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**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN DIEGO**

PEDRO CORTEZ, as an individual and on
behalf of all others similarly situated,

Plaintiff,

vs.

BG TRUCKING, INC., an California
corporation; and DOES 1 through 50,
inclusive,

Defendants.

Case No.: 37-2021-00010743-CU-OE-CTL

[Assigned for All Purposes to Hon. Joel R
Wohlfeil, Dept. C-73]

**PLAINTIFF'S NOTICE OF MOTION AND
MOTION FOR FINAL APPROVAL OF CLASS
AND REPRESENTATIVE ACTION
SETTLEMENT; MEMORANDUM OF
POINTS AND AUTHORITIES IN SUPPORT**

Date: November 3, 2023

Time: 9:00 a.m.

Dept.: C-73

Complaint Filed: March 10, 2021

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on November 3, 2023, at 9:00 a.m., or as soon thereafter as the matter may be heard, before the Honorable Joel R. Wohlfeil, judge presiding, in Department S-26 of the above referenced Court located at 330 W. Broadway, San Diego, CA 92101, Plaintiff Pedro Cortez (“Plaintiff”) will seek an Order:

(1) granting final approval of the Joint Stipulation of Class and Representative Action Settlement (“Settlement Agreement” of “Stipulation”) in this matter;

(2) approving distribution of the settlement funds to the Class Members pursuant to the terms of the Settlement Agreement;

(3) approving Plaintiff’s request for an Enhancement Payment of \$5,000.00 to Plaintiff pursuant to the terms of the Settlement Agreement;

(4) approving Plaintiff’s request for an award of attorneys’ fees to Class Counsel for approximately one-third of the \$130,000.00 Gross Settlement Amount, or \$43,333.33, and reimbursement of litigation costs of \$8,442.29 pursuant to the terms of the Settlement Agreement;

(5) approving Plaintiff’s request for payment of the settlement administration costs to Phoenix Settlement Administrators in the amount of \$3,250.00 pursuant to the terms of the Settlement Agreement; and

(6) entering final judgment as to all members of the Class in this action.

This Motion is made pursuant to Rule 3.769 of the California Rules of Court, which provides for court approval of the settlement of a purported class action and allows the Court to grant final certification of a class for settlement purposes. In light of the overwhelmingly positive response, as shown by the lack of objections and opts, there is no question that the settlement is fair, reasonable, and adequate and thus should be granted final approval.

This Motion will be based on the attached Memorandum of Point and Authorities and the supporting Declarations of Kristen M. Agnew, Nicholas Rosenthal, Plaintiff Pedro Cortez, and Lluvia Islas of Phoenix Settlement Administrators, and upon the oral arguments of counsel (should there be any), and on the complete records and file herein.

1
2
3 Dated: October 12, 2023

DIVERSITY LAW GROUP, P.C.

4
5 By:

Larry W. Lee
Kristen M. Agnew
Nicholas Rosenthal

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1 **I. INTRODUCTION**

2 Plaintiff Pedro Cortez (“Plaintiff”) seeks the Court’s final approval of the Joint
3 Stipulation of Class and Representative Action Settlement (“Settlement Agreement” of
4 “Stipulation”) in this matter. The settlement provides for a \$130,000.00 **non-reversionary** fund
5 to be created for the benefit of the Class, from which attorneys’ fees, litigation costs,
6 Enhancement Payment to Plaintiff, and Settlement Administration Costs are to be paid. The Net
7 Settlement Amount after these deductions will be paid to all Class Members.

8 The history of this litigation was previously detailed in Plaintiff’s Motion for Preliminary
9 Approval of Class and Representative Action Settlement. The Court preliminarily approved this
10 Settlement on July 5, 2023, directing distribution of the Notice of Proposed Class Action
11 Settlement (“Notice Packet”) and scheduling the hearing for final approval of settlement (the
12 “Preliminary Approval Order”).

13 As directed by the Court, the Settlement Administrator distributed the Notice Packet to
14 thirty-five (35) Class Members. *See* Declaration of Lluvia Islas (“Admin Decl.”) (on behalf of
15 Phoenix Settlement Administrators (“Phoenix”)) ¶ 5. To date, zero Request(s) for Exclusion have
16 been received and there have been no objections. *See id.* at ¶¶ 8, 9. As such, there is a 100%
17 participation rate. Thus, an inference can be made that the Class supports the Court’s Preliminary
18 Approval Order finding that the Settlement Agreement is fair and reasonable.

