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**SUPERIOR COURT OF CALIFORNIA**  
**IN AND FOR THE COUNTY OF SAN BERNARDINO**

ESTEBAN MARTINEZ, on behalf of all others  
similarly aggrieved,

Plaintiff,  
vs.

‘T’ MCGEE ELECTRIC, INC., a California  
corporation; TRENT MCGEE, an Individual;  
and DOES 1-20, Inclusive,

Defendants.

CASE NO. CIVSB2114427

Assigned for All Purposes to:  
Hon. Jessica Morgan  
Dept. S-26

MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
MOTION FOR PRELIMINARY  
APPROVAL OF CLASS ACTION  
SETTLEMENT AND REQUEST FOR  
ATTORNEY’S FEES AND COSTS

[Filed concurrently with Notice of Motion  
and Motion, Declarations of J. Kirk  
Donnelly, Zachary M. Crosner, and Jeremy  
Romero; [Proposed] Order]

Date: December 20, 2023  
Time: 8:30 a.m.  
Dept.: S-26

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1     **I.     INTRODUCTION**

2             Plaintiff Esteban Martinez seeks final approval of a non-reversionary class action  
3     settlement resolving wage and hour claims on behalf of 416 individuals who worked for  
4     Defendant ‘T’ McGee Electric, Inc. (“McGee Electric” or “Defendant”), as non-exempt  
5     employees in California during the Class Period of May 17, 2017 to July 22, 2023. The proposed  
6     \$950,000 total settlement provides about \$539,970 in cash payments to the Class, with an average  
7     award of about \$1,300, plus additional amounts payable under PAGA. The remaining balance  
8     will cover a modest service award to Plaintiff, settlement administration costs, civil penalties to  
9     the state, and reasonable attorney’s fees and costs. The parties and their counsel finalized the  
10    settlement after extensive and difficult arms-length negotiations overseen by an experienced and  
11    highly-regarded mediator. The Court conditionally certified the Class and preliminarily approved  
12    the settlement on August 23, 2023. Since then, the Court-approved notice form was mailed to the  
13    Class Members, and they reacted very favorably to the settlement. There are no objections, and  
14    only one class member requested exclusion, for a 99.76% participation rate.

15            Class Counsel secured an excellent settlement with Defendant after well over two  
16    and half years of investigation, litigation, and settlement negotiation and  
17    administration, all without any compensation for services rendered or costs expended.  
18    The class notice duly informed the class members that Class Counsel would request  
19    attorney’s fees not to exceed 1/3 of the Gross Settlement Amount, or \$316,666.67, along  
20    with reimbursement of no more than \$25,000 for actual costs incurred litigating this  
21    matter. As of the filing of this motion, *not one Class Member objected* to the proposed  
22    fee award. Consistent with the Settlement and notice, Plaintiff now respectfully requests  
23    the Court award Class Counsel's fees in the amount of \$316,666.67 and costs in the  
24    amount of \$22,112.68, as described in the Declarations of J. Kirk Donnelly (“Donnelly  
25    Decl.”) and Zachary M. Crosner (“Crosner Decl.”) filed herewith. The requested  
26    attorney’s fees are well within the range of reasonableness, especially considering the  
27    complex and risky nature of this litigation, the contingent risk assumed, the nearly three  
28    year delay in payment and, when subjected to a lodestar crosscheck, result in a modest

1 and reasonable lodestar enhancement of 1.16.

2 Accordingly, on behalf of himself and the Settlement Class, Plaintiff respectfully  
3 requests the Court grant this motion, give full and final approval to the settlement, grant  
4 Class Counsel's request for attorney's fees and costs, and enter judgment

5 **II. FACTUAL BACKGROUND AND PROCEDURAL POSTURE**

6 The details of the procedural and factual background of this matter were outlined in  
7 the Plaintiffs' Motion for Preliminary Approval of Class Action Settlement (filed on or about  
8 August 8, 2023). To refresh the Court's recollection, on May 17, 2021, Plaintiff filed a PAGA-  
9 only complaint against Defendant for several alleged violations of the Labor Code and IWC  
10 Wage Orders. Plaintiff filed his complaint on behalf of individuals who worked for Defendant as  
11 non-exempt employees in California during the relevant time frame. Defendant is an electrical  
12 contractor operating throughout Southern California and based out of Pomona. Plaintiff Martinez  
13 worked for McGee Electric as a non-exempt yard and warehouse employee for several months in  
14 2019-20. After confirming there was no potentially applicable arbitration agreement, and after a  
15 contested motion, the Court granted leave for Plaintiff to file a first amended complaint adding  
16 class allegations based on the same alleged wage and hour violations. Plaintiff filed his FAC on  
17 January 31, 2022, on behalf of a putative class of all of Defendant's California non-exempt  
18 employees from May 21, 2017 to present. [Donnelly Decl., ¶ 2.]

19 Plaintiff alleges a number of wage and hour violations by Defendant. First, he alleges  
20 McGee Electric failed to pay all wages due, and more specifically that: (a) McGee Electric fails to  
21 include non-discretionary bonus pay in its calculations of the "regular rate of pay" for purposes of  
22 calculating overtime pay, (b) fails to compensate certain employees who are paid on piece rate for  
23 all of their rest and recovery periods, and fails to compensate them for all of their "non-  
24 productive" time. [Donnelly Decl., ¶ 3.]

25 Plaintiff next alleges Defendant failed to maintain a compliant written meal and rest break  
26 policy, and further failed to provide all required meal and rest breaks on a fully compliant basis.  
27 In particular, Plaintiff claims Defendant frequently provided untimely meal periods based on a  
28 review of the company's own time records, and further that Defendant never provided second

1 meal periods on shifts of 10+ hours. For the alleged rest break violations, Plaintiff primarily  
2 claims McGee Electric did not provide required third rest breaks on 10+ hour shifts. Likewise,  
3 Plaintiff contends TWC never paid an extra hour of premium pay in lieu of a missed or non-  
4 compliant break. [Donnelly Decl., ¶ 4.]

5 Based on these allegations, Plaintiff's FAC asserted class claims for failure to pay all  
6 wages due, failure to provide meal and rest breaks, failure to provide accurate wage statements,  
7 failure to pay wages due on separation of employment, and violation of the Unfair Competition  
8 Law, Bus. & Prof. Code sections 17200, *et seq.* Plaintiff also alleged violations of the Private  
9 Attorney's General Act premised on the same Labor Code violations. [Donnelly Decl., ¶ 5.]

10 McGee Electric has at all times denied Plaintiff's allegations and maintained its meal  
11 break and payroll policies and procedures comply with California law, that it provided its  
12 employees with required meal and rest breaks, that it properly tracked employee time and paid  
13 Plaintiff and all other employees all wages due. Additionally, Defendant strongly contends the  
14 case cannot be maintained as any kind of class or representative action, arguing that to the extent  
15 class members missed meal breaks, that such breaks were non-compliant, or that any unpaid non-  
16 productive work occurred, it was intermittent and infrequent and evidence of such violations  
17 would be purely anecdotal, and therefore individualized issues predominate and trial would be  
18 unmanageable. [Donnelly Decl., ¶ 6.]

