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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA-WESTERN DIVISION

STEVEN KANE, on behalf of
himself and other similarly-situated
employees,

Plaintiff,

vs.

SMITHFIELD DIRECT, LLC, a
Delaware Limited Liability
Company; and DOES 1 through 10,
inclusive,

Defendants.

CASE NO. 21-CV-04832 PA (JCx)

CLASS ACTION

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION FOR ORDER GRANTING
AWARD OF ATTORNEYS' FEES,
LITIGATION COSTS, CLASS
REPRESENTATIVE SERVICE
PAYMENT, AND ADMINISTRATION
EXPENSES**

Date: August 1, 2022

Time: 1:30 p.m.

Judge: Percy Anderson

Ctrm.: 9A

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I. INTRODUCTION

Plaintiff Steven Kane, individually and on behalf of the Conditionally Certified Class, moves for an award of attorneys' fees of \$116,666.00 (one-third of the Gross Settlement Amount), reimbursement of litigation expenses of \$16,293.78, Class Representative Service Payment of \$10,000.00, and settlement administration expenses of \$6,500.00 from the \$350,000.00 common fund settlement obtained in the above-captioned Class and PAGA representative action preliminarily approved on December 29, 2021. Dkt 37. Declaration of Diana M. Khoury, ("Khoury Decl."), ¶¶10, 13.

Class Counsel obtained a substantial monetary recovery for the Class by applying skill and considerable wage and hour class action experience to novel and complex issues, while accepting the significant risk of non-payment on a purely contingent basis. The proposed Settlement will pay Class Members based on tenure using the number of weeks worked during the Class Period, paying Class Members on average \$3,757.52 and highest payments of \$6,473.63. Those Class Members who worked during the PAGA Period will also receive a proportional share of the \$3,750 PAGA Payment paying on average \$79.79 and highest PAGA Payment estimated at \$158.57. Declaration of Irvin Garcia, on behalf of CPT Group, Inc., (CPT Decl.), ¶¶16, 17. Through the present time¹, the lack of objections as to any term following notice to the Class, further supports the requested attorneys' fee award. Khoury Decl. ¶¶12, 33, 34.

II. THE PARTIES

A. Defendant, Smithfield Direct, LLC

Smithfield supplies grocery products to stores throughout the United States,

¹ Preliminary approval was granted December 29, 2021. Dkt. 37. On February 16, 2022, the appointed Administrator mailed the Court-approved Notice of Class Action Settlement, and Change of Address Form to the Class. The deadline to opt out, or dispute the basis of their estimated Settlement Payments is April 18, 22, with an extended deadline of May 3, 2022 for those whose Notice Packets were remailed. Through the present, no disputes, opt outs or objections have been returned. CPT Decl. ¶¶9, 11, 12, 13.

1 including California. During the April 12, 2017 and November 30, 2020 Class
2 Period, Smithfield operated out of only two branches in California in Fresno and
3 Ontario, and employed 45 RSRs in California. Smithfield closed both branches in
4 November 2020 and ceased operations in those locations.

5 **B. Plaintiff, Steven Kane**

6 Plaintiff Steven Kane was employed by Smithfield as an RSR at
7 Smithfield's Ontario, California location for nearly five years, from November 30,
8 2015 through November 13, 2020. Plaintiff contends that, throughout the Class
9 Period, his job entailed driving, delivering and stocking products to, and taking
10 back expired products from, large commercial retailers in California such as
11 Dollar General, Big Lots, local food markets, and other chain stores. Khoury Decl.
12 ¶16. Declaration of Steven Kane filed in Support of Class Certification, (Kane
13 Cert. Decl.), Dkt. 27-14.

14 Smithfield paid Plaintiff, and other RSRs, a base hourly rate of \$10.00 to
15 \$10.50 per hour, plus the greater of a \$425.00 commission or actual commissions
16 earned each workweek. Including these commissions, RSRs were paid at least
17 minimum wage for all hours worked. Khoury Decl. ¶17. Plaintiff alleges that
18 during his tenure with Smithfield, there were only three instances where he earned
19 commissions from sales greater than the \$425.00 minimum weekly commission.
20 Dkt. 27-14, ¶¶9, 15. Other Class Members had similar experiences. Dkt. 27-15,
21 ¶¶4, 6 (Victor Davila Decl); Dkt. 27-16, ¶¶4, 7 (David Gillum Decl). Khoury
22 Decl. ¶18.

23 **C. The Class and Aggrieved Employees**

24 The proposed Class is defined as all individuals employed by Smithfield in
25 California as hourly Route Sales Representatives or Relief Route Sales
26 Representatives ("RSRs") during the Class Period, April 12, 2017 through
27 November 30, 2020. Stipulation of Class Action and PAGA Settlement and
28 Release of Claims, Dkt. 34-3, ("SA") ¶7. There are 47 Class Members, including

1 Plaintiff, who worked 5,156 weeks during the Class Period. SA ¶41. A subset of
2 the Class, PAGA Members, were employed sometime during the March 7, 2020
3 through November 30, 2020 PAGA Period. SA ¶¶26, 28. There are 28 PAGA
4 Members with 875 Pay Periods² during the PAGA Period. SA ¶29; Khoury Decl.
5 ¶19.

6 **D. Smithfield’s Contentions and Affirmative Defenses**

7 Smithfield denies Plaintiff’s allegations and continues to deny Plaintiff, or
8 any other Class Member, is entitled to any relief whatsoever. Smithfield denies it
9 violated California law and maintains it fully complied with the law at all times.
10 Smithfield contends Plaintiff and other RSRs were timely provided all
11 compensation as required by law.