19 In addition to the results of the notice process, for the same reasons as set forth earlier in
20 Plaintiff’s Motion for Preliminary Approval of Class and Representative Action Settlement, the
21 following represent the basic points previously covered supporting approval of the settlement:

- 22 ■ The settlement provides a total settlement sum of \$130,000.00 which is **non-**
23 **reversionary**;
- 24 ■ The settlement is fair given that Class Members will receive (*after deductions for*
25 *fees, costs, etc.*) a substantial amount of money (on average, each Class Member
26 will receive approximately \$1,856.41);
- 27 ■ Class Members did not need to submit claim forms to participate in the
28 settlement, but are being paid automatically;

- 1 ▪ The allocation reflects that payment of claims will be paid to all Class Members
- 2 in proportion to the number of pay periods worked by each Class Member during
- 3 the Class Period;
- 4 ▪ Plaintiff conducted significant investigation in this case, including the exchange
- 5 of formal written discovery, the informal production of updated Class data in
- 6 connection with mediation, and reviewing payroll data for the entire Class;
- 7 ▪ In conjunction with this Motion, Plaintiff will upload a copy of this motion to the
- 8 LWDA's online portal; and
- 9 ▪ A highly regarded administrator, Phoenix Settlement Administrators, was retained
- 10 for \$3,250.00.

11 Accordingly, the Court should grant Final Approval consistent with the Preliminary
12 Approval Order.

13 **II. CLASS MEMBERS WERE PROVIDED PROPER NOTICE OF THE**
14 **SETTLEMENT**

15 The notice procedures required by the Preliminary Approval Order have been followed
16 and satisfy all due process rights of Class Members. The Preliminary Approval Order
17 contemplated that the Notice of Proposed Class Action Settlement (the "Notice"), as approved in
18 the Preliminary Approval Order, be sent to all Class Members by first class mail, as specified in
19 the Settlement Agreement. The Preliminary Approval Order contemplated, further, that Phoenix
20 Settlement Administrators would serve as the Settlement Administrator.

21 As clearly stated in the Administrator's Declaration, notice was provided to Class
22 Members, as required by the Preliminary Approval Order. On July 26, 2023, the Settlement
23 Administrator received the Class List and Data from Defendant's Counsel that included 35 Class
24 Members. *See* Admin Decl. ¶ 3. On or about August 23, 2023, each of the persons identified on
25 the mailing list were sent the Notice Packet (in English and Spanish) via first class mail. *See id.*
26 at ¶ 5. As part of the administration process, the Settlement Administrator has re-mailed Notice
27 Packets to five (5) Class Members using newly updated addresses after performing a skip-trace
28 using the U.S. Postal Service National Change of Address Database, one of the most

comprehensive address databases available for skip tracing. *See id.* at ¶ 6. As of the date of this filing, one (1) Notice Packet remains undeliverable. *See id.* Further, the Notice Packet provided Class Members with Class Counsel’s contact information, where they could further seek information regarding the settlement, leave questions for the Settlement Administrator, and update their address. *See id.* at ¶ 5, Exhibit A.

The provision of sending the notice to class members as described above meets the requirements for the “best notice practicable” in this case as necessary to protect the due process rights of class members. *See, Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985) (provision of “best notice practicable” with description of the litigation and explanation of opt-out rights satisfies due process); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 174-75 (1974) (individual notice must be sent to class members who can be identified through reasonable means); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (best practicable notice is that which is “reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections”).

Here, the Class Members were provided with a mailing regarding the settlement that explained the settlement and allowed Class Members to seek information, ask questions, and object, if so desired. As such, proper notice has been given to the Class Members. Thus, the Court may proceed to determine the fairness and adequacy of the settlement and enter its Order granting final approval, secure in the knowledge that all absent Class Members have been given the opportunity to participate fully in the claims, exclusion, and the approval process.

III. THE SETTLEMENT TERMS ARE FAIR, ADEQUATE, AND REASONABLE, AND THE SETTLEMENT SHOULD BE GIVEN FINAL APPROVAL

A. The Terms, Negotiation, and Reception of the Settlement by Class Members
All Strongly Support the Conclusion that the Settlement is Fair, Adequate, and Reasonable

As explained by the Court of Appeal in *Kullar v. Foot Locker Retail, Inc.*, 168 Cal. App. 4th 116, 130, 133 (2008), a class action settlement should be approved when the plaintiff has conducted sufficient discovery and the settlement is reasonable in light of the strengths of the

1 plaintiff's claims. As discussed in the Motion for Preliminary Approval, Class Counsel have
2 conducted extensive formal and informal discovery and investigation and, in light of the strength
3 and weaknesses of Plaintiff's claims, Class Counsel submits that this settlement is fair pursuant
4 to *Kullar*.