19 After Plaintiff filed his complaint, the Parties engaged in formal discovery, both  
20 propounding and responding to written discovery, and Plaintiff filed multiple discovery motions.  
21 Defendant filed an unsuccessful motion to transfer venue and a motion to dismiss the PAGA  
22 claims following the U.S. Supreme Court's Viking River Cruises decision, which motion the  
23 Court also denied. After further meet and confer discussions regarding ongoing discovery and  
24 discovery disputes, potential law and motion, and other case management issues, the Parties  
25 ultimately agreed to attempt mediation. Thereafter, the Parties engaged in additional informal  
26 discovery to facilitate an exchange of information necessary to engage in a meaningful mediation.  
27 The Parties then mediated in May 2023 with the Hon. Carl J. West (Ret.) a highly respected  
28 mediator with extensive wage and hour class action experience, and reached the settlement now

1 before the Court. Donnelly Decl., ¶¶ 7-8.] This Court preliminarily approved the settlement on  
2 August 23, 2023.

3 Class Notices were mailed to class members on September 28, 2023, with a 45-day  
4 window (to November 13, 2023) for class members to opt out or object to the proposed  
5 settlement. [Declaration of Jeremy Romero (“Romero Decl.”), ¶ 7.]

### 6 **III. THE PROPOSED SETTLEMENT TERMS**

7 Under the settlement, McGee Electric will pay \$950,000.00 into a common fund, the  
8 Gross Settlement Amount (“GSA”). Reasonable attorney’s fees of up to one-third of the GSA, or  
9 \$316,666.67, actual litigation costs of up to \$25,000 (only \$22,112.68 is requested), a modest  
10 enhancement award of up to \$10,000 for plaintiff, settlement administration costs of no more than  
11 \$12,500 (only \$11,250 is requested), and \$50,000 for alleged civil penalties under PAGA,<sup>1</sup> all  
12 will be paid from the GSA. The remainder of approximately \$539,970 will be allocated among  
13 the Participating Class Members based on their total weeks worked during the Class Period. No  
14 portion of the GSA will revert to Defendant. [Donnelly Decl., ¶ 9.]

#### 15 **A. Certification of the Settlement Class**

16 The Court conditionally certified a settlement class including all non-exempt employees  
17 who worked for Defendant in California during the Class Period of May 17, 2017 to July 22,  
18 2023. The Settlement Administrator ultimately mailed class notices to 416 individuals  
19 identified as members of the Class. [Romero Decl., ¶ 8.] Nothing has changed to require  
20 reconsideration of the Court’s certification of the Settlement Class.

#### 21 **B. The Benefit Conferred on the Settlement Class**

22 As noted, the settlement obligates McGee Electric to pay \$950,000 to resolve the  
23 Settlement Class’s claims, inclusive of attorney’s fees and costs. At least \$539,970 from the GSA  
24 will be distributed to the Participating Class Members. This is a cash settlement that does not  
25 require Participating Class Members to submit a claim form to receive their settlement share.  
26 Participating Class Members will receive their settlement checks automatically via First Class

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27 <sup>1</sup> Consistent with PAGA, \$37,500 of that amount will go the LWDA for the State’s share of the civil penalties, and  
28 the remaining \$12,500 will be distributed pro rata to the Aggrieved Employees (defined as all individuals employed  
as non-exempt employees during the PAGA period of March 17, 2020 to July 22, 2023).

1 U.S. Mail. Twenty percent of each settlement share will be allocated to wages and the remaining  
2 eighty percent will be allocated to penalties and interest. McGee will pay any and all applicable  
3 employer-side payroll taxes separately and in addition to the GSA. Subject to the Court's  
4 approval, any amounts not claimed (because a class member does not cash his or her settlement  
5 check) will be forwarded to the California State Controller's Unclaimed Property Fund.

6 [Donnelly Decl., ¶ 10.]

7 Each Participating Class Member will receive a share of the Net Settlement Amount based  
8 on his or her total weeks worked for McGee Electric during the Class Period while employed as a  
9 non-exempt employee. Thus, each Class Member's Individual Settlement Payment will be  
10 calculated using criteria typically used in determining appropriate amounts of alleged unpaid  
11 wages, unpaid premium wages for missed meal breaks, and potential statutory penalties under  
12 applicable law. These methods are intended to ensure each Class Member receives a portion of  
13 the available settlement funds corresponding to the relative value of his or her potential claims.  
14 The proposed allocation provides a reasonable way to compensate Class Members based on the  
15 amount of time they worked for Defendant, and the number of instances they missed a break,  
16 were not provided compensation in lieu of such missed breaks, or lost wages due to Defendant's  
17 alleged improper payroll practices. [Donnelly Decl., ¶ 11.]

18 The average class award will be approximately \$1,301.13, and class awards will range  
19 from \$14.42 to \$6,634.08. The average PAGA award will be about \$45.29, and PAGA awards  
20 will range from \$0.62 to \$144.68. [Romero Decl., ¶ 13.]

21 **C. Settlement Administration**

22 CPT Group, Inc., as the Court-approved Settlement Administrator, mailed the Notice  
23 Packet to the Class members after making all reasonable effort to ascertain the best mailing  
24 address, including running each address through the National Change of Address database  
25 and "skip-tracing" any Notice Packets returned as undeliverable. [Romero Decl., ¶¶ 3-9.]  
26 The Class Notice, previously approved by the Court, duly informed Class Members of the  
27 settlement terms, including the estimated relief each Class Member will receive, the amounts  
28 to be requested for attorney's fees and the class representative enhancement awards, and the

1 right to opt out of or object to the settlement. [Romero Decl., Exh. A.] CPT mailed 416  
2 Notice Packets on September 28, 2023. [Romero Decl., ¶ 7.] Ultimately, zero Notice  
3 Packets were deemed undeliverable, representing a 100% success rate. [Romero Decl., ¶ 9.]  
4 The 45-day response window for opting out of or objecting to the settlement expired on  
5 November 13, 2023. [Romero Decl., ¶ 7.] As of the filing of this motion, CPT has received  
6 one request for exclusion (for a 99.76% participation rate), and zero objections to the  
7 settlement. No disputes have been submitted regarding the information used to calculate  
8 class member settlement shares. [Romero Decl., ¶ 13.]

9 **D. Release of Claims**

10 All Participating Class Members will be deemed to release Defendant from all class  
11 claims alleged in the operative complaint, or that could have been brought based on the  
12 allegations in the operative complaint, May 21, 2017 through July 22, 2023, and the Aggrieved  
13 Employees will release all claims under PAGA for the PAGA Period of March 17, 2020 to July  
14 22, 2023. The release is limited to the claims that were actually pleaded or could have been  
15 pleaded based on the alleged facts in the operative complaint. [Donnelly Decl., ¶ 12.]

