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21 situated, and on behalf of the general public.

22
23 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
24 **IN AND FOR THE COUNTY OF SAN DIEGO**

25 ABEL ESCOBEDO and CHRISTOPHER
26 CARVER on behalf of themselves, all
27 others similarly situated, and on behalf of
28 the general public,

Plaintiffs,

v.

MATHESON TRI-GAS, INC. an unknown
business entity; and DOES 1 through 25,
inclusive,

Defendants.

Case No. 37-2020-00044507-CU-OE-CTL

**PLAINTIFFS' MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT OF MOTION FOR FINAL
APPROVAL OF CLASS ACTION
SETTLEMENT, ATTORNEYS' FEES,
COSTS, CLASS REPRESENTATIVE
SERVICE AWARDS, AND ENTERING OF
FINAL JUDGMENT**

Date: October 20, 2023
Time: 8:30 a.m.
Judge: Hon. Ronald F. Frazier
Dept.: C-65

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1 **I. INTRODUCTION**

2 This motion seeks final approval of a non-reversionary \$750,000 proposed wage and hour
3 class action settlement by Plaintiffs Abel Escobedo and Christopher Carver (hereinafter
4 “Plaintiffs”) on behalf of themselves and all non-exempt drivers, truck drivers, truck workers, or
5 similar job designations and titles, and all other similarly situated non-exempt employees of
6 Defendant Matheson Tri-Gas, Inc. (hereinafter “Defendant”) (hereinafter, Plaintiffs and Defendant
7 are collectively referred to as the “Parties”) at any time between December 4, 2016 and July 28,
8 2022 (“Class Period”). To date, there is a 100% participation rate amongst Class Members—that
9 is, there were no objections, no disputes, and no requests for exclusion. **The proposed settlement**
10 **is projected to pay an average estimated payment of \$2,312.60 per Class Member, with a**
11 **high payment of \$5,001.52.¹**

12 This case required 823 hours of attorney time from Class Counsel and sought relief for 186
13 individuals. This litigation involved investigations with Class Members throughout California,
14 extensive discovery, the production of thousands of documents and lines of data by Defendant,
15 and a full day of mediation.

16 Plaintiffs move for final approval of attorneys’ fees in the amount of \$250,000, which
17 represents one-third of the Gross Fund Value Amount (“GFVA”). As will be demonstrated herein,
18 Plaintiffs’ attorney fee request is supported using the percentage fee method and the lodestar
19 method. Second, Plaintiffs move for final approval of litigation costs in the amount of \$17,006.94
20 incurred in litigating this matter. Third, Plaintiffs move for final approval of the Class
21 Representative Service Awards in the amount of \$10,000 each to compensate the Class
22 Representatives for general releases of their claims against Defendants, and for the time they spent
23 on and the risks absorbed in undertaking this case. Plaintiffs played a vital role in representing the
24 other individuals in this case and spearheading the lawsuits to seek monetary relief for them.
25 Fourth, Plaintiffs move for final approval of payment of \$7,850.00 to the Settlement Administrator,
26 Phoenix Settlement Administrators (“Phoenix”) for the costs and fees of administering settlement.
27 Fifth, Plaintiffs move for final approval of payment to the Labor and Workforce Development
28

¹ Declaration of Yami Burns (“Burns Dec.”) ¶ 13.

Agency (“LWDA”) under the Private Attorneys’ General Act (“PAGA”) in the amount of \$18,750 (75% of \$25,000 allocated to PAGA penalties).

The requested amounts of attorneys’ fees, litigation costs, class representative payments, settlement administration costs, and PAGA payment were fully disclosed to the Class Members when the Class Notice was mailed to them on March 30, 2023.² **Most importantly, the Settlement and all its terms received universal support from Class Members as there no were objections, no disputes, and no requests for exclusion.**³ The Court is therefore respectfully requested to honor the Class Members’ endorsement of the settlement and grant final approval of the settlement, attorneys’ fees, litigation costs, class representative payment, costs of settlement administration, and payment to the LWDA pursuant to PAGA in the amounts as preliminarily approved by this Court, as fully disclosed to the Class Members, and as requested herein.