5 Without reiterating the Parties' showing that the Settlement Agreement and the
6 negotiation process that led up to it was fair and adequate, as set forth in detail in the Motion for
7 Preliminary Approval, the Parties highlight the following facts. The Settlement Agreement was
8 the product of negotiation between highly able and experienced attorneys on both sides. *See*
9 Declaration of Kristen M. Agnew ("Agnew Decl.") ¶¶ 2-11; Declaration Nicholas Rosenthal
10 ("Rosenthal Decl.") ¶¶ 4, 5. In addition, the resolution of this case was reached only after the
11 production of data relevant to the potential value of the claims, including the number of
12 employees paid of mileage/piece-rate basis, the average hourly rates of mileage/piece-rate
13 employees, the number of pay periods worked by mileage/piece-rate employees, the number of
14 pay periods in which mileage/piece rate employees worked a shift lasting 3.5 hours or longer, the
15 number of mileage/piece rate employees whose employment separated during the liability
16 period, and the number of wage statements at issue. *See* Agnew Decl. ¶ 3. Defendant also
17 provided information regarding the amount of time drivers spent conducting non-productive
18 tasks, including, pre-trip inspections. *See id.* Using the data provided by Defendant, Class
19 Counsel was able to calculate a range of potential damages and penalties. *See id.* at ¶ 4. Class
20 Counsel estimated that Defendant's maximum liability exposure is approximately \$493,411.20.
21 *See id.* Thus, in the present case, the Gross Settlement Amount is approximately 26.98 % of the
maximum recovery of the class and representative PAGA claims.

22 The results after mailing of the Class Notice further support confirmation of the Court's
23 preliminary approval of the settlement with final approval of the settlement, as evidenced by the
24 fact that ***there is not a single Class Member who has objected to the current settlement or***
25 ***submitted a request to opt-out.*** The Court may appropriately infer that the class action settlement
26 is fair, adequate, and reasonable when, among other reasons, few, or no class members object to
27 it. *See Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1291 (9th Cir. 1992); *Churchill Vill.*
28 *LLC v. Gen. Elec.*, 361 F.3d 566, 577 (9th Cir. 2004) (approving settlement with 45 objections

1 and 500 opt-outs from a 90,000-person class, representing 0.05% and 0.56% of the class,
2 respectively); *Chun–Hoon v. McKee Foods Corp.*, 716 F. Supp. 2d 848, 852 (N.D. Cal. 2010)
3 (where 16 of 329 class members opted out, court found that positive class reaction “strongly
4 supports settlement”). Here, the lack of any objections and opt-outs to this current settlement is
5 an indication that Class Members themselves view the settlement as fair, adequate, and
6 reasonable.

7 **B. Under Well-Established Legal Principles, the Court Should Grant Final**
8 **Approval of the Settlement**

9 **1. Standard of Review**

10 On a motion for final approval of a class action settlement under California Code of Civil
11 Procedure section 382 and California Rule of Court 3.769, a court’s inquiry is whether the
12 settlement is “fair, adequate and reasonable.” *Officers for Justice v. Civil Serv. Comm’n*, 688
13 F.2d 615, 625 (9th Cir. 1982), *cert. denied subnom.*, *Byrd v. Civil Serv. Comm’n*, 459 U.S. 1217
14 (1983). A settlement is fair, adequate, and reasonable, and therefore merits final approval, when
15 “the interests of the class are better served by the settlement than by further litigation.” *See*
16 *Manual for Complex Litigation, Fourth* § 21.6 at 309 (Fed. Jud. Ctr., 4th ed. 2004) (“*Manual*”).
17 The law favors settlement, particularly in class actions and other complex cases, where
18 substantial resources can be conserved by avoiding the time, cost, and rigors of formal litigation.
19 *See* Alba Conte & Herbert B. Newberg, *4 Newberg on Class Actions* § 11.41 (4th ed. 2002);
20 *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992); *Van Bronkhorst v. Safeco*
21 *Corp.*, 529 F.2d 943, 950 (9th Cir. 1976).

22 Although the Court possesses “broad discretion” in determining that a proposed class
23 action settlement is fair, the Court’s role must be limited to the extent necessary to reach a
24 reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion
25 between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable, and
26 adequate to all concerned. *See Officers for Justice*, 688 F.2d at 625. Accordingly, the Court
27 should give due regard to what is otherwise a “private consensual agreement” between the
28 parties. *Id.*; *see also Church v. Consolidated Freightways, Inc.*, 1993 WL 149840 (N.D. Cal.

1993); *In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 720 F. Supp. 1379 (D. Ariz. 1989), *aff'd sub nom.*, *Class Plaintiffs*, 955 F.2d 1268; *Manual* § 21.6 at 309 (“The judicial role in reviewing a proposed settlement is critical, but limited to approving the proposed settlement, disapproving it, or imposing conditions on it. The judge cannot rewrite the agreement”).