16 **E. PAGA Claims and Notice to the LWDA**

17 The Parties allocated \$50,000 to payment of civil penalties under PAGA for such claims  
18 against McGee Electric, as addressed in more detail below, and Plaintiff requests the Court  
19 approve said amount. Consistent with PAGA, \$37,500 from this amount will be paid to the  
20 LWDA as the state's share of the civil penalties, and the remaining \$12,500 will be  
21 distributed to the 276 individuals eligible to receive a PAGA payment. [Romero Decl., ¶ 11.]  
22 As required by Labor Code section 2699(l)(2), Plaintiff gave notice of the settlement and final  
23 approval hearing to the LWDA via its online portal. [Donnelly Decl., ¶ 13; Exh. 1.]

24 **IV. ARGUMENT**

25 The law favors settlement, particularly in class actions where substantial resources  
26 can be conserved by avoiding the time, cost, and rigors of formal litigation. H. Newberg &  
27 A. Conte, 4 Newberg on Class Actions (4th ed. 2002), § 11.41; Class Plaintiffs v. City of  
28 Seattle (9th Cir. 1992) 955 F.2d 1268, 1276, cert. denied, 506 U.S. 953; Van Bronkhorst v.

1 Safeco Corp. (9th Cir. 1976) 529 F.2d 943,950; Potter v. Pacific Coast Lumber Co. (1951) 37  
2 Cal.2d 592, 602. Nevertheless, to make certain the rights of absent parties are not unjustly  
3 compromised, the settlement of a class action requires court approval. Cal. Rule of Court  
4 3.769; Dunk v. Ford Motor Co. (1996) 48 Cal.App.4th 1794, 1801; Wershba v. Apple  
5 Computer (2001) 91 Cal.App.4th 224, 245. The purpose of that judicial review is to protect  
6 against fraud or collusion, and to ensure fairness to absent class members. Dunk, 48  
7 Cal.App.4th at 1800-01; Newberg, at §§ 11.22, *et seq.* Review is accomplished through a  
8 two-step process intended to determine whether, under the totality of circumstances, the  
9 settlement is fair, reasonable and adequate. Dunk, 48 Cal.App.4th at 1801; Wershba, 91  
10 Cal.App.4th at 245.

11 On a motion for final approval, the trial court is charged with determining whether, in  
12 light of the total circumstances of the action and the response of the class members to the  
13 proposed settlement, the settlement is fair, reasonable, and adequate. Dunk, 48 Cal.App.4th at  
14 1801-02; Wershba, 91 Cal.App.4th at 244-45. The court has broad discretion in making that  
15 determination and may consider a number of relevant factors, including: the strength of  
16 plaintiff's case; the likelihood of potential recovery; the risk, expense and likely duration of  
17 further litigation; the amount offered in settlement; the extent of discovery and stage of the  
18 proceedings; the experience and opinion of counsel; and the reaction of class members to the  
19 settlement. Id. In light of the strong judicial policy favoring the settlement of class actions,  
20 courts generally apply a presumption of fairness to a proposed class action settlement when:  
21 (1) the settlement is reached through arm's-length bargaining; (2) investigation and  
22 discovery are sufficient to allow counsel and the court to act intelligently; (3) counsel is  
23 experienced in similar litigation; and (4) the percentage of objectors is small. Dunk, 48  
24 Cal.App.4th at 1802; Wershba, 91 Cal.App.4th at 245.

25 **A. The Proposed Settlement Merits Final Approval**

26 The proposed settlement of this action warrants final approval under the standards  
27 summarized above. The settlement is fair, reasonable and adequate, and represents a  
28 favorable resolution of highly disputed claims. Further, the settlement was overwhelmingly

1 approved by the class members, as there were no objections and only one opt out.

2 **1. The Settlement Is the Product of Arm's-Length, Informed**  
3 **Negotiations**

4 The settlement is not the result of fraud or collusion. Rather, the proposed settlement  
5 was reached following arm's-length negotiations presided over by the Hon. Carl J West ( Ret.), a highly respected and well-known mediator with extensive experience mediating wage  
6 and hour class actions. [Donnelly Decl., ¶ 8.] Moreover, Plaintiff and his counsel were well-  
7 informed about the facts and the law, and counsel J. Kirk Donnelly and Zachary M. Crosner  
8 have years of litigation experience, including litigating wage and hour class actions. Plaintiff's  
9 counsel are well-qualified to evaluate the risks and benefits of pursuing further litigation or  
10 settling the matter. [Donnelly Decl., ¶¶ 29-31; Declaration of Zachary M. Crosner ("Crosner  
11 Decl."), ¶¶ 15-20.] Defendant likewise was represented by highly-qualified and experienced  
12 defense counsel. Both sides advocated vigorously for their clients, and nothing was "left on  
13 the table."

14 **2. The Class Reacted Favorably to the Settlement**

15 The settlement was well-received by the class. As of the filing of this motion, no  
16 objections have been filed, and only one Class Member requested exclusion. [Romero Decl.,  
17 ¶ 10.] As many courts recognize, class member reaction to the settlement is one of the most  
18 important factors to consider in determining if final approval should be granted. Mandujano v.  
19 Basic Vegetable Prods., Inc., 541 F.2d 832, 837 (9th Cir. 1976); see also In re: American Bank  
20 Note Holographics, 127 F.Supp.2d 418, 425 (S.D.N.Y. 2001) ("It is well-settled that the reaction  
21 of the class to the settlement is perhaps the most significant factor to be weighed in considering  
22 its adequacy") (internal quotation marks omitted).

23 **3. The Settlement Is Fair and Reasonable Considering the Benefits**  
24 **Conferred, the Case Value, and Significant Litigation Risks**

25 The proposed settlement involves a substantial sum of money that, when distributed,  
26 will confer meaningful monetary benefits on the Class members. As described above, each  
27 individual award will be based on an allocation consistent with the nature of the claims  
28 asserted and will fairly and equitably allocate the available funds in relation to the degree of

1 damage each Class member incurred. While Class members who worked for only a short  
2 period of time will receive relatively small sums, those with longer tenures and who worked  
3 more hours and shifts throughout the class period will receive appropriately larger awards.

4 Prior to mediation, the parties engaged in extensive formal and informal discovery to  
5 facilitate settlement discussions. As a result, Plaintiff reviewed documents and information  
6 regarding McGee Electric's payroll practices, pay stubs and time records for a sampling of class  
7 members, meal and rest break policies, etc., and information from Defendant regarding class size  
8 and breakdown of job positions, work weeks, rates of pay, and other information used to  
9 formulate a damages model. Plaintiff also obtained information from putative class members via  
10 surveys and interviews. This extensive information then was analyzed by a consulting expert to  
11 look for meal and rest break violation rates, whether McGee Electric properly tracked and paid  
12 for rest and recovery breaks, and other issues relevant to liability and damages. Plaintiff's counsel  
13 are confident they obtained sufficient information to enable them to understand the law and facts  
14 of this case and make an informed decision regarding the proposed settlement and whether it is in  
15 the best interests of the class. [Donnelly Decl., ¶¶ 7, 14; Crosner Decl., ¶¶ 4-7.]

