantial information and data pursuant to formal and informal discovery methods, including preparing plaintiff Zhang for his deposition, multiple days of deposition of plaintiff Zhang, deposition of Defendant's person most knowledgeable (“PMK”) over two days, responding to 16 special interrogatories, and 77 requests for production of documents, drafting supplemental responses, corresponding with Plaintiff Zhang on each of those responses, drafting special interrogatories, requests for production of documents, and requests for admissions, reviewing approximately 11,000 pages of documents, consisting of millions of data points, and Defendant's confidential financial records. (Favarote Decl. ¶¶9, 16-20, Becerra ¶5.)

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In addition, Class Counsel spent more than 100 hours interviewing Class Members as part of their investigation. Class Counsel also conducted significant litigation in the action before coming to the present Settlement. In addition to the discovery exchanged, Class Counsel engaged in substantial meet and confer efforts and IDCs with this Court. (Favarote Decl. ¶¶9, 16-20, Becerra ¶5.)

On September 22, 2021, Plaintiff filed a motion for class certification. Plaintiff's motion for class certification was supported by a compendium of evidence of nearly 300 pages of, *inter alia*, cited deposition testimony, declarations, and Defendant's policy documents in addition to a Class Action Trial Plan. (Favarote Decl. ¶20, Becerra Decl. ¶10.)

### A. The Requested Enhancement Awards to the Named Plaintiff Is Fair and Reasonable.

Incentive awards to the class representatives are not only authorized, but entirely appropriate. *Staton v. Boeing Co.*, 327 F.3d 938, 977 (9th Cir. 2003). "Because a named plaintiff is an essential ingredient of any class action, an incentive award is appropriate if it is necessary to induce an individual to participate in the suit." *Cook v. Niedert*, 142 F. 3d 1004, 1016 (7th Cir. 1998); see also *Rodriguez v. West Publ. Corp.*, 2007 WL 2827379 (C.D. Cal. Sept. 10, 2007), aff'd in part, rev'd in part sub nom. *Rodriguez v. West Publ. Corp*. 563 F.3d 948 (9th Cir. 2009) [incentive awards should compensate for risks taken, such as "retaliation . . . , discrimination, trouble finding employment, and significant financial risk."].)

The *Rodriguez* court noted that "[i]ncentive *awards* are fairly typical in class action cases. *See* 4 William B. Rubenstein et al., Newberg on Class Actions § 11:38 (4th ed. 2008); Theodore Eisenberg & Geoffrey P. Miller, *Incentive Awards to Class Action Plaintiffs: An Empirical Study*, 53 U.C.L.A. L.Rev. 1303 (2006) . . . .". *Rodriguez, supra,* at 958 (italics in original).

In evaluating the enhancement award to a class representative, a court should consider all relevant factors including: (1) the risk to the class representative in commencing suit, both financial and otherwise; (2) the notoriety and personal difficulties encountered by the class representative; (3) the amount of time and effort spent by the class representative; (4) the duration of the litigation and; (5) the personal benefit (or lack thereof) enjoyed by the class representative as a result of the litigation. *Van Vranken v. Atl. Richfield Co.*, 901 F. Supp. 294, 299 (N.D. Cal. 1995); *see also Staton v. Boeing Co.*, *supra* at 977 (court should consider all "relevant factors including the actions the plaintiff has taken to protect the interests of the class, the degree to which the class has benefitted from those actions, . . . the amount of time and effort the plaintiff expended in pursuing the litigation[,] . . . and reasonable fears of workplace retaliation." (internal marks and citation omitted).) Here, the relevant factors warrant final approval of the proposed enhancement award of $10,000.00 to Ms. Dong. A $10,000.00 enhancement for Ms. Dong is warranted because her efforts to step in to be the Class Representative has provided a substantial benefit to over 1,300 individuals, most of whom she never knew or met. (Dong Decl. ¶¶10-11, Favarote ¶¶28-29.)

**1. The Class Has Benefited Significantly from Plaintiff's Efforts**

Plaintiff Dong's efforts have resulted in hundreds of thousands of dollars of compensation for participating Class Members. Plaintiff Dong selflessly stepped forward to keep this case going after the last representative plaintiff abandoned the class. (Dong Decl. ¶¶8-9.) Plaintiff Dong took time away from work and her family to speak to Class Counsel and educate herself on the case, the claims, and the details of the proposed settlement agreement. (Dong Decl. ¶9.) Plaintiff Dong spoke to Class Counsel and attended in-person meetings to discuss the details of the settlement agreement before singing it. (Dong Decl. ¶¶5, 9; Becerra Decl. ¶3.) Plaintiff Dong regularly communicates with Class Counsel about the case status and next steps. (Dong Decl. ¶9.)