II. BACKGROUND, INVESTIGATION, DISCOVERY

Defendant is a supplier of industrial and specialty gases, and gas handling equipment in the United States. In order to conduct its business, Defendant hires hourly driver employees, such as Plaintiffs and Class Members, to transport these gases and equipment in California. Declaration of David Mara, Esq. (“Mara Dec.”) ¶ 10.

On June 8, 2020, Plaintiff Escobedo sent notice to the California Labor and Workforce Development Agency (“LWDA”) of his intent to pursue various wage and our claims against Defendant on behalf of similarly situated aggrieved employees. Shortly thereafter, Plaintiff Escobedo filed a putative class action complaint on December 4, 2020, against Defendant, alleging causes of action for: (1) Failure to Pay Minimum Wage; (2) Failure to Pay Overtime Wages; (3) Failure to Provide Accurate, Itemized Wage Statements; (4) Failure to Permit Meal Periods; (5) Failure to Permit Rest Periods; (6) Waiting time penalties; (7) Civil Penalties Under the Private Attorney General Act of 2004; and (8) Unlawful Business Practices. Mara Dec ¶ 11.

On March 4, 2021, Plaintiff Carver sent notice to the LWDA of his intent to pursue various wage and hour claims against Defendant on behalf of similarly situated aggrieved employees. Shortly thereafter, Plaintiff Carver filed a putative class action complaint on May 10, 2021, against

² Burns Dec. ¶ 5, Ex. A.

³ Burns Dec. ¶¶ 8-10.

1 Defendant, alleging causes of action for: (1) Failure to Pay All Straight Time Wages; (2) Failure
2 to Pay All Overtime Wages; (3) Failure to Provide Meal Periods; (4) Failure to Authorize and
3 Permit Rest Periods; (5) Knowing and Intentional Failure to Comply with Itemized Employee
4 Wage Statement Provisions; (6) Failure to Pay All Wages Due at the Time of Termination of
5 Employment; (7) Irregular Pay Periods; (8) Failure to Adopt a Compliant Sick Pay/Paid Time Off
6 Policy; and (9) Violation of Unfair Competition Law. Plaintiff Carver also filed a separate action
7 alleging identical violations of the California Labor Code and seeking civil penalties under the
8 PAGA on May 10, 2021, against Defendant. Mara Dec ¶ 12.

9 After agreement amongst the Parties to consolidate the matters, Plaintiffs filed a First
10 Amended Complaint in this matter on or around August 30, 2021, which added the entirety of the
11 claims alleged by Plaintiff Carver in the two other actions. The two actions filed by Plaintiff Carver
12 were then dismissed without prejudice. Mara Dec. ¶ 13.

13 Defendant filed an Answer to the First Amended Complaint on or around October 4, 2021.
14 Defendant denies the allegations of the action in its entirety, deny any liability or wrongdoing of
15 any kind associated with the claims alleged in this action, and further deny that, for any purpose
16 other than settling this action, this matter is appropriate for class treatment. Defendant further
17 contends that they have complied with all applicable California laws, the California Labor Code,
18 the applicable California Wage Order(s), and the Unfair Competition Law. Defendant finally
19 contends that, if this matter were to be litigated further, they would have strong defenses to oppose
20 class certification and succeed on the merits of Plaintiffs' causes of action. Mara Dec. ¶ 14.

21 **a. Discovery and Investigation**

22 Through discovery, Plaintiffs sought numerous documents and substantial amounts of data
23 that were needed to evaluate the case. These documents included requests for time and wage
24 records for the Class, policies and practices in place during the class period, employee training in
25 place during the class period, as well as data surrounding the number of current and former
26 employees. Mara Dec. ¶ 15.

27 This discovery, in conjunction with the Parties' meet and confer efforts, resulted in the
28 production of over 10,000 documents and thousands of lines of data, including Defendant's

1 employee policies and practices, and paystubs and time records for Plaintiffs and Class Members.
2 Using the time and wage records for the Class provided and the data surrounding the number of
3 current and former employees, Plaintiffs were able to establish a potential exposure model in
4 preparation for mediation. Mara Dec. ¶ 16.