12 Smithfield contends Plaintiff and the proposed Class were exempt from
13 California’s overtime laws under state law and the Federal Motor Carrier Safety
14 Act of 1984, 49 U.S.C. §§ 31136, 31141 (FMCSA). Smithfield contends that
15 Industrial Welfare Commission (“IWC”) Wage Orders expressly exempt drivers
16 of trucks that weigh over 26,000 pounds, like Plaintiff and the Class, from
17 California’s overtime requirements. *See, e.g.*, IWC Wage Order No. 9-2001 at sec.
18 3, sub. (L); *see also* D.L.S.E. Opinion Letter 1996.07.10; *Collins v. Overnite*
19 *Transp. Co.*, 105 Cal.App.4th 171, 177-180 (2003) (recognizing that truck drivers
20 are exempt from the overtime rules of Labor Code section 510). Drivers of trucks
21 weighing between 10,000 and 26,001 pounds are similarly exempt from
22 California’s overtime laws if the goods that they are carrying are transported
23 across states—regardless of whether or not the drivers or trucks, themselves, also
24 cross state lines. 29 U.S.C. § 213(b)(1); 49 U.S.C. § 31502; *see Bell v. H.F. Cox,*
25 *Inc.*, 209 Cal.App.4th 62, 79-80 (2012); *Nieto v. Fresno Beverage Co., Inc.*, 33
26 Cal.App.5th 274, (2019). Smithfield contends Plaintiff and the Class are exempt
27

28 ² Class Members were paid weekly during the Class Period, so Pay Periods and Work
Weeks are the same period of time. SA ¶ 29.

1 from California's overtime laws because they all drove trucks weighing over
2 26,001 pounds, and were engaged in interstate commerce as the goods they
3 delivered in California originated from out of state.

4 Smithfield also contends Plaintiff and the Class were exempt from
5 California's meal and rest break laws. The Ninth Circuit has held that federal law
6 preempts California's meal and rest break laws as applied to drivers of property-
7 carrying commercial motor vehicles who are subject to FMCSA safety
8 regulations. *International Brotherhood of Teamsters, Local 2785 v. Federal*
9 *Motor Carrier Safety Administration*, 986 F.3d 841 (9th Cir. 2021); *see*
10 *California's Meal and Rest Break Rules for Commercial Motor Vehicle Drivers*,
11 83 Fed. Reg. 67470-01, 2018 WL 6809341 (Dec. 28, 2018). Smithfield contends
12 that as drivers of commercial motor vehicles weighing 10,001 lbs. or more in
13 interstate commerce, Plaintiff and the Class are subject to FMCSA safety
14 regulations and thus, are exempt from California's meal and rest break laws.

15 Smithfield also contends the Class was exempt from California's overtime
16 and meal and rest break laws under the outside sales exemption, as the RSRs spent
17 nearly all of their working time on commercial trucks and on-site with customers,
18 selling and delivering products. *See* 8 CCR § 11070 at 2(J); Cal. Labor Code §
19 1171. Finally, because Plaintiff's claims for overtime, rest and meal break
20 premiums fail, Defendant contends so do the derivative claims for inaccurate
21 wage statements and untimely final wages.

22 **III. PROCEDURAL HISTORY**

23 On February 22, 2021, Plaintiff filed charges with the Labor and Workforce
24 Development Agency ("LWDA") alleging various violations of the Labor Code.
25 On April 12, 2021, Plaintiff filed a complaint in the Superior Court of California,
26 County of Los Angeles, entitled *Steven Kane v. Smithfield Direct, LLC.*, Case No.
27 21STCV13736. Plaintiff alleged Smithfield (1) failed to pay for all time worked
28 while clocked out for meal periods; (2) failed to properly pay overtime wages,

1 premium wages for non-compliant meal and rest periods, and sick leave pay
2 because Smithfield did not properly calculate the Class Member's regular rate
3 pay; (3) failed to maintain a compliant meal and rest period policy; and derivative
4 claims for (4) inaccurate wage statements and (5) untimely final wages. Without
5 indication from the LWDA that it intended to investigate Plaintiff's charges, on
6 May 11, 2021, a First Amended Class Action Complaint (FAC) was filed adding
7 claims for civil penalties arising under PAGA.

8 On June 14, 2021, Defendant removed the Action to this Court under 28
9 U.S.C. § 1441 and 28 U.S.C. § 1332(a), and for supplemental jurisdiction under
10 28 U.S.C. § 1367(a), alleging diversity of citizenship and that the individual
11 amount in controversy was \$75,000.00 or more. Dkt. 1. Smithfield answered the
12 FAC on June 21, 2021. Dkt. 10. Plaintiff filed a motion to remand the Action to
13 state court on July 14, 2021. Dkt. No. 13. The Court denied the motion on August
14 3, 2021, with a finding Defendant had satisfied its burden to establish diversity
15 jurisdiction. Dkt. 25.

16 On October 12, 2021, following an exchange of written discovery, Initial
17 Disclosures, and depositions taken, Plaintiff filed his motion to certify a class of
18 individuals employed by Smithfield as Route Sales Representatives. Dkt. 27. The
19 motion was supported by substantial evidence, including declarations from
20 Plaintiff and two other Class Members. Prior to the hearing on the motion set for
21 November 22, 2021, the Parties attended mediation on October 25, 2021. After a
22 day of intense negotiations, and the acceptance of a mediator's proposal days
23 later, Plaintiff withdrew the motion. Dkts. 28, 33.