A court’s approval of a class action settlement will only be reversed for a clear abuse of discretion. *See Dunk v. Ford Motor Co.*, 48 Cal. App. 4th 1794, 1801 (1996); *Officers for Justice*, 688 F.2d at 626 (“reverse only upon a strong showing that the district court’s decision was a clear abuse of discretion”); *Class Plaintiffs*, 955 F.2d at 1276; *Ackerman v. Kassar*, 1993 WL 326453 (9th Cir. 1993); *Linney v. Cellular Alaska P’ship*, 151 F.3d 1234, 1238 (9th Cir. 1998). As the court cautioned in *7-Eleven Owners for Fair Franchising v. Southland Corp.*:

“It cannot be overemphasized that neither the trial court in approving the settlement nor this Court in reviewing that approval have the right or duty to reach any ultimate conclusions on the issues of fact and law which underlie the merits of the dispute. It is well settled that in the judicial consideration of proposed settlements, ‘the [trial] judge does not try out or attempt to decide the merits of the controversy,’ [citation] and the appellate court ‘need not and should not reach any dispositive conclusions on the admittedly unsettled legal issue.’”

85 Cal. App. 4th 1135, 1146 (2000).

2. The Settlement is Presumed to Be Fair

The Court should begin its analysis with the presumption that the settlement is fair and should be approved:

[A] presumption of fairness exists where: (1) the settlement is reached through arm’s-length bargaining; (2) investigation and discovery are sufficient to allow counsel and the court to act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of objectors is small.

Dunk, 48 Cal. App. 4th at 1802; *7-Eleven Owners for Fair Franchising*, 85 Cal. App. 4th at 1146; *accord*, *Ellis v. Naval Air Rework Facility*, 87 F.R.D. 15, 18 (N.D. Cal. 1980); *In re Wash. Pub Power Supply*, 720 F. Supp. at 1387.

The settlement in the case at bar warrants approval and carries a presumption of fairness. As previously noted in the Motion for Preliminary Approval, this current settlement was negotiated at arm’s length. Agnew Decl. ¶ 2. Second, Class Counsel engaged in extensive factual

1 investigation before settling, including reviewing class data. *See id.* at ¶¶ 3, 4. Further, Class
2 Counsel is highly experienced in this type of litigation. As shown in the supporting declarations,
3 Class Counsel has significant experience in class actions and employment wage and hour
4 matters. *See id.* at ¶¶ 6-11; Rosenthal Decl. ¶¶ 4, 5.

5 **3. Two-Way Costs and Other Risks Inherent in Continued Litigation**
6 **Favor Final Approval**

7 To assess the fairness, adequacy and reasonableness of a class action settlement, the
8 Court also should weigh the immediacy and certainty of substantial settlement proceeds against
9 the risks inherent in continued litigation. *See also In re General Motors Corp.*, 55 F.3d 768, 806
10 (3d Cir. 1995) (“present value of the damages plaintiffs would likely recover if successful,
11 appropriately discounted for the risk of not prevailing, should be compared with the amount of
12 the proposed settlement”) (internal citations omitted); *Girsh v. Jepson*, 521 F.2d 153, 157 (3d
13 Cir. 1975); *Boyd v. Bechtel Corp.*, 485 F. Supp. 610, 616-17 (N.D. Cal. 1979).

14 If Plaintiff pursued this case without settlement and failed to prevail, Plaintiff would have
15 been potentially responsible for Defendant’s costs. As such, should any individual bring
16 individual claims against Defendant on the same causes of action, they would each face the
17 uncertainty of prevailing and the possibility of paying costs to Defendant. Accordingly, such
18 claims likely would not be brought—thus, this lawsuit achieves a true benefit for the class that
19 they might not otherwise get or seek as individuals. Here, given that a fair and reasonable
20 settlement has been reached, neither Plaintiff, nor any of the Class Members will be required to
21 pay for Defendant’s litigation costs.

22 The risks of this case were weighed by Class Counsel and should be considered a
23 significant factor by the Court in its determination of final approval. Class Counsel obtained a
24 very substantial settlement for the Class that resulted in a fair recovery which at the same time
25 provides for finality and no risk of costs by the Class Members or the Class Representative.

26 The Settlement Agreement also affords the Class prompt, fair relief, while avoiding
27 significant legal and factual battles that otherwise may have prevented the Class from obtaining
28 any recovery at all. While Class Counsel believe the Class Members’ claims are meritorious and

1 can be successfully litigated, they are experienced and fully understand the inherent risks and
2 uncertainty involved with such matters as the resolution of class certification, the outcome of a
3 potential trial, and the outcome of any appeals that would inevitably follow should the Class
4 prevail at trial. Class Counsel have also assessed the same risks in connection with the current
5 settlement. Because the settlement provides immediate and substantial relief, without the
6 attendant risks and delay of continued litigation—not to mention the threat of litigation fees and
7 costs—Class Counsel believe that the settlement warrants the Court’s final approval.

8 **4. The Complexity, Expense, and Likely Duration of Continued**
9 **Litigation Against Defendant Favor Final Approval**

10 Another factor considered by courts in approving a settlement is the complexity, expense,
11 and likely duration of the litigation. *See Officers for Justice*, 688 F.2d at 625; *Girsh*, 521 F.2d at
12 157. In applying this factor, the Court must weigh the benefits of the settlement against the
13 expense and delay involved in achieving an equivalent or more favorable result at trial. *Young v.*
14 *Katz*, 447 F.2d 431, 433-34 (5th Cir. 1971).