5 **b. The Parties' Staunchly Conflicting Positions**

6 As discussed at length in Plaintiffs' Motion for Preliminary Approval, the gravamen of
7 Plaintiffs' claims is that Defendants failed to pay Class Members for all time worked, failed to pay
8 Class Members contractually agreed upon overtime, and failed to provide Class Members with
9 lawful wage statements. This proposed Settlement was only possible following significant
10 discovery and evaluation of Defendants' relevant policies, procedures, and records, which
11 permitted Plaintiffs' Counsel to engage in a comprehensive analysis of liability and potential
12 damages to prepare for the mediation and class certification. Mara Dec. ¶ 17.

13 Defendants vigorously deny Plaintiffs' contentions, claiming that Class Members were
14 paid for all time worked, were not contractually promised overtime, and were provided with lawful
15 wage statements. Defendants contend that all of the challenged policies and practices comply with
16 California law and that the limited individualized accusations of Plaintiffs are complete outliers,
17 rendering this matter unsuitable for class certification. Mara Dec. ¶ 18.

18 **c. The Parties Attended Mediation Which Led to Settlement**

19 The Parties agreed to attend mediation with mediator Jeff Ross, Esq. on July 28, 2022.
20 Shortly thereafter, Mr. Ross issued a mediator's proposal, which was accepted on August 4, 2022.
21 The Parties then met and conferred regarding all the terms of the settlement and finalized the
22 Settlement Agreement that the Parties now seek to finally approve. Mara Dec. ¶ 19; **Exhibit 5**.

23 **III. THE PROPOSED SETTLEMENT AND THE CLASS MEMBERS' RESPONSE**

24 **a. Terms of the Proposed Settlement**

25 The Parties agreed (subject to and contingent upon the Court's approval) that this action
26 be settled and compromised for the non-reversionary total sum of \$750,000 GFVA which includes,
27 subject to Court approval: (a) attorneys' fees of up to \$250,000 (one-third of the GFVA) to
28 compensate Class Counsel for work already performed and all work remaining to be performed in

1 documenting the settlement, administrating the settlement and securing Court approval; (b)
2 litigation costs of \$17,006.94 (originally estimated not to exceed \$20,000); (c) Class
3 Representative Service Payments to the named class representatives, Abel Escobedo and
4 Christopher Carver, in a sum not to exceed \$10,000 each in consideration for general releases of
5 their claims against Defendants and for initiating and prosecuting this Class Action, serving as
6 Class Representatives, work performed, and risks undertaken for the payment of Defendants'
7 attorneys' fees and costs in the event they had been unsuccessful in either matter; (d) claims
8 administration fees and expenses to Phoenix, in the amount of \$7,850.00; and (e) the \$25,000
9 allocated to Plaintiffs' claims under the PAGA. Mara Dec. ¶ 20.

10 After all Court-approved deductions from the GFVA, it is estimated that \$430,143.06,
11 ("Net Fund Value Amount" or "NFVA"), less all applicable employee taxes, will be distributed to
12 Class Members – **with an average estimated payment of \$2,312.60 per Class Member, and a**
13 **high payment of \$5,001.52.** One hundred percent (100%) of the NFVA will be paid to the Class
14 Members, less taxes. Subject to the terms and conditions of the settlement, the NFVA will be
15 allocated among Settlement Class Members according to each Settlement Class Member's
16 workweeks during the Class Period as a *pro rata* portion of the total combined workweeks of all
17 the Settlement Class Members during the Class Period as derived from Defendants' records.

18 **Under no circumstances will any portion of the \$750,000 settlement revert to**
19 **Defendant.**

20 **b. Released Claims**

21 Upon cashing their checks for their Individual Settlement Payments, the Class
22 Representatives and the Class Members, release any and all claims that are asserted in the operative
23 complaint and which could have been asserted based on the facts alleged in the complaint. A full
24 recital of the released claims can be found in **Exhibit 5** attached to the Declaration of David Mara,
25 Esq., which is the Settlement Agreement, in Section 3(e).