**2. Plaintiff Took a Substantial Burden and Risk for the Class**

Plaintiff Dong took significant risks and burdens by stepping forward to keep this case going on a class basis. First, she exposed herself to the potential for significant financial loss as she arguably could have been found liable to pay Defendant's costs if the case was unsuccessful. Accordingly, she shouldered the risk of owing thousands of dollars in costs if they did not prevail. (Dong Decl. ¶10.)

Second, Plaintiff Dong subjected herself now—and in the future—to being stigmatized for bringing a class action against her former employer. (Dong Decl. ¶10.) Records of filings and settlements of class actions are public and are readily accessible on-line and through pay services (*e.g.*, Lexis, etc.). Additionally, the fact that Plaintiff Dong does not speak English fluently created the trepidation and concern regarding the extensive terms of the settlement. Notwithstanding all of that, Plaintiff Dong stepped in to save the class without regard to herself.

#### 3. The Requested Amount of the Enhancement Awards Are Reasonable

For the reasons above, the proposed payment of $10,000.00 (to Plaintiff Dong) -is fair and reasonable. (Dong Decl., ¶11, Favarote Decl. ¶¶28-29.) *See In re TFT-LCD (Flat Panel) Antitrust Litig.,* Case No. 3:07-md-1827 SI, 2011 WL 7575003, at *2 (N.D. Cal. Dec. 27, 2011) (approving $15,000.00 incentive awards for 11 class representatives "in recognition of their work performed for the benefit of the Class and risks undertaken"); *Singer v. Becton Dickinson and Co.,* 08-cv-821 IEG (BLM), 2010 WL 2196104, at *9 (S.D. Cal. June 1, 2010) (finding class representative award of $25,000.00 reasonable).

### B. The Requested Attorney's Fees and Costs and Fair and Reasonable

This successful outcome for the Class was the product of significant work by Class Counsel, Torey Joseph Favarote, Gleason & Favarote LLP ("Mr. Favarote"), and Joseph R. Becerra, Becerra Law Firm ("Mr. Becerra").[7] Here, the Settlement Agreement states that Class Counsel will make a motion for attorneys' fees and costs at the same time as the Motion for Final Approval of the Settlement, in the amount of 35% of the total settlement or $253,750 plus costs for the case in the amount of no more than $12,000.[8]

#### 1. Summary of Class Counsel's Efforts

Because this lawsuit is a common fund case, Class Counsel seeks an award of fees reflecting the same, and commensurate with their demonstrated efficiency and ability in obtaining a

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[7] For ease of review, the summary of these efforts will be discussed together with an analysis of the factors governing attorney fee awards. As a secondary "backup" to the percentage of the common fund requested, Class Counsel will also discuss their Lodestar calculation in connection with the efforts they have extended in this matter. The Lodestar discussion is merely presented as a "double check" on the reasonableness of the "percentage of the common fund" request which forms the basis of this fee application.

[8] Defendant paid out an additional $111,899.40 in "Pick-Up Stix" settlement monies to individual drivers after this case was filed by Zhang. The "true" settlement amount and benefit conferred upon the driver class is actually $836,899.40. 33.3%, the benchmark for attorneys' fees in wage/hour class actions, on the true settlement value is $278,938.57, which is less than the requested 35% ($253,750.00) in this case. (Favarote Decl. ¶¶32, 33.)

substantial award for the Class. As such, the use of the percentage of recovery methodology should be applied. This number reflects positively upon the efforts expended by Class Counsel on behalf of the absent Class Members.

The fruits of this lawsuit will provide a tremendous benefit to the Class Members. Before individual payroll taxes, and before PAGA penalties, the average Individual Net Settlement Payment to Class Members is expected to be approximately $299.37,[9] plus the average PAGA group member payment of approximately $4.63, for a total of approximately $304.00 per Class Member.[10] (Favarote Decl. ¶¶4, 12, 23.)

Mr. Favarote has practiced law in California for over twenty (20) years and has significant experience with wage-and-hour class litigation and has been appointed Class Counsel in several other matters. The declaration of Torey Joseph Favarote, filed herewith, demonstrates the depth and range of his experience. (Favarote Decl., ¶32, See also Declaration of Torey Joseph Favarote in Support of the Motion for Preliminary Approval Decl. ¶¶48-51.)

Mr. Becerra also has significant experience with employment law including more than 20 years of wage-and-hour class action litigation. He has previously been appointed Class Counsel in dozens of wage-and-hour class actions. The declaration of Mr. Becerra, filed herewith, demonstrates the depth and range of experience. (Becerra Decl., ¶12.)