24 On November 9, 2021, the Court held a status conference at which the
25 Parties informed the Court of the proposed Settlement and recited its terms on the
26 record. A motion for preliminary approval was then set for January 10, 2022, with
27 a filing deadline of December 10, 2021. Dkt. 32.

28 ///

1 **IV. DISCOVERY CONDUCTED PRIOR TO MEDIATION**

2 The Parties conducted significant formal written discovery prior to the
3 filing of Plaintiff's Motion for Class Certification and engaged in informal
4 discovery prior to the scheduled mediation. Khoury Decl. ¶20.

5 On July 6, 2021, Plaintiff served Smithfield with interrogatories, to which it
6 responded on August 6, 2021. Smithfield served Plaintiff with interrogatories and
7 requests for document production on August 13, 2021, to which Plaintiff
8 responded and produced documents on September 15, 2021. Khoury Decl. ¶21.

9 The Parties exchanged FRCP Rule 26(a) Initial Disclosure Statements
10 identifying numerous potential witnesses possessing information relevant to the
11 alleged claims on August 30, 2021. Plaintiff's disclosures included 147 pages of
12 pay stubs, wage statements and IRS Form W-2 Wage and Tax Statements,
13 company handbook materials and policies, and various other documents. Khoury
14 Decl. ¶22.

15 With respect to the discovery and release of Class Member contact
16 information to Plaintiff's Counsel, the Parties agreed upon the use of a *Belaire-*
17 *West* opt-out privacy notice. On September 27, 2021, the agreed-upon privacy
18 notice was mailed to all 45 Class Members giving them until October 27, 2021 to
19 opt out of the release of their contact information. Following the close of the
20 November 3, 2021 opt out deadline, Plaintiff's Counsel was provided with the
21 contact information for all Class Members. Khoury Decl. ¶23.

22 Prior to the release of the Class' contact information, and in support of
23 Plaintiff's class certification motion, Plaintiff's Counsel conducted several
24 telephonic interviews of Class Members whose names had been obtained through
25 their own investigation. Declarations from two class members were filed in
26 support of Plaintiff's certification motion. Dkts. 27-15, 27-16; Khoury Decl. ¶24.

27 Smithfield's counsel deposed Plaintiff Kane on October 18, 2021. On
28 October 19, 2021, pursuant to FRCP 30(b)(6), Plaintiff's Counsel took depositions

of Smithfield's persons most knowledgeable: Crystal Delorey, Senior Director of Payroll, and Michael Hughley, Senior Director of Operations for DSD, Direct Store Delivery. Khoury Decl. ¶25.

On October 8, 2021, following agreement to attend mediation, Smithfield informally produced 781 pages of documents that included (1) relevant timekeeping and meal and rest period policies and procedures; (2) job descriptions for years 2017 - 2020; (3) total number of Class Members and their Work weeks during the Class Period; (4) total number of PAGA Members and their Pay Periods during the PAGA period; (5) number of terminated employees; and (6) hourly rates paid from April 12, 2017 to December 31, 2017 - \$10/hour; and from January 1, 2018 through November 2020 - \$10.50/hour. Smithfield also produced two Microsoft excel spreadsheets containing over 23,000 lines of data of time punch details for Plaintiff and fourteen randomly-selected Class Members. On receipt of the data, and review of the information gathered from Class Counsel's investigations and informal Class Member interviews, Plaintiff's Counsel analyzed the data and calculated its assessment of Class-wide damages for mediation. Khoury Decl. ¶26.

V. MEDIATION.

On October 25, 2021, the Parties attended mediation with Deborah Saxe, Esquire of JAMS, an experienced and respected wage and hour mediator in Southern California. After a full day of negotiations facilitated by Ms. Saxe, the Parties were not able to reach agreement, although considerable progress had been made. A mediator's proposal was tendered to the Parties, which was accepted with minor modifications on October 27, 2021. Khoury Decl. ¶27. The Parties thereafter continued to negotiate at arms'-length the balance of the terms contained in the long-form Settlement Agreement preliminarily approved on December 29, 2021. Dkt. 34-3. *Id.*

///

VI. SUMMARY OF PROPOSED SETTLEMENT

A. Settlement Terms

The Parties have agreed, subject to Court approval, that the Action may be settled for the Gross Settlement Amount of \$350,000.00 (GSA), no part of which may revert to Smithfield. The GSA includes (i) Class Counsel's attorneys' fees up to \$116,666.00 to compensate Class Counsel for work performed and remaining to be performed to secure final settlement approval³, and (ii) litigation expenses of \$16,293.78 (originally estimated at \$19,000.00); (iii) a Class Representative Service Payment of \$10,000.00 to Plaintiff Steven Kane, for acting as the sole representative for the Class, work performed, risks undertaken for Smithfield's costs if the case had been lost, and the substantial benefits conferred upon 44 other members of the Class; (iv) Administration expenses of \$6,500.00; and (e) PAGA Payment of \$15,000.00, apportioned: 75% (\$11,250.00) to the to the Labor Workforce and Development Agency (LWDA Payment), and 25% (\$3,750.00) to PAGA Members distributed based on the number of Pay Periods worked during the PAGA Period. SA ¶22; Khoury Decl. ¶10.

After all Court-approved deductions from the GSA, less the Employer Tax Obligations estimated at \$8,936.85, the remaining Net Settlement Amount (NSA) of \$176,603.37 will be distributed entirely to Participating Class Members based on the number of Weeks Worked during the Class Period. With an aggregate 5,156 Weeks Worked, Class Members may expect to receive an estimated \$34.25 for per Week Worked during the Class Period. Khoury Decl. ¶11; CPT Decl. ¶¶15, 16.