16 Using that data, Plaintiff ran various calculations and estimated McGee Electric's likely  
17 maximum exposure on the class claims at approximately \$8,367,000, including \$260,000 on the  
18 unpaid/underpaid rest and rec pay claims, \$1,648,000 on the unpaid/underpaid non-productive  
19 time claim, \$20,000 on the regular rate claim, \$3,320,000 on the meal break claims, \$605,000 on  
20 the rest break claims, \$845,000 on the wage statement claims, and \$1,669,000 on the waiting time  
21 penalty claims. [Donnelly Decl., ¶ 15.] Plaintiff and his counsel substantially discounted the  
22 value of these claims, however, in light of the multiple and considerable risks posed by  
23 proceeding with the litigation.

24 The unpaid wage claims focus primarily on McGee Electric's alleged failure to pay piece  
25 rate employees correctly, and in particular to separately account and pay for rest break time and  
26 non-productive time. Under well-settled law, all such time must be paid for separately from the  
27 piece rate compensation. Labor Code 226.2; Cardenas v. McLane Foodservices, Inc. (C.D. Cal.  
28 2011) 796 F.Supp.2d 1246, 1252 (confirming a piece-rate pay formula that does not "compensate

1 for all time worked does not comply with the California Labor Code, even if, averaged out, it  
2 would pay at least minimum wage for all hours worked.”); Gonzalez v. Downtown LA Motors,  
3 LP (2013) 215 Cal.App.4th 36, 49 (same); Armenta v. Osmose, Inc. (2005) 135 Cal.App.4th 314,  
4 320 (same). Here it does not appear McGee fully complied with these requirements. First as to  
5 “rest and rec pay” (i.e. pay for rest breaks), the pay records suggest McGee Electric pays for  
6 break time for some employees but not others and, as to those employees who did receive  
7 separate pay for their break time, McGee Electric pays for such time based on a schedule that  
8 understated the number of “rest and rec” hours and thus shorted employees on the rest and rec  
9 pay. Further, since McGee Electric’s rest break policy arguably did not provide for third breaks,  
10 employees likewise were not paid applicable rest and rec pay on shifts lasting longer than 10  
11 hours (which is about 15% of all shifts). Finally, McGee Electric did not apply the correct  
12 formula for determining the “regular rate” of pay for rest and rec pay and as result underpaid any  
13 rest and rec pay that it did actually issue. Defendant likewise did not account for non-  
14 discretionary pay, primarily bonuses, when calculating the employees’ “regular rate of pay” for  
15 purposes of determining the correct overtime rate. Alvarado v. Dart Container Corp. of  
16 California (2018) 4 Cal.5th 542, 552–54. As a result, McGee Electric underpaid class members  
17 for their overtime. [Donnelly Decl., ¶ 16.]

18 In response, McGee Electric argued its payroll policies are fully compliant, that it  
19 properly tracked and paid for all hours worked, including non-productive hours. Defendant also  
20 argued that, if any class members failed to record and report non-productive time it was in  
21 violation of company policy and would have occurred on a haphazard and individual basis.  
22 Accordingly Defendant argued the issue would not be certifiable since it would require  
23 individualized inquiries whether compensable non-productive time occurred and why it was or  
24 was not documented and paid for. [Donnelly Decl., ¶ 17.]

25 On the meal and rest break claims, Plaintiff contends McGee Electric’s written policies  
26 are not fully compliant, as they arguably do not (a) account for second meal periods and third rest  
27 breaks on shifts longer than 10 hours, or address potential waiver of second meal periods, and (b)  
28 do not properly advise employees as to the timing of meal periods (i.e., before the start of the fifth

1 hour of work). Plaintiff's review of the time and payroll records provided suggested these  
2 deficiencies in the written policies affected employee breaks, as the violation rate for late meal  
3 periods is about 79%, and the violation rate for second meal periods is over 99%. [Donnelly  
4 Decl., ¶ 18.]

5 In response, McGee Electric argued its written policies are fully compliant, that it  
6 provided employees with all required breaks, and that many class members waived their second  
7 meal periods. Defendant further maintained that, in light of its compliant policies, whether a  
8 class member missed a meal period, received a late meal period, or missed a rest break would  
9 have been aberrational and against company policy. Thus, per McGee Electric, these issues are  
10 not amenable to class or representative treatment since their resolution would require  
11 individualized inquiries as to why a break was missed or non-compliant. [Donnelly Decl., ¶ 19.]

12 The claims under Labor Code sections 203 and 226 are derivative of the primary unpaid  
13 wage claims, and accordingly are subject to the same risks and uncertainties plus additional risks  
14 posed by the need to take into account the discretionary nature of such awards and the "good  
15 faith" and other defenses available to Defendant. Amaral v. Cintas Corp. No. 2 (2008) 163  
16 Cal.App.4th 1157, 1203-4 (employer did not willfully fail to pay wages under Labor Code § 203  
17 even though class prevailed on underlying claim for failure to pay living wages). Thus, while  
18 these claims largely are derivative of the unpaid wage claim, they also are subject to additional  
19 defenses. [Donnelly Decl., ¶ 20.]

20 As far as potential PAGA liability, the allegedly aggrieved employees theoretically are  
21 entitled to penalties totaling about \$4 million in civil penalties should Plaintiff prevail on all  
22 claims and establish violations of the multiple Labor Code sections at issue. [Donnelly Decl.,  
23 ¶ 21.] As with the class claims, Plaintiff discounted the potential PAGA penalties based on  
24 Defendant's various defenses on the merits and also accounted for the Court's wide discretion to  
25 reduce such penalties, or to decline to award penalties at all. Labor Code § 2699(e)(2); Carrington  
26 v. Starbucks Corp. (2018) 30 Cal.App.5th 504 (trial court awarded penalties of \$5 per pay period  
27 after a bench trial, which decision was upheld on appeal); In re Taco Bell Wage and Hour  
28 Actions (E.D. Cal. Apr. 8, 2016) 2016 U.S. Dist. LEXIS 48557 (PAGA penalties denied after

1 trial). Accordingly, the Parties allocated \$50,000 to PAGA penalties, and Plaintiff submits this  
2 amount is reasonable under the circumstances and in line with comparable settlements in other  
3 wage and hour class actions in California. *E.g.*, Van Kempen v. Matheson Tri-Gas, Inc. (N.D.  
4 Cal. Aug. 25, 2017) 2017 U.S. Dist. LEXIS 137182 (granting final approval of \$5,000 PAGA  
5 penalty from \$370,000 settlement, or 1.4 percent of total settlement); Slavkov v. First Water  
6 Heater Partners I (N.D. Cal. July 25, 2017) 2017 U.S. Dist. LEXIS 116303 (finding a \$7,500  
7 PAGA payment reasonable when measured against the overall settlement of \$345,000 and the  
8 possible weaknesses in Plaintiffs' case, or 2.2 percent of total settlement). Additionally, the  
9 LWDA has been informed of the terms of the PAGA portion of the settlement, and will be able to  
10 weigh in as necessary. Jennings v. Open Door Mktg. Inc. (N.D. Cal. Oct. 3, 2018) 2018 U.S. Dist.  
11 LEXIS 171356, at \*27 (approving settlement with PAGA penalties of 0.6% where "[p]laintiffs  
12 [have] submitted the settlement agreement to the LWDA, and the LWDA has not objected to the  
13 settlement.