Class Counsel spent considerable time on this litigation which included preparing plaintiff Zhang for his deposition, multiple days of deposition of plaintiff Zhang, deposition of Defendant's person most knowledgeable ("PMK") over two days, responding to special interrogatories, and requests for production of documents, interviewing dozens of class members, and preparing and filing a motion for class certification. (Favarote Decl., ¶¶9, 16, 20, 26, Becerra Decl. ¶¶5, 9.)

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[9] There are 1,346 Class Members who made approximately 1.3 Million Covered Deliveries during the Class Period. Defendant entered into individual settlement agreements (i.e. *Pick-up Stix* settlements) with 458 Class Members who made and settled approximately 485,000 Covered Deliveries during the Class Period, however this did not settle deliveries performed after the individual settlement agreements were signed. (Favarote Decl. ¶ 38.) $404,250.00 ÷ 1,351 = $299.22.

[10] 25% of $25,000.00 PAGA Allocation = $6,250.00; $6,250.00 ÷ 1,351 PAGA group members = $4.62.

### 2. The Attorney's Fees Request is Fair and Appropriate Under the Common Fund Method

Class Counsel seeks an award of 35% of the total settlement or $253,750.00, plus costs for the case up to $12,000. This amount is fair and reasonable under either the "Common Fund" or "Lodestar" methods.

Class Counsel seeks to recover attorneys' fees based upon a percentage of the common fund created by their efforts. While the contemporaneously filed declarations of Class Counsel sets forth the "Lodestar" amounts as a "double check" of the percentage fee, Class Counsels' primary basis for the fee award sought is based upon a percentage of recovery, in light of the efficiency they exhibited in resolving this case for the benefit of the Class. As stated in *Newberg on Class Actions, Fourth Edition*, vol. 4, p. 556, §14.6:

> Unlike the lodestar method which can encourage class counsel to devote unnecessary hours to generate a substantial fee, under the POR [percentage of recovery] method, the more the attorney succeeds in recovering money for the client, and the fewer legal hours expended to reach that result, the higher dollar amount of fees the lawyer earns. Thus, one of the primary advantages of the POR method is that it is thought to equate the interests of class counsel with those of the class members and encourage class counsel to prosecute the case in an efficient manner.

In short, Class Counsel should be rewarded for creating substantial recoveries for the Class in the most efficient method possible.

California encourages attorneys to take the enormous risks of time and money necessary to vindicate the public interest, and to protect the public policies underlying our employment laws. To fulfill this policy, California law provides that attorney fee awards should be equivalent to fees paid in the legal marketplace to compensate for the result achieved and risk incurred. *See Lealao v. Beneficial Cal., Inc.*, 82 Cal.App.4th 19 (2000). Accordingly, Class Counsels' request is based on marketplace standards.

In *Lealao*, the First District held that when an action leads to a recovery that can be "monetized" with a reasonable degree of certainty, the trial court should "ensure that the fee awarded is within the range of fees freely negotiated in the legal marketplace in comparable litigation." *Id.* at 50. Even in cases where class members present claims against a potential maximum settlement fund (*as opposed to the guaranteed payment here*), and the settlement agreement provides that the defendant agrees to pay the attorneys a percentage of the same, use of that percentage method is appropriate. *Id.* at 32.

In clear common fund cases, like the one before this Court, use of the percentage of recovery as a basis for determination of attorneys' fees is the appropriate method. As noted by the court in *Dunk v. Ford Motor Company*, 48 Cal.App.4th 1794, 1809 (1996), "In *Serrano v. Priest,* 20 Cal.3d 25 (1977) [citation omitted], the California Supreme Court acknowledged the use of a percentage method in common fund cases." Here, a common fund has been created, and it contemplates payment of attorneys' fees directly from that fund on a percentage basis.

The governing principles, as well as a survey of attorney fee jurisprudence (both in California and throughout the country), are set out in *Lealao*. As the Court in *Lealao* explained, in determining an attorney fee request, courts should strive to award fees equivalent to those "freely negotiated in the legal marketplace in comparable litigation." *Lealao*, *supra*, at 50. "If courts were to ask what fee structure an informed, sophisticated client would use to compensate his attorney when close monitoring is not feasible, they would at least have focused on the correct question." *Id.* at 48. As *Lealao* recognizes, fee awards that are too small will "chill the private enforcement essential to the vindication of many legal rights and obstruct the representative actions that often relieve the courts of the need to separately adjudicate numerous claims." *Id.* at 53. Finally, an attorney's fee motion should not turn into "a second major litigation." *Id.* at 31 (citing *Hensley v. Eckerhart,* (1983) 461 U.S. 424, 437). Where the amount of the available settlement is a "certain easily calculable sum of money," California courts may calculate attorney fees as a reasonable percentage of the settlement created. Weil and Brown, California Practice Guide, *Civil Procedure Before Trial*, Chapter 14, section 14:145; *Dunk, supra,* at 1808.