15 As noted in the Motion for Preliminary Approval, Defendant denies liability in this action
16 and has asserted a number of procedural and merit based defenses, including preemption of
17 California law by the Federal Motor Carrier Safety Administration’s (“FMCSA”) regulations. On
18 the other hand, the settlement that was reached provides to all Class Members—regardless of
19 their means—fair relief in a prompt and efficient manner. Were the Court to deny final approval,
20 the Class Members would be left without a remedy as a practical matter and courts across the
21 State would have to address the issues presented here in a piecemeal, costly, and time-consuming
22 manner. The settlement in this case is therefore consistent with the “overriding public interest in
23 settling and quieting litigation” that is “particularly true in class action suits.” *See Van*
24 *Bronkhorst*, 529 F.2d at 950 (footnote omitted); *see also 4 Newberg* § 11.41. Here, this case
25 would have likely involved years of litigation.

26 **5. The Opinion of Experienced Counsel Favors Final Approval**

27 Class Counsel supports the settlement as fair, reasonable, and adequate, and in the best
28 interest of the Class Members as a whole. Agnew Decl. ¶ 5; Rosenthal Decl. ¶ 2. Similarly,

counsel for Defendant is in favor of this settlement. The endorsement of qualified and well-informed counsel of a settlement as fair, reasonable, and adequate is entitled to significant weight by the Court in its final approval determination. *See Officers for Justice*, 688 F.2d at 625; *Ellis*, 87 F.R.D. at 18; *Boyd*, 485 F. Supp. at 617; *Linney*, 151 F.3d at 1242.

IV. THE REQUESTED CLASS REPRESENTATIVE ENHANCEMENT PAYMENT SHOULD BE APPROVED

Class Representative Pedro Cortez requests an Enhancement Payment of \$5,000.00. During the pendency of the Action, Plaintiff provided assistance to Class Counsel, including providing substantive documents and information regarding Defendant's practices. *See Cortez Decl.* ¶ 7. Additionally, Plaintiff spent a significant amount of time: (i) engaging in telephonic discussions with Class Counsel regarding the case; (ii) searching for documents relating to his claims, including pay records; (iii) reviewing various files and pleadings in this case, including the PAGA letter, the complaints and his declarations; and (iv) reviewing the Settlement Agreement. *See id.* Plaintiff has continuously been kept apprised of the status of this case. *See id.*

In addition to the invaluable services that Plaintiff provided, he took significant risks, both professionally and monetarily, in acting as the Class Representative, seeking benefits on behalf of the Class. *Cortez Decl.* ¶¶ 9-11. Because the claims alleged by Plaintiff involved the payment of costs to the prevailing party, Plaintiff could have possibly faced paying the costs of Defendant, had he not prevailed in this action. Moreover, Plaintiff understood that an individual case would have resolved much faster than a class action and involved much less financial risk than a class action. *See id.* at ¶ 9. Despite this, however, Plaintiff agreed to pursue this case on behalf of the Class. *See id.* at ¶ 11.

Also, given that future employers are much less likely to hire individuals who have filed employment-related lawsuits, particularly cases of this nature, Plaintiff also faced significant risk in not being able to find suitable employment, all as a result of filing of this case against Defendant. *Cortez Decl.* ¶ 10. Plaintiff took these risks upon himself to the benefit of the Class. *See id.* at ¶ 11. Class Members did not have to file individual lawsuits and bear the risks of payment of costs if they did not prevail, nor did they have to face the potential for retaliation and

1 not getting future employment had they filed a lawsuit which is a public record. These are
2 significant benefits that weigh in favor of granting the requested enhancement. As such, the
3 service payment should be awarded to Plaintiff for his commitment, dedication, and risks taken
4 for this litigation.¹

5 Courts have routinely granted approval of settlements containing such enhancements. *See*
6 *e.g., Herrera v. Federal Express Corporation*, 2020 WL 2951122 at *7 (C.D. Cal. March 31,
7 2020) (noting that case law supports enhancements of \$10,000); *Potter v. Big Text Trailer*
8 *Manufacturing, Inc.*, 2020 WL 1942619 at *10 (C.D. Cal. March 20, 2020) (awarding \$10,000
9 enhancement where plaintiff spent 30-40 hours on the matter and entered into a general release);
10 *Smith v. Experian Information Solutions, Inc.*, 2020 WL 6689209 at *7 (C.D. Cal. Nov. 9, 2020);
11 *Aikhan v. Goodrich Corporation*, 2020 WL 49191382 at *9 (C.D. Cal. June 25, 2020); *Thomas*
12 *v. Cognizant Technology Solutions U.S. Corporation*, 2013 WL 12371622 at *9 (C.D. Cal. June
13 24, 2013); *Djukich v. AutoNation, Inc.*, 2015 WL 13756099 at *14 (C.D. Cal. Nov. 12, 2015).
14 Moreover, it should be noted that there were no objections by any members of the Class to the
15 proposed Enhancement Payment.