14         The settlement obviates the significant risk that this Court may find any kind of class or  
15 representative resolution unachievable or deny certification of all or some of Plaintiff's claims.  
16 Furthermore, even if Plaintiff obtained certification of all or some of the claims, continued  
17 litigation would be lengthy and expensive as the parties pursued merits discovery, a probable  
18 motion to decertify, as well as trial and possible appeals, and would further and substantially  
19 delay any recovery by the class with no assurance of recovering significantly more than the  
20 proposed settlement. While Plaintiff is confident in the merits of these claims, legitimate  
21 controversies exist regarding each one of them. Plaintiff also recognizes proving the amount of  
22 wages and penalties due each Class Member would be an expensive, time-consuming, and  
23 uncertain proposition. [Donnelly Decl., ¶ 22; Crosner Decl., ¶¶ 4-10.]

24         As noted, Defendant raised various defenses to each of Plaintiff's claims, any one of  
25 which, if successful, could have decimated Plaintiff's case. Overall, Plaintiff faced risky issues  
26 going forward with this litigation, and given the need to secure class certification, try the case,  
27 and deal with post-trial appeals, it would have taken years to realize any recovery in this action.  
28 Plaintiff's counsel discounted the value of the class claims consistent with the risks discussed

1 above, and carefully weighed the likelihood of the class receiving substantially greater benefit if  
2 the litigation continued. Plaintiff and counsel concluded – in light of these very real and  
3 substantial risks – settlement on the proposed terms and without prolonged and costly litigation  
4 was in the best interests of the class. The overall \$950,000 recovery represents a significant  
5 percentage of Defendant’s potential exposure. Given these risks, a total recovery for the class of  
6 \$950,000, which will result in average award of over \$\_\_\_ per class member, is a significant  
7 result well within the range of reasonableness considering all potential outcomes, and it will  
8 provide direct monetary awards to all Class Members in short order. [Donnelly Decl., ¶ 23;  
9 Crosner Decl., ¶¶ 10-11.]

10       Importantly, the mere fact that a settlement does not provide the same recovery as might  
11 be achieved at trial is not a proper indicator of whether the settlement is fair, reasonable, and  
12 adequate. Wershba, 91 Cal.App.4th at 246, 250 (“Compromise is inherent and necessary in the  
13 settlement process...even if the relief afforded by the proposed settlement is substantially  
14 narrower than it would be if the suits were to be successfully litigated, this is no bar to a class  
15 settlement because the public interest may indeed be served by a voluntary settlement in which  
16 each side gives ground in the interest of avoiding litigation”); Lane v. Facebook, Inc. (9th Cir.  
17 2012) 696 F.3d 811, 819 (“[T]he question whether a settlement is fundamentally fair . . . is  
18 different from the question whether the settlement is perfect in the estimation of the reviewing  
19 court”); 7-Eleven Owners for Fair Franchising v. Southland Corp. (2000) 85 Cal.App.4th 1135,  
20 1150 (“The fact that a proposed settlement may amount to only a fraction of the potential  
21 recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and  
22 should be disapproved”); White v. Experian Information Solutions, Inc. (C.D. Cal. 2011) 803  
23 F.Supp.2d 1086, 1098 (rejecting contention settlement was not fair and reasonable even though it  
24 represented 99% discount off the maximum value of the claims). Importantly as well, the  
25 proposed settlement is non-reversionary and will provide timely benefits to the Class Members  
26 without a claims process. White, 803 F.Supp.2d at 1098; c.f., Federal Judicial Center, Managing  
27 Class Action Litigation: A Pocket Guide for Judges (3d ed. 2010) at 20, available at [http://](http://www.fjc.gov/sites/default/files/2012/ClassGd3.pdf)  
28 [www.fjc.gov/sites/default/files/2012/ClassGd3.pdf](http://www.fjc.gov/sites/default/files/2012/ClassGd3.pdf) (reversionary provisions and/or cumbersome

claims process may indicate lack of fairness). Plaintiff and his counsel submit the settlement is within the “range of reasonableness,” and is fair and adequate for the Class.

**V. PLAINTIFF’S ENHANCEMENT AWARD**

Under to the terms of the settlement, Plaintiff seeks a modest incentive award of \$10,000 for his service in bringing these claims on behalf of the Class. The request is reasonable given the risks he undertook on behalf of the Class Members. By contacting and retaining counsel to pursue these claims, Plaintiff helped make this settlement possible for the absent Class Members, while shouldering the risk of being liable for Defendant’s litigation costs. Plaintiff also exposed himself to unwanted notoriety related to filing a public lawsuit (discoverable even through a simple google search) for the benefit of other employees, placing himself at risk of discrimination by future prospective employers. As set forth in more detail in his declaration submitted with the preliminary approval motion, among taking many other actions assisting in the successful litigation of this case, Plaintiff provided substantial factual information and documents to counsel, responded to written discovery, attended numerous meetings/phone conferences with counsel to discuss the case, and kept abreast of all significant developments. [Declaration of Esteban Martinez (filed August 8, 2023), ¶¶ 2-9; Donnelly Decl., ¶ 24.] Finally, there are no class member objections submitted with respect to the amounts Plaintiff proposes to receive. [Romero Decl., ¶ 10.] Accordingly, the requested enhancement payment to Plaintiff is appropriate and justified as part of the settlement. Staton v. Boeing (9th Cir. 2003) 327 F.3d 938, 977 (collecting cases awarding class representatives service and incentive payments ranging from \$2,000 to \$25,000).

**VI. SETTLEMENT ADMINISTRATION COSTS**

The settlement provides for a payment to CPT for its services as the Settlement Administrator. As set forth in the Declaration of Jeremy Romero, CPT has performed and will continue to perform its required duties through final distribution of the settlement funds and incurred \$11,250 in fees and expenses. [Romero Decl., ¶ 14.] Accordingly, Plaintiff respectfully requests the Court approve payment of \$11,250.00 to CPT from the GSA. [Donnelly Decl., ¶ 25.]