The method of distribution provided for by the Settlement Agreement allocates funds based on each Class Member's tenure with Smithfield, i.e., using

³Plaintiff consented in writing to apportionment of attorneys' fees awarded in the following amounts: one-third to the Davtyan Law Firm, Inc., and two-thirds to Cohelan Khoury & Singer. Khoury Decl. ¶14.

the number of weeks worked during the Class Period and does not give preference to any Class Member. The information and data needed to distribute the funds is readily available from Smithfield's records, and the Administrator can apply the formula fairly and transparently. Settlement Payments will be allocated one-third to wages, for which an IRS W-2 Form will be issued, and two-thirds to interest and penalties, for which IRS 1099 Forms will be issued. Participating Class Members will release the Released Parties from the Released Claims arising from the factual allegations of the First Amended Complaint. SA ¶¶ 36, 60-63. Khoury Decl. ¶36.

If a Class Member is also a PAGA Member, he or she will also receive a portion of the \$3,750.00 PAGA Member Payment based on the number of Pay Periods worked during the PAGA Period. With 875 Pay Periods worked by 28 PAGA Members, each may expect to receive \$4.29 per Pay Period, whether or not they opt out of the Class settlement. SA ¶¶23, 29, 41; Khoury Decl. ¶19, 34; CPT Decl. ¶17. PAGA Members will receive an IRS Form 1099 for their portion of the \$3,750.00 PAGA Payment. SA ¶63; Khoury Decl. ¶34.

Following Final Approval and the Effective Date of settlement, Participating Class Members will receive their Settlement Payment checks, and PAGA Members will receive a share of the \$3,750.00 PAGA Payment even if they should opt-out of the Class settlement. A postcard reminding Class Members to cash their checks will be mailed 30 days of issuance of the checks, and after 90 days of issuance, all uncashed checks will be voided and funds forwarded to California's Controller, Unclaimed Property Division for further handling on behalf of the Class Member whose check was voided. SA ¶¶76, 77; Khoury Decl. ¶35.

B. Preliminary Approval, Class Notice, and Class Response

On December 10, 2021, Plaintiff's Motion for Preliminary Approval was filed and served on the LWDA the same date. The motion was noticed for January

10, 2022. Dkt. 34. Khoury Decl. ¶28. On December 29, 2021, the Court issued its Order Granting Plaintiff’s Motion for Preliminary Approval and Conditional Certification of the Class, and vacated the January 10, 2022 hearing. Dkts. 34, 37. Having evaluated the terms of the Settlement that provided for direct notice to the Class via First Class U.S. Mail, and a notice plan that included the Administrator’s search of the National Change of Address database to update stale addresses prior to the initial mailing of the Notice Packet, and skip-tracing of returned and undelivered Notice Packets using the Class Member’s social security number, the Court determined the Settlement’s “notice plan was reasonably calculated to reach the members of the Class”. Dkt. 37, II.D; Khoury Decl. ¶29. The Court further stated,

“The proposed notice describes the essential terms of the proposed Settlement Agreement, defines the class, sets forth the procedures for opting out of the class, filing objections to the proposed Settlement Agreement, and provides information on the date, time, and location of the fairness hearing. The Court finds that these notice methods are reasonably calculated to afford the class members an opportunity to present their objections. As such, the parties are ordered issue settlement notices to the class pursuant to the proposed notice plan and substantially in the form submitted for the Court’s approval ...”

Dkt. 37, II.D. Khoury Decl. ¶30.

On February 16, 2022, the Notice of Class Action Settlement, Change of Address form and pre-printed return envelope, (“Notice Packets”) were mailed to all identified Class Members giving them through April 18, 2022 to postmark and return written objections, requests for exclusion, and disputes of the information on which their Settlement Payments would be calculated. CPT Decl. ¶9; Khoury Decl. ¶31. An extended deadline of May 3, 2022 is provided to Class Members whose Notice Packets were returned as undelivered, and remailed to an updated mailing address. Through the present, no objections or requests for exclusion have been returned to the Administrator by any member of the Class, nor has any Class

Member disputed the information on which a Settlement Payment will be calculated⁴. CPT Decl. ¶¶9, 11-13; Khoury Decl. ¶32. Class Members will receive an estimated \$34.25 for each week worked during the Class Period (\$176,603.37 NSA /5,156 weeks); and based on this rate, will receive Settlement Payments averaging \$3,757.52, and highest payments of \$6,473.63. CPT Decl. ¶16; Khoury Decl. ¶¶11, 12, 33, 57. Additionally, PAGA Members will receive a proportionate share of the \$3,750.00 PAGA Payment based on the number of Pay Periods worked during the PAGA Period, paying on average \$79.79, and highest payment of \$158.57. CPT Decl. ¶17; Khoury Decl. ¶34.

VII. LEGAL ANALYSIS

A. Attorneys' Fees Calculated as a Percentage of the Common Fund Is Warranted Under California and Federal Law

Class Counsel seeks an award of attorneys' fees of \$116,666.00 which represents one-third of the GSA. This percentage is reasonable and appropriate based on the substantial hours expended to achieve this result, the litigation risks and complexities of prosecuting these types of cases, the contingent nature of any fee recovered, Class Counsels' experience in handling cases of this type, the fees commonly awarded in these cases, and the vindication of the Class' rights by securing a \$350,000.00 non-reversionary Settlement. Khoury Decl. ¶37.

"While attorneys' fees and costs may be awarded in a certified class action where so authorized by law or the parties' agreement, Fed. R. Civ. P. 23(h), courts have an independent obligation to ensure that the award, like the settlement itself, is reasonable, even if the parties have already agreed to an amount." *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 941 (9th Cir. 2011).