The Common Fund Doctrine is predicated on the principle of preventing unjust enrichment. It provides that when a litigant's efforts create or preserve a fund from which others derive benefits, the litigant may require the passive beneficiaries to compensate those who created the fund. Both state and federal courts in California have embraced this doctrine. *Serrano v. Priest* (Serrano III), *supra* at 35; *Crampton v. Takegoshi,* (1993) 17 Cal.App.4th 308, 317; *Vincent v. Hughes Air West, Inc. supra*, 769.

In the present case, it is clear that the payments to the Class Members constitute a common fund. Under the foregoing doctrine, courts have historically and consistently recognized that class litigation is increasingly necessary to protect the rights of individuals whose injuries and/or damages might not be resolved absent group representation.

Accordingly, in the determination of a reasonable common fund fee award, courts award fees to serve as economic incentive for lawyers to bring class action litigation in order to achieve increased access to the judicial system for meritorious claims and to enhance deterrents to wrongdoing. *See* A. Conte, *Attorney Fee Awards*, 2nd Ed. 1993, 104, p.6.

The goal in a case such as this is to set a fee that approximates the probable terms of a contingent fee contract negotiated by a sophisticated attorney and client in comparable litigation. *Lealao, supra,* at 48. *In re Warner Communications Sec. Lit.* (S.D.N.Y. 1985) 618 F.Supp. 735, Newberg on Class Actions, and other authorities in various judicial circuits all support the conclusion that fees between 25% and 40% of a common fund have normally been awarded over the past several years. Class Counsel's requested fee comes to 35%, a percentage well within the range of reasonableness.

*Newberg on Class Actions Fourth Edition*, vol. 4, p. 560, §14.6 contains an interesting analysis and discussion of the concept of a marketplace analysis and why it is so valuable in determining a percentage award:

> [Goodrich and Silver[11]] ... suggest that fee awards should be consistent with contingent fee arrangements negotiated in non-class litigation:
>
> 1. . . . As Judge Posner emphasized in *In re Continental Illinois Securities Litigations*, "[t]he object in awarding a reasonable attorney's fee...is to simulate the market...**The class counsel are entitled to the fee they would have received had they handled a similar suit on a contingent fee basis, with a similar outcome, for a paying client." In non-class litigations, one-third contingency fees are typical. In their concurring opinion in *Blum*, Justices Brennan and Marshall observed that "[i]n tort suits, an attorney might receive one-third of whatever the plaintiff recovers. In**

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[11] Goodrich, Frank and Silver, Reagan, *Common Fund and Common Fund Problems: Fee Objections and Class Counsel's Response*, 17 Rev. Litig. 525 (Summer 1995).

**those cases, therefore, the fee is directly proportional to the recovery.**"

Here, the excellent result justifies the awarding of a fee that is consistent with the standard market fee. Class Counsels' experience, reputation, and ability to obtain a substantial result for the Class as expeditiously as possible should be rewarded.

### 3. The Fees Appropriately Cross-Check with the Lodestar Method

It is sometimes helpful for courts to "cross-check" a percentage award by employing a Lodestar coupled with a multiplier analysis. While the Lodestar method is generally considered inappropriate in a common fund case where real cash benefits are made available to class members, such as in this case, its use can provide further validation of the appropriateness of the percentage award. See, *In re Prudential Ins. Co. of America Sales Practice Litigation* (D.N.J. 2000) 106 F. Supp.2d 721.

The fee total for Gleason & Favarote LLP ("G&F") for prosecuting the Action is $352,548. The hours G&F expended litigating the Action total 715.20. (Favarote Decl. ¶31.) The costs incurred by G&F prosecuting the Action total $11,137.63. (Id., Exhibit 2). The fee total for Becerra Law Firm ("BLF") in prosecuting the Action are $247,425 for the 329.9 hours that BLF billed to the Action. (Becerra Decl., ¶14.) BLF also had $2,711 in costs in the Action. (Becerra Decl., ¶14; Exhibit 1.) As such, the total fees billed by Class Counsel collectively for the Action equals $599,973 plus $13,848.63 in costs.