////

1 **VII. ATTORNEY'S FEES AND COSTS**

2 **A. The Attorney's Fees Requested Are Fair and Reasonable and Should Be**  
3 **Approved**

4 This Court has discretion over the amount of attorneys' fees awarded and court  
5 approval is required for Class Counsel's fees. Cal. Rule of Court 3.769; Levy v. Toyota  
6 Motor Sales, U.S.A. (1992) 4 Cal.App.4th 807, 813; Lealao v. Beneficial Cal., Inc. (2000) 82  
7 Cal.App.4th 19. In defining a reasonable fee, the Court should attempt to mimic the  
8 marketplace for cases involving significant contingent risk, such as this one. Deposit  
9 Guaranty Nat'l Bank, Jackson, Miss. v. Roper (1980) 445 U.S. 326, 338, rehg. den. 446 U.S.  
10 947; Lealao, 82 Cal.App.4th at 49-50 (court should attempt "to award the fee that informed  
11 private bargaining, if it were truly possible, might have reached" in determining a reasonable  
12 fee, and a fee award should approximate a "range of fees freely negotiated in comparable  
13 litigation"). Here, Class Counsel's request for attorney's fees and costs is reasonable and  
14 justified by the work performed, the benefits obtained, and the contingent risk assumed.

15 As addressed in detail above, at the time the parties reached the tentative settlement  
16 after more than two years of adversarial litigation, success for Plaintiff and the putative class  
17 remained far from certain. Plaintiff faced a real risk that some or all the claims would not be  
18 certified for class treatment, as Defendant had strong arguments that its compensation  
19 policies were legal and properly compensated the class members. Even if Plaintiff certified  
20 some or all of the claims and ultimately prevailed on the merits, it undoubtedly would have  
21 taken several additional years to realize any recovery while they pursued class certification,  
22 trial, and an almost certain appeal. [Donnelly Decl., ¶¶ 16-21; Crosner Decl., ¶¶ 8-11.]

23 Nonetheless, Plaintiff succeeded and obtained the relief he set out to obtain, and the  
24 settlement provides substantial cash payments to Class Members, with an average award of  
25 about \$1,300, and with a maximum award of over \$6,500. Importantly as well, the Class  
26 Members have been overwhelmingly supportive of the Settlement – as of the filing of this  
27 motion, there are no objections and only one opt outs to the settlement. [Romero Decl., ¶ 10.]

28 /////

1           **B. The Requested Fee Award Is Reasonable and Appropriate**

2           The United States Supreme Court has ruled the parties to a class action properly may  
3 negotiate not only the settlement of the action itself but also the payment of attorney's fees.  
4 Evans v. Jeff D. (1986) 475 U.S. 717, 734-35, 738, fn. 30.) In Hensley v. Eckerhart (1983)  
5 461 U.S. 424, 437, the Supreme Court explained that negotiated, agreed-upon attorney's fee  
6 provisions are the ideal towards which the parties should strive: "A request for attorney's fees  
7 should not result in a second major litigation. Ideally, of course, litigants will settle the  
8 amount of a fee." The United States Supreme Court has reemphasized this policy and further  
9 stressed trial courts have "a responsibility to encourage agreement" on fees. Blum v. Stenson  
10 (1984) 465 U.S. 886, 902 n.19.

11           As part of the Settlement, Defendants agreed not to object to an award of no more  
12 than 1/3 of the GSA for attorney's fees, or \$316,666.67, and no more than \$25,000 in  
13 reimbursement for litigation costs and expenses. Such a fee is commensurate with what the  
14 market would provide for similar services and the Court therefore can most certainly enforce  
15 the agreement. As California's Court of Appeal has instructed:

16           Given the unique reliance of our legal system on private litigants to enforce substantive  
17 provisions of law through class and derivative actions, attorneys providing the essential  
18 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.

19 Lealao, 82 Cal.App.4th at 47.

20           Here, the parties did not negotiate the inclusion of attorney's fees until after extensive  
21 arms-length bargaining regarding relief to the Class was completed. [Donnelly Decl.,  
22 ¶¶ 26-27.] The requested fee and cost award was a product of these arms-length  
23 negotiations and fairly reflects the marketplace value of the services rendered by Class  
24 Counsel in this case. As a result, the fee agreed to by the parties should be approved.

25           **C. Class Counsel's Fees are Justified When Calculated as a Percentage of the**  
26 **Common Fund**

27           In approving fee applications, courts typically apply either a percentage-of-recovery  
28 method or the lodestar method. Laffitte v. Robert Half Int'l, Inc. (2016) 1 Cal.5th 480, 489;

1 Wershba v. Apple Computer, Inc. (2001) 91 Cal.App.4th 224, 254, disapproved on other  
2 grounds, Hernandez v. Restoration Hardware, Inc. (2018) 4 Cal.5th 260. The California  
3 Supreme Court recently recognized the advantages and equities of calculating attorney's fees  
4 using the percentage-of-the-common-fund method in another wage-and-hour case:

5       The recognized advantages of the percentage method-including relative ease of  
6       calculation, alignment of incentives between counsel and the class, a better  
7       approximation of market conditions in a contingency case, and the encouragement it  
8       provides counsel to seek an early settlement and avoid unnecessarily prolonging the  
9       litigation convince us the percentage method is a valuable tool that should not be  
10       denied our trial courts.

11 Laffitte, 1 Cal.5th at 503 (citations omitted).

12       Indeed, both California and federal courts have long recognized an appropriate  
13       method for determining the award of attorney's fees is based on a percentage of the total  
14       value of benefits afforded to class members by the settlement. Serrano v. Priest (1977) 20  
15       Cal.3d 25, 34; Boeing Co. v. Van Gernert (1980) 444 U.S. 472, 478; Vincent v. Hughes Air  
16       West, Inc. (9th Cir. 1977) 557 F.2d 759, 769. Awarding a fee based on a percentage of the  
17       common fund recovered operates to "spread litigation costs proportionately among all the  
18       beneficiaries so that the active beneficiary does not bear the entire burden alone." Vincent,  
19       557 F.2d at 769.

20       In determining a reasonable common fund fee award, courts should also consider the  
21       fact that fees serve as an economic incentive for lawyers to bring class action litigation to  
22       achieve increased access to the judicial system for meritorious claims and to enhance  
23       deterrents to wrongdoing. Conte, Attorney Fee Awards (2d ed. 1993) § 104. Without  
24       prosecution on a contingent basis and use of the class action mechanism, the courthouse door  
25       would effectively be closed to most class members due to the relatively small size of their  
26       individual claims in relation to the enormous time and cost associated with class action  
27       litigation.

28       Here, Class Counsel seek a fee award for their successful prosecution and resolution  
of this action of no more than 1/3 of the GSA, or \$316,666.67. The percentage requested is  
justified for the reasons set forth further below, and comports with fee awards calculated on a

percentage-of-the-benefit basis. Indeed, review of class action settlements shows that courts have historically awarded fees in the range of 20 to 50 percent, depending upon the circumstances of the case. In re Warner Communications Sec. Litig. (S.D.N.Y. 1985) 618 F.Supp. 735, 749-50 (concluding that percentage fees in common fund cases range from 20 to 50 percent); Newberg, Newberg on Class Actions (3d ed.) § 14.03, pp. 13-14 ("Usually 50% of the fund is the upper limit on a reasonable fee award from a common fund in order to assure that the fees do not consume a disproportionate part of the recovery obtained for the class, although somewhat larger percentages are not unprecedented.").