In the case of a common fund—as created in this case where there is no reversion or claims process—the percentage method is the preferred method under

⁴ Following the close of the extended Class Period, and prior to the Final Approval Hearing, a supplemental declaration from CPT will be filed with the Court to update Class Member participation.

1 California law. See *Laffitte v. Robert Half International Inc.* (2016) 1 Cal. 5th 480,
2 494. The California Supreme Court recognized several advantages of the
3 percentage method:

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

8 *Laffitte*, 1 Cal. 5th at 503 (internal citation omitted).

9 A district court has discretion to apply either the percentage of the fund
10 method or the lodestar method. *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047
11 (9th Cir. 2002); *In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291,
12 1295-96 (9th Cir. 1994); see also *In re Bluetooth*, 654 F.3d 944 (“Thus, even
13 though the lodestar method may be a perfectly appropriate method of fee
14 calculation, we have also encouraged courts to guard against an unreasonable
15 result by cross-checking their calculations against a second method.”).

16 Courts often award fees equaling one-third of the gross recovery in class
17 action settlements. “[R]egardless whether the percentage method or the lodestar
18 method is used, fee awards in class actions average around one-third of the
19 recovery.” *Chavez v. Netflix, Inc.* (2008) 162 Cal. App. 4th 43, 66, n. 11; see e.g.,
20 *Laffitte*, 1 Cal. 5th at 485-87 (affirming trial court’s granting of a fee request for
21 one-third of a \$19 million settlement). “Other case law surveys suggest that 50%
22 is the upper limit, with 30-50% commonly being awarded in case in which the
23 common fund is relatively small.” *Cicero v. DirecTV, Inc.*, No. EDCV 07-1182,
24 2010 WL 2991486, at *6 (C.D. Cal. July 27, 2010) (citing Rubenstein, Conte and
25 Newberg, *Newberg On Class Actions* at § 14:6).

26 In cases where the common fund is under \$10 million, fees are often above
27 25%. *Craft v. Cnty. of San Bernardino*, 624 F. Supp. 2d 1113, 1127 (C.D. Cal.
28 2008) (citing *Van Vranken v. Atlantic Richfield Co.*, 901 F. Supp. 294, 297-98

(N.D. Cal. 1995) (most cases cited in which 30-50 percent of the fund were awarded involved funds of less than \$10 million).

Percentage awards “must be supported by findings that take into account all of the circumstances of the case.” *Vizcaino*, 290 F.3d at 1048. Ninth Circuit courts consider the following: “(a) the results achieved; (b) the risk of litigation; (c) the skill required, (d) the quality of work; (e) the contingent nature of the fee and the financial burden; and (f) the awards made in similar cases.” *Vasquez v. Coast Valley Roofing, Inc.*, 266 F.R.D. 482, 492 (E.D. Cal. 2010).

Here, Plaintiff achieved an outstanding result for the Class, against a well-funded Defendant with excellent and experienced counsel by performing quality work. A positive outcome was not certain and risky given the FMCSA’s opinion issued in late December, 2018 holding that interstate drivers were not subject to, and not protected by California’s rest and meal period laws and which was upheld by the Ninth Circuit in the *IBT* case on January 15, 2021. Any payment of attorneys’ fees was completely contingent on a successful outcome for the Class. Khoury Decl. ¶38.

The requested fee of 33-1/3% of the common fund achieved, is in line with awards made in similar cases in California, consistent with market rates and is reasonable. *See, e.g., Gomez v. USF Reddaway, Inc.*, (C.D.Cal. Sep. 21, 2020, No. LA CV16-05572 JAK (FFMx)) 2020 U.S.Dist.LEXIS 172911 (finding 33-1/3% reasonable in a wage and hour class action settlement); *Stuart v. RadioShack Corp.* (N.D.Cal. Aug. 9, 2010, No. C-07-4499 EMC) 2010 U.S.Dist.LEXIS 92067) (finding 33% fee award “well within the range of percentages which courts have upheld as reasonable in other class action lawsuits”; *Barbosa v. Cargill Meat Solutions Corp.* (E.D.Cal. July 2, 2013) 297 F.R.D. 431, (awarding 33-1/3% of the \$1,290,000 common fund, and identifying other cases where similar fee awards were granted); *Vasquez v. Coast Valley Roofing, Inc.*, 266 F.R.D. 482 (E.D. Cal. 2010) (approving attorney’s fee award of 33.3% of the