16 For such reasons, Plaintiff respectfully requests that this Court approve the award of the
17 Enhancement Payment to Plaintiff.

18 **V. THE REQUESTED ATTORNEYS' FEES SHOULD BE APPROVED**

19 Class Counsel seeks a fee award calculated as approximately one-third of the total value
20 of the settlement for the successful prosecution and resolution of this action. Recently, the
21 California Supreme Court issued its ruling regarding the award of attorney's fees in wage and
22 hour class action settlements. Under California law, the award of attorneys' fees in common fund
23 wage and hour class action settlements should start with the percentage method. *See Laffitte v.*
24 *Robert Half Int'l*, 1 Cal. 5th 480, 503 (2016) ("We join the overwhelming majority of federal and
25 state courts in holding that when class action litigation establishes a monetary fund for the
26

27
28 ¹ Plaintiff also provided a general release of claims as part of the settlement, which included a
waiver of the protections of Civil Code section 1542. Settlement Agreement ¶ C-32.

1 benefit of the class members, and the trial court in its equitable powers awards class counsel a
2 fee out of that fund, the court may determine the amount of a reasonable fee by choosing an
3 appropriate percentage of the fund created”). Under the percentage of the fund method, the
4 Court’s objective remains to “mimic the market” in fixing a reasonable fee. *See Gaskill v.*
5 *Gordon*, 160 F.3d 361, 363 (7th Cir. 1998) (“When a fee is set by a court rather than by contract,
6 the object is to set it at a level that will approximate what the market will set...The judge, in
7 other words, is trying to mimic the market in legal services”).

8 An award of one-third or 33 1/3% of the fund in attorneys’ fees mimics the marketplace
9 as it “is supported by the fact that typical contingency fee agreements provide that class counsel
10 will recover 33% if the case is resolved before trial and 40% if the case is tried.” *Fernandez v.*
11 *Victoria Secret Stores LLC*, 2008 WL 8150856, *16 n. 59 (C.D. Cal. July 21, 2008) (citing
12 Brickman, *Effective Hourly Rates of Contingency-Fee Lawyers: Competing Data and Non-*
13 *Competitive Fees*, 81 Wash U. L. Q. 653, 659 n. 11 (Fall 2003)). Indeed, “empirical studies [that]
14 show that...fee awards in class actions average around one-third of the recovery.” *Chavez v.*
15 *Netflix, Inc.*, 162 Cal. App. 4th 43, 66 n.11 (2008).

16 The California Supreme Court in *Laffitte* affirmed a fee award representing 33 1/3
17 percent of the fund. *Laffitte*, 1 Cal. 5th at 506. And this was based on a lodestar amount that
18 required a multiplier of 2.13. *Id.* at 487. As the Court held, only when the multiplier is
19 “extraordinarily high or low [should] the trial court [] consider whether the percentage method
20 should be adjusted so as to bring the imputed multiplier within a justifiable range.” *Id.* at 505.

21 Moreover, in the *Laffitte* intermediate court decision, the court observed that “33 1/3
22 percent of the common fund is consistent with, and in the range of, awards in other class action
23 lawsuits.” *Laffitte v. Robert Half Int’l*, 231 Cal. App. 4th 860, 871 (2014). Here, the fee award
24 representing one-third of the fund clearly falls within that range and is consistent with other
25 comprehensive surveys of class action settlements and fee awards. *See Fitzpatrick, An Empirical*
26 *Study of Class Action Settlements and Their Fee Award*, 7 J. Empirical Leg. Stud. 811, 833
27 (2010) (analyzing 444 cases between 2006-2007 and concluding that “[m]ost fee awards were
28 between 25 percent and 35 percent, with almost no awards more than 35 percent”); Eisenberg &

1 Miller, *Attorney Fees in Class Action Settlements: An Empirical Study: 1993-2008*, 7 J. of
2 Empirical Leg. Stud. 248, 262, fn. 16 (2010) (independent studies of class action litigation
3 nationwide conclude that fees representing one-third of the total recovery is consistent with
4 market rates).

5 In addition, it is recognized that one of the primary factors justifying an enhanced
6 attorney's fees reward is the attendant risks inherent in the litigation. As observed in *City of*
7 *Detroit v. Grinnell Corp.*:

8 No one expects a lawyer whose compensation is contingent upon his success to
9 charge, when successful, as little as he would charge a client who had agreed to
10 pay for his services, regardless of success. Nor, particularly in complicated cases
11 producing large recoveries, is it just to make a fee depend solely on the reasonable
12 amount of time expended.