**D. A Lodestar Cross-Check Also Supports Class Counsel's Fee Request**

To ensure the fairness of an attorney's fee award, courts frequently conduct a lodestar cross check of counsel's fees. "A lodestar cross-check thus provides a mechanism for bringing an objective measure of the work performed into the calculation of a reasonable attorney fee." Laffitte, 1 Cal.5th at 504. Here, Class Counsel spent a combined total of 313.9 hours of time on this matter over the past 2.5+ years, resulting in a modest and very reasonable total lodestar of \$273,760.

As is fully detailed in the Donnelly and Crosner Declarations, Class Counsel's efforts included: (1) extensive pre-lawsuit investigation of the claims of Plaintiff and the putative class, including legal research, research into similar claims and claims against other employers in the same industry, and attempts to locate and contact other employees of the Defendants (2) drafting a PAGA notice letter; (3) successfully opposing a motion to transfer venue; (4) drafting the initial complaints and related documents; (5) drafting and filing a first amended complaint; (6) successfully briefing and arguing a motion for leave to amend; (7) case management, including communications with defense counsel, meeting and conferring/preparing case management statements, etc.; (8) propounding and responding to multiple sets of written discovery, (9) extensive meeting and conferring re discovery responses, including multiple IDCs, (10) successfully briefing and arguing two motions to compel; (11) fully briefing four additional motions to compel that were mooted by the settlement; (12) obtaining a class list, propounding hundreds of written questionnaires to class members, and follow up telephone interviews with

1 class members; (13) successfully opposing Defendant's motion to dismiss the PAGA claims  
2 based on the Viking River Cruises decision; (14) lengthy discussions with defense counsel  
3 regarding settlement/mediation and informal discovery needed for meaningful settlement  
4 discussions; (15) engaging in substantial informal pre-mediation discovery, including  
5 propounding informal discovery "requests" and reviewing documents and other information  
6 produced; (16) working with a consulting expert on the analysis of Defendant's production; (17)  
7 drafting a mediation brief and accompanying damages model after review and analysis of  
8 defendant's formal and informal discovery production; (18) attending an all-day mediation; (19)  
9 negotiating and drafting the settlement agreement and related documents; (20) drafting the motion  
10 for preliminary approval, and attending the hearing; (21) administration of the settlement,  
11 including communications with the Settlement Administrator and settlement class members; (22)  
12 drafting the motion for final approval and attorney's fees, and attending the final approval  
13 hearing; and (23) extensive communications with the Plaintiff regarding case status, case  
14 investigation and document review, mediation, and settlement terms. Additionally, Class Counsel  
15 will incur additional time following final approval to, inter alia, respond to class member  
16 inquiries, work with the Settlement Administrator on the distribution of settlement funds, and on  
17 the compliance hearing and amended judgment. [Donnelly Decl., ¶ 28, Exh. 2; Crosner Decl.,  
18 ¶¶ 12-14, Exh. 1.]

19 In pursuing this matter, Class Counsel incurred total attorney's fees of \$273,760, the  
20 lodestar is based on an eminently reasonable number of hours (313.9 attorney hours) worked to  
21 litigate this matter to a successful conclusion over the course of the past two and half years, and  
22 the requested attorney hourly rates are reasonable and comport with hourly rates charged by other  
23 attorneys with similar experience in this practice area in California. [Donnelly Decl., ¶¶ 29-36,  
24 Exh. 3; Crosner Decl., ¶¶ 12-24.] On a lodestar basis, the fee request of \$316,666.67 results in  
25 a multiplier of 1.16, which is a modest enhancement entirely in line with California law.  
26 [Donnelly Decl., ¶¶ 35-36.] Indeed, California courts routinely approve multipliers in the in  
27 the 2-4 range to compensate for the time and risk of class action cases. Chavez v. Netflix,  
28 Inc. (2008) 162 Cal.App.4th 43, 66 (affirming attorneys' fee award including an upward

multiplier of 2.5); Wershba, 91 Cal.App.4th at 255 ("Multipliers can range from 2 to 4 or even higher."); City of Oakland Oakland Raiders (1988) 203 Cal.App.3d 78, 85 (affirming a multiplier of 2.34).) Class Counsel submits that the requested 1.16 multiplier effectively operates to show that the percentage fee request is reasonable considering the challenges presented in this contingency fee matter, and appropriately compensates Class Counsel for the contingent risk assumed and delay in payment during the nearly three years counsel has been representing Plaintiff. Thus, the multiplier results in a fee constituting a fair return on the contingency.

E. **The Award is Supported By 1) the Results Achieved; 2) the Risk, 3) the Skill Required, 4) the Contingent Nature of the Fee and 5) Awards in Similar Cases**

What has now emerged in most fee award decisions is the recognition that fee determinations in both common fund and statutory fee situations are incapable of mathematical precision because of the intangible factors that must be resolved in the court's discretion based on the circumstances of each particular case. Conte, § 207, p. 44. In determining an appropriate fee in a common fund case, a Court must decide, based on the unique posture of each case, what percentage of the common fund would most reasonably compensate Class Counsel given the nature of the litigation and the performance of counsel. Paul, Johnson, Alston & Hunt v. Graulty (9th Cir. 1989 886 F.2d 268, 272) (the benchmark percentage fee may be adjusted to account for the circumstances involved in a case).

Courts apply a five-part test in calculating a reasonable percentage fee in common fund cases: (1) the results achieved; (2) the risk of litigation; (3) the skill required and the quality of work; (4) the contingent nature of the fee and the financial burden carried by the plaintiffs; and (5) awards made in similar cases. Laffitte, 1 Cal.5th at 489.

**1. The Results Achieved.**

Class Counsel obtained an excellent result in this case for the Class Members. The Settlement provides real monetary benefits to the Class Members, and the Settlement is particularly advantageous to the Class Member because the proceeds will be distributed shortly as opposed to waiting additional years for a similar, or possibly, less favorable result.

1 Considering many individual claims would be very modest and would not be cost-effective  
2 to pursue successfully, the Settlement provided them with fair compensation for their claims.  
3 Moreover, the absence of any objection to either the Settlement or the attorney's fee request  
4 bolsters the excellent results. Indeed, the approval of the Class is overwhelming as indicated  
5 by the fact that not one class member opted out. Additionally, the settlement amounts to a  
6 substantial percentage of the maximum value of the amount the Class might have obtained if  
7 it had tried the case and recovered on all theories seeking recovery of wages and penalties.  
8 "It is well-settled law that a cash settlement amounting to only a fraction of the potential  
9 recovery does not per se render the settlement inadequate or unfair." In re Omnivision  
10 Techs., Inc., 559 (N.D. Cal. 2008) F.Supp.2d 1036, 1042.