common fund of in a wage and hour putative class action settlement); *Benitez v. Western Milling, LLC* (E.D.Cal. June 19, 2020, No. 1:18-cv-01484-SKO) 2020 U.S.Dist.LEXIS 108900, finding 33-1/3% of the \$650,000 common fund reasonable); *Beaver v. Tarsadia Hotels* (S.D.Cal. Sep. 28, 2017, No. 11-cv-01842-GPC-KSC) 2017 U.S.Dist.LEXIS 160214 (approving a fee award of one-third of the \$51,150,000 settlement fund in a class action settlement); *McGrath v. Wyndham Resort Dev. Corp.* 2018 U.S. Dist. LEXIS 16095 (S.D. Cal. Jan. 31, 2018) awarding 33-1/3% of the \$7,250,000 common fund in a pre-certification wage and hour class action settlement; *Birch v. Office Depot, Inc.*, No. 06 CV 1690 DMS (WMC), 2007 U.S. Dist. LEXIS 102747 (S.D. Cal. September 28, 2007) (attorneys' fee award of 40% of \$16,000,000 settlement in pre-certification meal and rest period class action); *Rippee v. Bos. Mkt. Corp.*, No. 05cv1359 BTM(JMA), 2006 U.S. Dist. LEXIS 101136 (S.D. Cal. October 10, 2006) (attorneys' fee award of 40% of \$3,750,000 wage and hour class action settlement); *Watson v. Raytheon Company*, USDC Southern District, Case No. CV-10-cv-00634 LAB (RBB) (S.D. Cal. March 7, 2011) (33-1/3% in \$2,000,000 settlement in certified misclassification class action); *Dirienzo v. Dunbar Armored, Inc.*, No. 09 cv 2745 DMS (JMA), 2011 U.S. Dist. LEXIS 166615 (S.D. Cal. August 5, 2011) (33-1/3% of \$1,500,000 settlement in pre-certification reimbursement, rest and meal period class action); *Green, et al. v. Penske Logistics, L.L.C., et al.*, USDC Southern District, Case No. CV-09-0069 DMS (CAB) (S.D. Cal. May 28, 2010) (33% of \$500,000 settlement in pre-certification wage and hour class action). Khoury Decl. ¶¶39, 40. Plaintiffs have satisfied the factors supporting the request for a percentage-of-the-fund award.

B. An Optional Lodestar Cross-Check Confirms the Reasonableness of Class Counsels' Attorneys' Fees

A court *may* conduct a lodestar "cross-check" to determine the reasonableness of the attorneys' fees requested by (1) by multiplying the number

of hours reasonably expended litigating the successful claims by a reasonable hourly rate⁵; and (2) adjusting the lodestar “upward or downward by an appropriate positive or negative multiplier reflecting a host of reasonableness factors,” including “the quality of representation, the benefit obtained for the class, the complexity and novelty of the issues presented, and the risk of nonpayment.” *In re Bluetooth*, 654 F.3d at 941-42.

Here, Class Counsels’ attorneys’ fees request is reasonable under either method, as the amount of requested fee is less than the \$223,772.00 lodestar through the filing date of this Motion; and, the results and quality of the settlement, the contingent risk, and comparator cases further support the reasonableness of Class Counsels’ request. Khoury Decl. ¶41. *See generally* Declarations of Class Counsel Diana M. Khoury and Emil Davtyan concurrently filed with this Motion.

1. Class Counsels’ Hourly Rates are Reasonable

To bring this matter to final approval, Class Counsel will have worked 412.1⁶ hours for a lodestar fee of \$240,272.00 based on rates ranging from \$595 to \$900 per hour. Khoury Decl. ¶¶15, 42, Exh. 1 – Consolidated Summary of Class Counsel Lodestar and Costs; Davtyan Decl. ¶¶10-12.

Class Counsels’ hourly rates are consistent with the *Laffey* Matrix, an

⁵Courts properly rely on declarations by counsel to determine lodestar. *Concepcion v. Amscan Holdings, Inc.* (2014) 223 Cal.App.4th 1309, 1324 (“Declarations of counsel setting forth the reasonable hourly rate, the number of hours worked and the tasks performed are sufficient.”); *Wershba v. Apple Computers, Inc.*, 91 Cal.App.4th 224, 255 (2001) (“[P]laintiffs’ attorneys submitted declarations evidencing the reasonable hourly rate for their services and establishing the number of hours spent working on the case ... California law permits fee awards in the absence of detailed time sheets.”)

⁶This includes an anticipated 30 hours between the time shortly prior to filing this motion, and the time of the Final Approval Hearing in August, 2022, to draft the Motion for Final Approval, interact with the administrator regarding the Class’ participation, disputes, if any received, its final declaration, preparation for and attendance at the Final Approval Hearing, and upon Final Approval, interact with counsel for Smithfield and the Administrator to approve the payment documents and mailing of the checks, respond to Class Member inquiries, and uncashed checks. Khoury Decl. ¶43.

1 inflation-adjusted methodology of attorney rates for lawyers of varying experience
2 levels first approved by the U.S. Court of Appeals for the District Court of
3 Columbia in *Laffey v. Northwest Airlines, Inc.*, 746 F.2d 4 (D.C. Cir. 1984). The
4 *Laffey* Matrix may be used as an “objective source for setting counsel’s hourly
5 rates.” *In re HPL Technologies, Inc. Securities Litigation*, 366 F. Supp. 912, 921
6 (N.D. Cal. 2005). In *Syers Properties III, Inc. v. Rankin*, 226 Cal. App. 4th 691
7 (2014) the California Court of Appeal affirmed a trial court order granting
8 attorneys’ fees relying upon the adjusted *Laffey* Matrix rates. 226 Cal. App. 4th
9 691, 697 (2nd Div. 2014). The trial court relied heavily on the *Laffey* matrix, and
10 the Court of Appeal affirmed the fee award, noting that reliance on “the adjusted
11 *Laffey* Matrix rates requested by [prevailing party] were reasonable and
12 appropriate for the lodestar calculation.” *Id.* at 702-03; *But see, Prison Legal*
13 *News v. Schwarzenegger* (9th Cir. 2010) 608 F. 3d 446 (not error to decline use of
14 *Laffey* matrix).

15 Class Counsel’s skill and experience support their hourly rates, which are in
16 line with those approved in wage and hour class action litigation in California, and
17 which have been approved by numerous California state and federal courts.
18 Khoury Decl. ¶¶3-9, 44. Class Counsels’ practice is limited to litigating class
19 actions on behalf of employees and consumers, and they have been appointed
20 Class Counsel in numerous cases. Khoury Decl. ¶¶3, 8, 9, 45; Davtyan Decl. ¶¶3-
21 5.