26 **c. The Class Members Overwhelmingly Support the Settlement – No Objections,**
27 **No Opt-Outs, and 100% of the Settlement Payment Will Be Paid to the Class**

28 On March 3, 2022, the Court granted preliminary approval, conditionally certified the
Class, appointed Phoenix to act as the Settlement Administrator, approved the notice to be sent to

1 the Class, and directed that the notice be mailed to the Class by First Class U.S. Mail. On March
2 10, 2023, Phoenix received the class data file from Counsel for Defendant, which contained the
3 name, social security number, last known mailing address, employment dates, and the total number
4 of applicable workweeks worked for each Settlement Class Member. Burns Dec. ¶ 3. On March
5 13, 2023, Phoenix conducted a National Change of Address (“NCOA”) search in an attempt to
6 update the class list of addresses as accurately as possible. *Id.* at ¶ 4. A search of this database
7 provides updated addresses for any individual who has moved in the previous four (4) years and
8 notified the U.S. Postal Service of their change of address. *Id.* On March 30, 2023, the Notice was
9 mailed, via U.S First Class Mail, to all 186 individuals contained in the Class List. *Id.* at ¶ 5.

10 Ten (10) Notices were returned to Phoenix by the Post Office. Burns Dec. ¶ 6. Phoenix
11 performed a computerized skip trace on the returned Notices that did not have a forwarding
12 address, in an effort to obtain an updated address for purpose of re-mailing the Notice. *Id.* Seven
13 (7) Notices were re-mailed as a result of a skip trace or through a forwarding address. *Id.* Three
14 (3) Notices have been deemed undeliverable, since they were again returned by the post office
15 after a second remailing. *Id.* at ¶ 7.

16 In sum, the settlement was received with overwhelming support from the Class Members.
17 Specifically, there were no objections, disputes, and no requests for exclusion submitted by Class
18 Members. Burns Dec. ¶¶ 8-10. This means all 186 Class Members, or 100%, will receive a
19 settlement payment. *Id.* at ¶ 11.

20 IV. ARGUMENT

21 a. The Settlement is Fair, Reasonable, and Adequate Based on the Strengths of 22 Plaintiffs’ Case, the Risks and Costs of Further Litigation, and Satisfies the Standard for Final Approval

23 California Rule of Court, Rule 3.769, requires court approval for class action settlements.
24 Cal. R. Ct. 3.769(g). California courts favor settlement. *Stambaugh v. Superior Court* (1976) 62
25 Cal. App. 3d 231, 236, *Potter v. Pacific Coast Lumber Co. of Cal.* (1951) 37 Cal. 2d 592, 602
26 (“[T]he law wisely favors settlements”). Accordingly, the Court must give “[due] regard to what
27 is otherwise a private consensual agreement between the parties.” *Wershba v. Apple Computer,*
28 *Inc.* (2001) 91 Cal. App. 4th 224, 245.

1 In deciding whether to approve a class settlement, a court evaluates whether the proposed
2 settlement is “fair, adequate, and reasonable.” *Dunk v. Ford Motor Co.* (1996) 48 Cal. App. 4th
3 1794, 1801 (citing *Officers for Justice v. Civil Serv. Comm’n of City & Cnty. of S.F.* (9th Cir. 1982)
4 688 F.2d 615, 625); *Cho v. Seagate Tech. Holdings, Inc.* (2009) 177 Cal. App. 4th 734, 742 43. A
5 court enjoys broad discretion to make its fairness determination. *Dunk*, 48 Cal. App. 4th at 1801.

6 However, “a presumption of fairness exists where: (1) the settlement is reached through
7 arm’s-length bargaining; (2) investigation and discovery are sufficient to allow counsel and the
8 court to act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of
9 objectors is small.” *Dunk*, 48 Cal. App. 4th at 1802; *accord Wershba*, 91 Cal. App. 4th at 245. In
10 addition, a court should consider additional relevant factors, including the strength of the plaintiff’s
11 case compared to the settlement amount; the risk, expenses, complexity, and likely duration of
12 further litigation; and the fair treatment of class members in relation to each other. *Id.* at 1802.

13 At the time of preliminary approval, the Court was provided with sufficient information to
14 satisfy three of the four *Dunk* factors, leaving the fourth factor, the number of objectors, unknown
15 until after the Class had an opportunity to respond to the Settlement as explained in the Class
16 Notice.⁴ Subject only to the Class’ reaction to the Settlement, the Court preliminarily presumed
17 the Settlement was fair, adequate and reasonable. Following dissemination of the Class Notice,
18 and adequate time provided to the Class to return an objection to the Settlement, no class members
19 objected to the Settlement. Burns Dec. ¶ 9. Thus, the proposed settlement is entitled to the
20 presumption that it is fair and in all other respects proper and should be finally approved.