There is a two-step Lodestar/multiplier method adopted in *Serrano III, supra*, 20 Cal. 3d at 48, and reaffirmed in *Ketchum v. Moses*, 24 Cal. 4th 1122, 1134 (2001). Trial courts first calculate the "Lodestar," consisting of "all the hours reasonably spent, excluding those relating solely to the fee," times reasonable hourly rates. *Ketchum, supra*, at 1133. The Lodestar may then be enhanced or multiplied to take into account factors other than hours and rates that go into the determination of a reasonable attorneys' fee, as "the unadorned lodestar reflects the general local hourly rate for a fee-bearing case; it does not include any compensation for contingent risk, extraordinary skill, or any other factors a trial court may consider ...." *Id.* at 1138.

Here, Class Counsel base their Lodestar on attorney hourly rates typically charged by attorneys with similar years of experience in similar litigation. Mr. Favarote, and Mr. Becerra, are experienced class action litigators with over 40 years of combined practice of law. Mr. Favarote's and Mr. Becerra's rates are $750.00 per hour. (Favarote Decl., ¶32; Becerra Decl., ¶13.) Class Counsel was recently approved at this rate by this Court in the *Arthur Barnes et. al. v. Target Corp.*, Lead Case No. CIVDS2007761 (consolidated with Case Nos. CIVDS2012750 and CIVDS2004578) and *Stokes et. al. v. Exact Staff, Inc.*, Case No. CIVDS1924628.

Class Counsel's attorney's fees requested ($253,750) is less than half the total fees billed by Class Counsel collectively which total $599,973.

## VII. CONCLUSION

Based upon the foregoing, the parties respectfully request that the Court enter an order granting final approval of the Settlement and approve the Class Representative Enhancement in the amount of $10,000 and Class Counsel's request for attorney's fees of $253,750 (35% of the Settlement) and costs up to $12,000.

Dated: September 9, 2022

BECERRA LAW FIRM
JOSEPH R. BECERRA

By: ______________________
Joseph R. Becerra

Attorneys for Plaintiff Jun Dong, on behalf of herself and all others similarly situated

Dated: September 9, 2022

GLEASON & FAVAROTE, LLP
TOREY JOSEPH FAVAROTE

By: ______________________
Fol:
Torey Joseph Favarote

Attorneys for Plaintiff Jun Dong, on behalf of herself and all others similarly situated

# PROOF OF SERVICE

I, Thomas Steinhart, declare:

I am and was at the time of the service mentioned in this declaration, employed in the County of Los Angeles, California. I am over the age of 18 years and not a party to the within action. My business address is Gleason & Favarote, LLP, 4014 Long Beach Blvd., Suite 300, Long Beach, CA 90807.

On September 9, 2022, I served a copy(ies) of the following document(s):

**MEMORANDUM IN SUPPORT OF MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND AWARD FOR ATTORNEYS' FEES, COSTS, AND CLASS REPRESENTATIVE ENHANCEMENT**

on the parties to this action as follows:

| Attorney | Party(ies) Served | Method of Service |
|---|---|---|
| Eric M. Steinert<br>Claire Y. Chang<br>SEYFARTH SHAW LLP<br>560 Mission Street, 31st Floor<br>San Francisco, California 94105<br>Telephone: (415) 397-2823<br>Facsimile: (415) 397-8549<br>esteinert@seyfarth.com<br>cchang@seyfarth.com | Attorneys for Defendant CA FAN TUAN INC. | By email per agreement in lieu of personal service |
| Leo Q. Li<br>SEYFARTH SHAW LLP<br>2029 Century Park East, Suite 3500<br>Los Angeles, California 90067-3021<br>Telephone: (310) 277-7200<br>Facsimile: (310) 201-5219<br>lli@seyfarth.com | Attorneys for Defendant CA FAN TUAN INC. | By email per agreement in lieu of personal service |
| Natalie Palugyai<br>Acting Secretary<br>California Labor & Workforce Development Agency<br>800 Capital Mall, MIC-55<br>Sacramento, CA 95814 | California Labor & Workforce Development Agency | By Electronic Submission |

☒ [BY ELECTRONIC TRANSMISSION] I caused said document to be sent by electronic transmission to the e-mail address indicated for the party(ies) listed above.

☒ [BY ELECTRONIC SUBMISSION] I hereby certify that the above-referenced document(s) were electronically submitted to the California Labor & Workforce Development Agency through the LWDA Online Filing Site located at: https://www.dir.ca.gov/Private-Attorneys-General-Act/Private-Attorneys-General-Act.html

I declare under penalty of perjury under the laws of the State of California that the above is true and correct, and that this declaration was executed on September 9, 2022, at Long Beach, California.

Thomas Steinhart