22 As leading attorneys in the field, Class Counsel continually monitors
23 prevailing market rates of defense and plaintiff law firms and sets the billing rates
24 to follow those attorneys and staff of comparable skill, qualifications and
25 experience. Other wage and hour attorneys working as Class Counsel before
26 California courts charge comparable if not higher rates. Khoury Decl. ¶46, Exh. 2
27 - 2014 National Law Journal survey of hourly billing rates for Partners and
28 Associates.

1 All of the work performed by Class Counsel to secure the Settlement was
2 reasonable and necessary, and their efforts are reflected in the excellent result
3 achieved for the Class. Khoury Decl. ¶47.

4 **2. All Factors Support Approval of Class Counsels' Fees**

5 The lodestar may be adjusted “upward or downward by an appropriate
6 positive or negative multiplier reflecting a host of reasonableness factors,”
7 including, “quality of representation, the benefit obtained for the class, the
8 complexity and novelty of the issues presented, and the risk of nonpayment.” *In*
9 *re Bluetooth*, 654 F.3d at 941-42.

10 Plaintiff does not request an upward adjustment, as the lodestar is *more* than
11 the percentage of the common fund sought by this Motion. Khoury Decl. ¶48. The
12 requested fee results in a so-called “negative multiplier” which “suggests that the
13 negotiated fee award is a reasonable and fair valuation of the services rendered to
14 the class.” *Chun-Hoon v. McKee Foods Corp.*, 716 F.Supp.2d 848, 854 (N.D. Cal.
15 2010).

16 Class Counsel obtained an excellent Settlement providing substantial
17 compensation to Class Members for unpaid wages for overtime and premium
18 payments for non-compliant meal and rest breaks. Class Counsel litigated this
19 case purely on a contingency fee basis and the requested fee of one-third of the
20 Gross Settlement Amount is in line with what other Ninth Circuit courts have
21 awarded in similar cases, which often award a higher percentage, as set for above.
22 Khoury Decl. ¶49.

23 In light of the substantial benefit achieved for the Class, and to the extent an
24 optional cross-check is considered, the requested attorneys' fees are less than the
25 lodestar fee for purposes of a cross-check, and Plaintiff's request for attorneys'
26 fees of one-third of the common fund settlement should be granted.

27 **C. Class Counsels' Litigation Expenses Are Reasonable**

28 “There is no doubt that an attorney who has created a common fund for the

benefit of the class is entitled to reimbursement of reasonable litigation expenses from that fund.” *West v. Circle K Stores, Inc.*, No. Civ. S-04-0438, 2006 U.S. Dist. LEXIS 76558, at *25 (E.D. Cal. Oct. 19, 2006).

Class Counsel incurred \$16,293.78 in ordinary and reasonable litigation costs that are reimbursable under the terms of the settlement agreement for up to \$19,000.00. Khoury Decl. ¶50, Exh. 3 – Itemization of Costs; Davtyan Decl. ¶13. Such expenses were reasonable and necessary to the prosecution of this case, and to represent the Class, and may be reimbursed from the common fund. *See Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994); *In Re DJ Orthopedics, Inc. Secs. Litig.*, No. 01-CV-2238-K (RBB), 2004 U.S. Dist. LEXIS 11457, at *21 (S.D. Cal. June 21, 2004).

D. Settlement Administration Expenses Are Reasonable

Class Counsel seeks payment of \$6,500.00 to CPT Group, Inc., the appointed Administrator for its work in noticing the Class, and administration of the Settlement as described in its declaration filed herewith, and as set forth in the Settlement Agreement. The Parties have no objection to this payment, and no objections have been asserted by any Class Member. Khoury Decl. ¶51.

CPT has, and will continue to, administer the Settlement following final approval through the effective date of Settlement by calculating Settlement Payments to all Participating Class Members, printing and mailing checks, reporting taxes, responding to inquiries, voiding uncashed checks, and forwarding the sum represented by uncashed checks to the State Controller in the names of Class Members. (As the close of the response deadline, i.e., April 18, 2021, does not occur until after this fees’ motion is filed, the Administrator’s supplemental declaration updating the Class’ response will be filed with the Final Approval Motion).

E. The Class Representative Should Receive a Service Payment

“[A] class representative is entitled to a fee in a California class action.”

1 *Cellphone Termination Fee Cases*, 186 Cal. App. 4th 1380, 1394 (2010). Service
2 payments “compensate class representatives for work done on behalf of the class,
3 [and] to make up for the financial or reputational risk undertaken in bringing the
4 action.” *Id.*

5 Mr. Kane, as the appointed representative for the Class, “should be
6 compensated for the expense or risk they have incurred in conferring a benefit on
7 other members of the class.” *Clark v. Am. Residential Services LLC*, 175 Cal.
8 App. 4th 785, 806 (2009). Factors to be considered in granting a service award
9 include: “‘actions the plaintiff has taken to protect the interests of the class, the
10 degree to which the class has benefitted from those actions, and the amount of
11 time and effort the plaintiff expended in pursuing the litigation,’ [and] ‘the risk to
12 the class representative in commencing suit, both financial and otherwise,’ ‘the
13 notoriety and personal difficulties encountered by the class representative,’ the
14 duration of the litigation, and ‘the personal benefit (or lack thereof) enjoyed by the
15 class representative as a result of the litigation.’” (internal citations and quotations
16 omitted) *Id.* at 804.