21 Furthermore, although Plaintiffs are confident in the strengths of their claims and believes
22 this case is suitable for certification on the claimed basis that there are company-wide policies and
23 practices that Plaintiffs contend violate California law and uniformly affect the Class Members,
24 Defendants’ counterarguments raise uncertainties with respect to both class certification and
25 success on the merits. As the California Supreme Court ruled in *Sav-On v. Superior Court* (2004)
26 34 Cal.4th 319, class certification is always a matter of the trial court’s sound discretion. Decisions

27 ⁴ See Memorandum of Points and Authorities in Support of Preliminary Approval, filed on February 7, 2023. In
28 addition to the *Dunk* factors, Class Counsel also detailed the other factors such as the strengths of Plaintiff’s case,
risks and costs of further litigation, as well as the reasonableness of the GFVA amount in light of *Kullar v. Foot Locker
Retail, Inc.* (2008) 168 Cal.App.4th 116. *Id.*

1 following *Sav-On* have reached different conclusions, with respect to certification of wage and
2 hour claims.⁵ In light of Defendants’ defenses, supporting evidence, and position that the action is
3 not suitable for class treatment, the settlement amount of \$750,000 — **with an average settlement**
4 **share estimated at \$2,312.60, with a high payment of \$5,001.52** — Plaintiffs and their counsel
5 believe this is a reasonable and fair settlement. Mara Dec. ¶ 21.

6 **V. THE COURT SHOULD APPROVE THE REQUESTED FEES AND COSTS**

7 **a. The Requested Fee Award is Fair and Reasonable, Calculated as a Percentage**
8 **of a Common Fund**

9 Class Counsel applies for an award of attorneys’ fees in the sum of \$250,000 (which is
10 one-third of the GFVA), and litigation costs of \$17,006.94 (originally estimated not to exceed
11 \$20,000). Mara Dec. ¶ 22. California courts have recognized an appropriate method for
12 determining an award of attorneys’ fees is based on a percentage of the total value of benefits to
13 Class Members by the settlement, also known as the “common fund” method. *Serrano v. Priest*
14 (1977) 20 Cal.3d 25, 34 (*Serrano III*) 34 (“when a number of persons are entitled in common to a
15 specific fund, and an action brought by a plaintiff or plaintiffs for the benefit of all results in the
16 creation or preservation of that fund, such plaintiff or plaintiffs may be awarded attorney’s fees
17 out of the fund.”); *Serrano v. Unruh*, 32 Cal.3d 621, 627 (1982) (in awarding a fee from the
18 common fund obtained for the benefit of all parties, the trial court acts within its equitable power
19 to prevent the other parties’ unjust enrichment.); *Rawlings v. Prudential-Bache Properties, Inc.*, 9
20 F.3d 513, 516 (6th Cir. 1993) (the percentage of the fund method for calculating attorney’s fees
21 more accurately reflects the results achieved for the putative class than the lodestar method and
22 “establishes reasonable expectations on the part of plaintiffs’ attorneys as to their expected
23 recovery; and it encourages early settlement, which avoids protracted litigation.”); *In re Rite Aid*
24 *Corp. Securities Litigation*, 396 F.3d 294, 300 (3d Cir. 2005) (“The percentage-of-recovery
25 method is generally favored in common fund cases because it allows courts to award fees from the

26 ⁵ See, e.g., *Harris v. Superior Court* (2007) 154 Cal. App. 4th 164 (reversing decertification of class claiming
27 misclassification and ordering summary adjudication in favor of employees), *review granted*, 171 P.3d 545 (2007)
28 (not cited as precedent, but rather for illustrative purposes only); *Walsh v. IKON Solutions, Inc.* (2007) 148 Cal. App.
4th 1440 (affirming decertification of class claiming misclassification); *Aguilar v. Cintas Corp. No. 2* (2006) 144 Cal.
App. 4th 121 (reversing denial of certification); *Dunbar v. Albertson’s Inc.* (2006) 141 Cal. App. 4th 1422 (affirming
denial of certification).

1 fund ‘in a manner that rewards counsel for success and penalizes it for failure.’”).