### 11 **2. Class Counsel Bore Considerable Risk.**

12 At the time of filing the complaint, Class Counsel recognized that they would have to  
13 expend a substantial amount of time and advance significant costs to prosecute a statewide  
14 class action suit with no guarantee of compensation or reimbursement, in the hope of  
15 prevailing against a sophisticated company represented by first-rate attorneys. Despite  
16 their belief in the validity of Plaintiffs' claims, they also knew they faced substantial risks  
17 of class certification and the ability to prove class-wide and individual damages. In light of  
18 the highly uncertain nature of this suit, Class Counsel also bore the risk that Defendants  
19 would dig in and attempt to bury their small firms in work. Given the small size of Class  
20 Counsels' respective firms, not receiving any compensation for several years while  
21 simultaneously advancing litigation costs posed considerable risk and difficulty. [Donnelly  
22 Decl., ¶¶ 37-38.]

### 23 **3. The Skill Required and the Quality of Work.**

24 Practice in the narrow area of wage and hour litigation requires skill, knowledge and  
25 experience. The issues presented in this case required more than just a general appreciation  
26 of wage and hour law and class action procedure. This Settlement was possible only  
27 because counsel persuaded Defendant that Plaintiff and the putative class had a realistic  
28 chance of prevailing on their claims despite Defendant's contrary arguments, and that

1 the case would be pursued through class certification and trial if necessary. In  
2 successfully navigating these hurdles, Class Counsel displayed appropriate skill while  
3 pursuing a risky and difficult case

#### 4                   **4.       The Contingent Nature of the Fee and Risk Assumed**

5           There is a substantial difference between the risk assumed by attorneys being paid  
6 by the hour and attorneys working on a contingent fee basis. The attorney being paid by  
7 the hour can go to the bank with his fee. Powers v. Eichen (9th Cir. 2000) 229 F.3d  
8 1249, 1256. The attorney working on a contingent basis can only log hours while  
9 working without pay towards a result that will hopefully entitle him to a market fee  
10 considering the risk and other factors of the undertaking. Id. at 1257. Otherwise, the  
11 contingent fee attorney receives nothing. Id. In this case, Class Counsel subjected  
12 themselves to this risk in this all or nothing contingent fee case wherein the necessity  
13 and financial burden of private enforcement makes the requested award appropriate.

14           Counsel retained on a contingency fee basis, whether in private matters or in class  
15 action litigation, is entitled to a premium beyond their standard, hourly, non-contingent  
16 fee schedule to compensate for both the contingent risk assumed and the delay in  
17 payment. The simple fact is that despite the most vigorous and competent of efforts,  
18 success is never guaranteed. McKittrick v. Gardner (4th Cir. 1967) 378 F.2d 872, 875.  
19 Indeed, if counsel is not adequately compensated for the risks inherent in difficult class  
20 actions, competent attorneys will be discouraged from prosecuting similar cases.  
21 Ketchum v. Moses (2001) 24 Cal.4th 1122, 1132-33; Cazares v. Saenz (1989) 208  
22 Cal.App.3d 279, 287.

23           Here, the contingent fee practices of Plaintiff's counsel simply do not accommodate  
24 the investment of unnecessary time in a case, and the adverse resolution of any one of several  
25 difficult issues present in this matter could have doomed the entire effort. As discussed, the  
26 attorney's fees in this case were not only contingent but fairly risky, and there was always a  
27 chance Plaintiff's counsel would receive nothing for any number of reasons. [Donnelly  
28 Decl., ¶¶ 37-38.] Accordingly, the contingent nature of the fee and the financial burdens on

1 Class Counsel and Plaintiffs also support the fee requested.

## 2 **5. Awards in Other Cases**

3 As discussed, the attorney's fees requested by Class Counsel are within the range of  
4 fees awarded in comparable cases, as California courts regularly approve class action fee  
5 awards amounting to 1/3 of a common fund. Additionally, review of class action settlements  
6 over the past 10 years shows that the courts have historically awarded fees in the range of 20  
7 to 50 percent, depending upon the circumstances of the case. In re Warner Communications  
8 Sec. Litig. (S.D.N.Y. 1985) 618 F.Supp. 735, 749-50 (concluding that percentage fees in  
9 common fund cases range from 20 to 50 percent); Newberg, Newberg on Class Actions (3d  
10 ed.) § 14.03, pp. 13-14 ("Usually 50% of the fund is the upper limit on a reasonable fee  
11 award from a common fund in order to assure that the fees do not consume a  
12 disproportionate part of the recovery obtained for the class, although somewhat larger  
13 percentages are not unprecedented."). Class Counsel's requested fees equal to 1/3 of the gross  
14 amount recovered on behalf of the class and are well within the range of reasonableness  
15 under either the percentage of the recovery or the lodestar method in light of the contingent  
16 risk assumed, the delay in payment, the result achieved, and the overall quality of the  
17 representation.

### 18 **F. Class Counsels' Costs and Expenses are Reasonable**

19 Plaintiff's counsel also requests reimbursement of actual out-of-pocket expenses incurred  
20 to prosecute this action. These expenses were incidental and necessary to the effective  
21 representation of the employees, and Plaintiff's counsel is permitted to recover litigation costs  
22 and expenses under the common fund doctrine and the Settlement Agreement. Serrano, 20 Cal.3d  
23 at 35 (common fund doctrine permits recovery of fees and costs from the fund); Rider v. County  
24 of San Diego (1992) 11 Cal.App.4th 1410, 1424 n.6 (costs are recoverable from the common fund  
25 "[o]f necessity, and for precisely the same reasons discussed above with respect to the recovery of  
26 attorneys' fees by ... [Plaintiffs'] attorneys"). Plaintiff's counsel also is entitled to recover "those  
27 out-of-pocket expenses that would normally be charged to a fee-paying client." Harris v.  
28 Marhoefer (9th Cir. 1994) 24 F.3d 16, 19.

1 As explained in the Donnelly and Crosner Declaration, Class Counsel incurred a  
2 total of \$22,112.68 in costs and expenses in connection with this litigation. These  
3 expenses include amounts paid for court filing fees, service of process, expert fees,  
4 postage, Courtcall charges, and mediation fees, all of which are costs normally billed to  
5 and paid by the client. These costs were reasonably incurred in the prosecution of this  
6 matter, and should be reimbursed in full. [Donnelly Decl., ¶¶ 39-40; Crosner Decl. ¶ 25.]

7 **VIII. CONCLUSION**

8 For all the foregoing reasons, Plaintiff Esteban Martinez respectfully requests that the  
9 Court grant this motion and grant final approval of the proposed class action settlement and  
10 approve the payment of PAGA penalties to the State. Plaintiff further requests the Court approve  
11 payment of the Settlement Administrator's fees and expenses, approve the requested class  
12 representative enhancement payment, approve the award of attorney's fees and costs as requested,  
13 and enter judgment in this action. Finally, Plaintiff requests the Court set a final compliance  
14 review for December 16, 2024, or a later date convenient for the Court.

15  
16 Dated: November 21, 2023

LAW OFFICES OF J. KIRK DONNELLY, APC

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19 J. Kirk Donnelly  
20 Attorneys for Plaintiff  
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