17 Mr. Kane came forward to represent the interests of a Class individuals
18 who, like himself, were misclassified as “exempt” commissioned sales employee
19 under the outside sales exemption, and who were not paid overtime wages or
20 provided with compliant meal and rest periods or paid premium wages when
21 proper breaks were not provided. Declaration of Steven Kane filed concurrently
22 herewith, (“Kane Dec”) ¶¶3, 4, 7.

23 On February 22, 2021, Plaintiff filed charges with the Labor and Workforce
24 Development Agency (“LWDA”), and on April 12, 2021 Plaintiff filed a wage
25 and hour class action complaint against Smithfield in the Los Angeles County
26 Superior Court for various Labor Code violations, which was removed to this
27 Court. Khoury Decl. ¶53; Kane Decl. ¶10.

28 Without indication that the LWDA intended to investigate the charges

1 against Smithfield, on May 11, 2021, Plaintiff filed a First Amended Class Action
2 Complaint adding PAGA claims. Since prior to the filing of the charges with the
3 LWDA, and agreeing to represent the Class, Plaintiff has been continuously
4 involved with this case, by providing responses to written discovery requests,
5 preparing for and sitting for his day-long deposition, working with Class Counsel
6 to draft a declaration in support of his certification motion, putting other Class
7 Members in touch with Class Counsel and from whom declarations in support of
8 certification were filed, and generally staying in regular contact with Class
9 Counsel regarding the litigation and the settlement process. Khoury Decl. ¶54;
10 Kane Decl. ¶¶10-14.

11 Mr. Kane has spent considerable time both before and after initiating this
12 class action litigation. By filing charges against his former employer, Mr. Kane
13 has risked the loss of future employment opportunities because prospective
14 employers may conduct background checks to determine if applicants have filed
15 lawsuits, with some employers considering the filing of a class action lawsuit
16 costing a former employer millions of dollars a disqualifying factor. Khoury Decl.
17 ¶55; Kane Decl. ¶¶20, 21.

18 Unlike other Class Members, Mr. Kane accepted the financial risk of a
19 judgment entered against him for costs had Smithfield prevailed in this litigation⁷.
20 Khoury Decl. ¶56; Kane Decl. ¶21. The risk of judgment entered for Defendant's
21 costs alone, is sufficient to support Plaintiff's service payment request. *Earley v.*
22 *Superior Court* (2000) 79 Cal.App.4th 1420, 1433-34. In addition, as a Plaintiff,
23 Mr. Kane agreed to give a general release of all claims no other Class Member
24 was required to give. SA ¶53; Khoury Decl. ¶57.

25
26 ⁷ Mr. Kane's declaration in support of class certification, stated among other
27 things, that "... I want to be a class representative so that Smithfield will comply
28 with the law. I understand there is a risk of loss, and I am willing to accept the
risk and serve as a champion for other RSRs in California who may be too fearful
to come forward." Dkt. 27-14, ¶11.

1 Plaintiff's efforts throughout the litigation, documented in his declaration,
2 demonstrates the commitment to the Class and independently supports a service
3 payment. Solely due to Mr. Kane's dedication to this litigation, efforts, burdens
4 and risks, will 47 Class Members receive substantial Settlement Payments they
5 would not have otherwise had. CPT Decl. ¶¶16, 17. Khoury Decl. ¶58.

6 California State and federal courts frequently award service payments to
7 plaintiffs in amounts of \$10,000.00 or more for efforts in prosecuting wage and
8 hour class and representative actions. See, e.g., *Garcia v. Gordon Trucking,*
9 *Inc.* (E.D.Cal. Oct. 29, 2012, No. 1:10-CV-0324 AWI SKO) 2012 U.S. Dist.
10 LEXIS 160052 (\$15,000 to each of four Plaintiffs in a \$3.7 million wage and hour
11 class action settlement); *La Fleur v. Medical Mgmt. Int'l* (C.D.Cal. June 25, 2014,
12 No. EDCV 13-00398-VAP (OPx)) 2014 U.S. Dist. LEXIS 90367, at *23 (\$15,000
13 for each of two plaintiffs as part of \$535,000 wage and hour class action); *Boyd v.*
14 *Bank of Am. Corp.* (C.D.Cal. Nov. 18, 2014, No. SACV 13-0561-DOC (JPRx))
15 2014 U.S. Dist. LEXIS 162880, at *20 (\$15,000 for plaintiff in \$5.8 million
16 settlement of wage and hour class action); *Chu v. Wells Fargo Invs., LLC*, Nos. C
17 05-4526 MHP, C 06-7924 MHP, 2011 U.S. Dist. LEXIS 15821, at *15–16 (N.D.
18 Cal. Feb. 16, 2011) (awarding a \$10,000 incentive award to two named plaintiffs);
19 *Singer v. Becton Dickinson & Co.*, 2010 U.S. Dist. LEXIS 53416 at *24-26 (S.D.
20 Cal. June 1, 2010) ("The \$25,000 incentive award is ... well within the acceptable
21 range awarded in similar cases."); *Glass v. UBS Financial Services*, 2007 U.S.
22 Dist. LEXIS 8476, 50-52 (N.D. Cal. Jan. 26, 2007) (\$25,000 incentive award to
23 each of four plaintiffs in FLSA overtime wage class action).

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VIII. CONCLUSION

Plaintiff respectfully requests this Court grant the Motion for Order Granting Award of Attorneys' Fees, and Litigation Costs, Class Representative Service Payment, and Settlement administration costs.

Respectfully submitted,

COHELAN KHOURY & SINGER
DAVTYAN LAW FIRM, P.C.

Dated: April 1, 2022

By: s/ Diana M. Khoury
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