2 The purpose of the common fund/percentage approach is to “spread litigation costs
3 proportionally among all the beneficiaries so that the active beneficiary does not bear the entire
4 burden alone.” *Vincent v. Hughes Air West, Inc.* (9th Cir. 1977) 557 F.2d 759, 769. In *Quinn v.*
5 *State of California* (1995) 15 Cal.3d 162, 167, the Court stated: “[O]ne who expends attorneys’
6 fees in winning a suit which creates a fund from which others derive benefits may require those
7 passive beneficiaries to bear a fair share of the litigation costs.” Similarly, in *City and County of*
8 *San Francisco v. Sweet* (1995) 12 Cal.4th 105, 110, the California Supreme Court recognized that
9 the common fund doctrine has been applied “consistently in California when an action brought by
10 one party creates a fund in which other persons are entitled to share.” The reasons for applying the
11 common fund doctrine include: “...fairness to the successful litigant, who might otherwise receive
12 no benefit because his recovery might be consumed by the expenses; correlative prevention of an
13 unfair advantage to the others who are entitled to share in the fund and who should bear their share
14 of the burden of its recovery; encouragement of the attorney for the successful litigant, who will
15 be more willing to undertake and diligently prosecute proper litigation for the protection or
16 recovery of the fund if he is assured that he will be properly and directly compensated should his
17 efforts be successful.” *Id.*

18 Indeed, the California Supreme Court confirmed in *Laffitte v. Robert Half Int’l, Inc.* that
19 using the percentage method has many advantages:

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

26 *Id.* at 503 (internal citation omitted).⁶ Because there is a defined and traceable benefit to the Class,
27 the Court can base an award of attorneys’ fees using a ‘common fund’ approach.

28 ⁶ *Laffitte* also held trial courts have discretion to assess reasonableness of fee awards with tools such as the lodestar cross-check, although they need not do so. *Laffitte*, 1 Cal.5th at 506 (“We hold further that trial courts have discretion to conduct a lodestar cross-check on a percentage fee . . . they also retain the discretion to forgo a lodestar cross-check and use other means to evaluate the reasonableness of a requested percentage fee”).

1 **b. The Requested Attorneys' Fee and Cost Award is Within the Range of Fees**
2 **Approved in Comparable Common Fund Cases**

3 Several studies of class action fee awards have found that the median common fund fee
4 award is approximately one-third of the total settlement fund.⁷ The requested fee falls in the mid-
5 range of percentage class fee awards, which generally range from 20% to 50% of a common fund,
6 and it constitutes fair compensation for undertaking complex, risky, expensive, and time-
7 consuming litigation on a contingent basis and compensates Class Counsel for their efforts, as well
8 as the result achieved for the benefit of the Class. Numerous state and federal courts in California
9 routinely approve fee requests equal to or greater than 33% of the common fund. Indeed, courts
10 have found that an award of 33% of the common fund represents the “benchmark” in California.⁸
11 In short, Plaintiffs’ counsels’ fee request of \$250,000 (one-third of the GFVA) is in line with
12 awards in similar cases in California and nationwide and demonstrates that Plaintiffs’ counsels’
13 fee request is consistent with market rates and is reasonable.

14 **c. A Lodestar Cross-Check Confirms the Reasonableness of the Requested Fee**

15 Class Counsel’s fee request is reasonable when calculated using the lodestar method.
16 Under the lodestar method, a base fee amount is calculated from a compilation of time reasonably
17 spent on the case and the reasonable hourly compensation of the attorney. *Serrano v. Priest* (1977)
18 20 Cal. 3d 25, 48. The court then enhances this lodestar figure by a “multiplier” to account for a
19 range of factors, such as the novelty and difficulty of the case, its contingent nature, and the degree
20 of success achieved. *Id.*, at 49; see also *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1132-36; *PLCM*
21 *Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1096; *Thayer v. Wells Fargo Bank* (2001) 92
22 Cal.App.4th 819, 834, (“[t] there is no ... rule limiting the factors that may justify an exercise of
23 judicial discretion to [adjust the] lodestar”)

24 ⁷See, e.g., *Chavez v. Netflix, Inc.* (2008) 162 Cal. App. 4th 43, 66, n.11 (numerous studies have shown that “fee awards
25 in class actions average around one-third of the recovery.”); Reagan W. Silber and Frank E. Goodrich, *Common Funds*
26 *and Common Problems: Fee Objections and Class Counsel’s Response*, 17 Rev. Litig. 525, 546 ; T. Willging, L.
27 Hooper and R. Niemic, *Empirical Study of Class Actions in Four Federal District Courts: Final Report to the*
28 *Advisory Committee on Civil Rules*, 90 (1996) (finding that attorneys’ fees in class litigation “were generally in the
 traditional range of approximately one-third of the total settlement”).