13 495 F.2d 448, 470 (2d Cir. 1974). Here, it is clear that a common fund of \$130,000.00 has been
14 created as the entire amount is to be paid out without any reversions. For Class Counsel, the fees
15 here were wholly contingent in nature and the case presented far more risk than the usual
16 contingent fee case. Among the risks was the cost inherent in class action litigation, as well as a
17 potentially drawn-out battle with a Defendant that retained premier defense counsel.

18 As a secondary support for the percentage of the fund method, when fees are allocated by
19 percentage method, courts have discretion to "cross-check" the fees awarded through the lodestar
20 method. However, the *Laffitte* Court "emphasize[d] [that] the lodestar calculation, when used in
21 this manner, does not override the trial court's primary determination of the fee as a percentage
22 of the common fund and thus does not impose an absolute maximum or minimum on the
23 potential fee award." *Laffitte*, 1 Cal. 5th at 505 (emphasis added); *In re Rite Aid Corp. Secs.*
24 *Litig.*, 396 F.3d 294, 306-307 (3d Cir. 2005) ("[The lodestar cross-check does not trump the
primary reliance on the percentage of common fund method]").

25 The Supreme Court in *Laffitte* stated: "If the multiplier calculated by means of a lodestar
26 cross-check is extraordinarily high or low, the trial court should consider whether the percentage
27 used should be adjusted so as to bring the imputed multiplier within a justifiable range, but the
28 court is not necessarily required to make such an adjustment." *Id.* Thus, a lodestar cross-check is

1 aimed at astronomical multipliers. Indeed, cross-checks are not required; in many cases,
2 performing a cross-check “undermines” one of the primary reasons for using the percentage
3 method: aligning counsel’s incentives with the benefits delivered to the class and discouraging
4 protracted litigation. *Id.* at 506 (finding trial courts “retain the discretion to forgo a lodestar
5 cross-check”); *Report of the Third Circuit Task Force, Court Awarded Attorney Fees* 108 F.R.D.
6 237, 258 (1985); *Lealao v. Beneficial California, Inc.*, 82 Cal. App. 4th 19, 29-30 (2000) (citing
7 the recommendations of the Third Circuit Task Force with approval and observing that “[t]he
8 criticisms of the lodestar approach set forth in this Report are now echoed by many authorities,
9 who have been most vocal about the manner in which it exacerbates the problem of ‘cheap
10 settlements’ and burdens already overworked trial judge”).

11 Courts have defined reasonable multipliers on a lodestar cross-check to “range from 2 to
12 4 or even higher.” *Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 255 (2001); *see also*,
13 *e.g.*, *Sutter Health Uninsured Pricing Cases*, 171 Cal. App. 4th 495, 512 (2009) (applying a 2.52
14 multiplier on a cross-check in an antitrust class action); *Chavez*, 162 Cal. App. 4th at 60
15 (applying a 2.5 multiplier on a lodestar cross-check); *City of Oakland v. Oakland Raiders*, 203
16 Cal. App. 3d 78 (1988) (affirming a 2.34 multiplier without remand). The intermediate court in
17 *Laffitte*, after finding that “2 to 4” is a reasonable range for multipliers on a cross-check, affirmed
18 a 2.13 multiplier. *Laffitte*, 231 Cal. App. 4th at 881-82. The intermediate court opinion was
19 affirmed in full by the California Supreme Court in its new decision guiding lower courts on
20 assessing fees.

21 With respect to Class Counsel’s lodestar, to date, approximately 114.60 hours have been
22 expended by Class Counsel in this matter. Agnew Decl. ¶ 12; Rosenthal Decl. ¶ 6. The courts are
23 quite liberal in the evidence required to prove an attorney’s hours. Detailed time records are not
24 required. An attorney’s testimony alone may suffice: “Testimony of an attorney as to the number
25 of hours worked on a particular case is sufficient evidence to support an award of attorney fees,
26 even in the absence of detailed time records.” *Martino v. Denevi*, 182 Cal. App. 3d 553, 559
27 (1986). Reasonable hours include, in addition to time spent during litigation, the time spent
28 before the action is filed, including time spent interviewing the clients, investigating the facts and

1 the law, and preparing the initial pleadings. *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54,
2 62 (1980). Further, the fee award should include fees incurred to establish and defend the
3 attorneys' fee claim. *Serrano v. Unruh*, 32 Cal. 3d 621, 639 (1982) [*Serrano IV*]. Thus, Class
4 Counsel requests that the court find that these hours were reasonable in this litigation.

5 A reasonable hourly rate is the prevailing rate charged by attorneys of similar skill and
6 experience in the relevant community. *PLCM Group, Inc. v. Drexler*, 22 Cal. 4th 1084, 1095
7 (2000). The court may consider other factors when determining a reasonable hourly rate, *e.g.*, the
8 attorney's skill and experience, the nature of the work performed, the relevant area of expertise
9 and the attorney's customary billing rates. *Flannery v. California Highway Patrol*, 61 Cal. App.
10 4th 629, 632-33 (1998).

11 Class Counsel's skill and experience justify the requested rate. As shown in the
12 supporting declarations, Class Counsel have significant experience in the area of employment
13 and wage and hour class actions. Specifically, Class Counsel's practice focuses on representing
14 employees in employment matters, particularly wage and hour cases. Agnew Decl. ¶¶ 6-11;
15 Rosenthal Decl. ¶¶ 4, 5. As such, based on the hours and Class Counsel's hourly rate of \$700, the
16 total lodestar to be expended by Class Counsel through present will be approximately \$80,220,
17 which exceeds the amount of the requested fees. Agnew Decl. ¶¶ 12, 13; Rosenthal Decl. ¶¶ 6, 7.

18 It is further worth noting that "the response of the class members to attorneys' fee notice,
19 though not decisive, is relevant to the... reasonable determination" regarding fees. *Swedish*
20 *Hospital v. Shalala*, 1 F.3d 1261, 1272 (D.C. Cir. 1993). A positive response rate tends to
21 suggest that the court's "approximation of the market" for fees is well supported. *Id.* at p. 1269.
22 In this case, the Notice specifically notified Class Members that Class Counsel would be seeking
23 \$43,333.33 of the settlement fund as attorneys' fees. No Class Member has objected to the
24 settlement. This strong favorable response also supports the requested fees.

25 As such, the requested fee amount of \$43,333.33 is fair and reasonable, and should be
26 awarded in its entirety. Class Counsel risked not only a great deal of time, but also a great deal of
27 expense to ensure the successful litigation of this action on behalf of all Class Members.

1 **VI. THE COURT SHOULD APPROVE THE REQUEST FOR REIMBURSEMENT**
2 **OF COSTS**

3 The request for reimbursement of costs, in the amount of \$8,442.29 is fair and
4 reasonable. The costs are all litigation related costs, which have been detailed in the supporting
5 declaration of Class Counsel. *See* Agnew Decl. ¶ 14, Ex. B. Significantly, the costs sought are
6 significantly less than the \$15,000.00 permitted by the Settlement Agreement, such that the
7 remaining amount will be distributed to Class Members.

8 **VII. THE SETTLEMENT ADMINISTRATOR'S FEES AND COSTS SHOULD BE**
9 **APPROVED**

10 Pursuant to the terms of the Settlement Agreement, the fees and costs of the Settlement
11 Administrator, Phoenix Settlement Administrators, are to be paid out of the class settlement
12 funds. As shown on the Declaration of the Administrator, the settlement administration fees
13 expended in this matter amount to a total of \$3,250.00. Admin Decl. ¶ 15, Ex. B.²

14 For such reasons, it is requested that the Settlement Administrator's fees be approved.

15 **VIII. NOTICE TO THE LWDA & FINAL JUDGMENT**

16 Plaintiff will provide notice of this Motion to the LWDA in conjunction with this filing.
17 *See* Agnew Decl. ¶ 15.

18 **VIII. CONCLUSION**

19 For all the foregoing reasons, and on the basis of the authorities cited herein, Plaintiff
20 respectfully submits that the standards for final approval have been met, and the terms of the
21 Settlement Agreement are fair, adequate and reasonable.

22 Accordingly, Plaintiff respectfully request that the Court enter an Order in the form
23 proposed and submitted:

- 24 1. Granting final approval to the proposed Settlement Agreement in this action;

25 _____
26 ² In light of the number of Spanish speaking Class Members, the Parties agreed to send the
27 Notice Packet in English and Spanish. The additional \$500.00 in costs incurred for the
28 translation will be paid out of Class Counsel's litigation costs. *See* Admin Decl. ¶ 15; Agnew
Decl. ¶ 14.

1 2. Approving distribution of the settlement funds to the Class Members pursuant to
2 the terms of the Settlement Agreement;

3 3. Approving Plaintiff's request for an award of the Service Payment of \$5,000.00 to
4 Plaintiff, with payment pursuant to the terms of the Settlement Agreement;

5 4. Approving Plaintiff's request for an award to Class Counsel for \$43,333.33 in
6 attorneys' fees and \$8,442.29 in costs with payment pursuant to the terms of the Settlement
7 Agreement;

8 5. Approving Plaintiff's request for payment of the settlement administration costs
9 to Phoenix Settlement Administrators in the amount of \$3,250.00 with payment pursuant to the
10 terms of the Settlement Agreement; and

11 6. Entering final judgment as to all members of the Class in this action.

12 Dated: October 12, 2023

DIVERSITY LAW GROUP, P.C.

13
14 By:  _____
15 Larry W. Lee
16 Kristen M. Agnew
17 Nicholas Rosenthal
18 Attorneys for Plaintiff and the Class
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