⁸ *Smith v. CRST Van Expedited, Inc.* (S.D. Cal. Jan. 14, 2013) 10-CV-1116- IEG WMC, 2013 WL 163293, *5 (“These
percentages compare favorably with both California (33%) and federal (25%) benchmarks.”); *Dennis v. Kellogg Co.*
(S.D. Cal. Nov. 14, 2013) 09-CV-1786-L WMC, 2013 WL 6055326, at *7 (“This percentage compares favorably with
both California (33%) and federal (25%) benchmarks and the requested fee compares well with a lodestar cross-check
as well.”).

As of the date of filing this Motion for Final Approval, Plaintiff's counsel has worked a total of 823 hours on this case and calculated the base lodestar at \$638,800 at rates reflecting those currently earned in the marketplace. Mara Dec. ¶¶ 23-25, 27-28; **Exhibit 1**; Declaration of Arthur R. Botham, Jr., Esq. ("Botham Dec.") ¶¶ 13-18; Declaration of Zachary T. Tyson, Esq. ("Tyson Dec.") ¶¶ 3, 5-6. All of the work and tasks performed by Plaintiff's counsel were reasonable and necessary to the prosecution of this case. Mara Dec. ¶¶ 23-25, 27-28; Botham Dec. ¶¶ 13-18; Tyson Dec. ¶¶ 3, 5-6. As Class Counsel's lodestar fee is in excess of their fee request, a multiplier on their lodestar fee is not sought herein. Mara Dec. ¶ 23. In fact, the requested fee results in a so-called "negative multiplier" which suggests the percentage of the fund amount is reasonable and fair.⁹

d. Class Counsel's Hourly Rates Are Reasonable

Class Counsels' hourly rates are between \$600 and \$850 and are in line with rates typically approved in wage and hour class action litigation and which have been approved by Los Angeles, Sacramento, San Francisco, Alameda, Orange and San Diego County Superior Courts.¹⁰ A reasonable hourly rate is the prevailing rate charged by attorneys of similar skill and experience in the relevant community. *PLCM Group, Inc v. Drexler* (2000) 22 Cal. 4th 1084, 1095. When determining a reasonable hourly rate, courts may consider factors such as skill and experience, the nature of the work performed, the relevant area of expertise and the attorney's customary billing rates. *Flannery v. California Highway Patrol* (1998) 61 Cal. App. 4th 629, 632.

Plaintiffs' counsels' skill and experience support their hourly rates. Their practice is limited exclusively to litigation, focusing on the representation of employees in wage and hour and consumer class action matters. Mara Decl. ¶¶ 2-9, 26; Botham Dec. ¶¶ 2-3; Tyson Dec. ¶¶ 4. As prominent attorneys in the field of wage and hour class action litigation, Plaintiffs' counsel continually monitors the prevailing market rates charged by both defense and plaintiff law firms and set the billing rates of their attorneys and paralegals to be consistent with the prevailing market rates in the private sector for attorneys and staff of comparable skill, qualifications and experience.

⁹ See *Chun-Hoon v. McKee Foods Corp.* (N.D. Cal. 2010) 716 F.Supp.2d 848, 854; *In re Portal Software, Inc. Securities Litigation* (N.D. Cal. 2007) 2007 U.S. Dist. LEXIS 88886, 2007 WL 4171201, at *16.

¹⁰ Mara Dec. ¶¶ 25, 27; **Ex. 2** Westlaw Court Express's Legal Billing Report, Volume 14, Number 3, California Region for December 2012; **Ex. 3**, 2014 Declaration of Richard M. Pearl in *Hohnbaum v. Brinker Restaurant Corp.* SDSC GIC834348; **Ex. 4**, 2012 National Law Journal Survey of Hourly Billing Rates for Partners and Associates.

1 Other wage and hour attorneys working as class counsel before California courts charge
2 comparable if not higher rates.¹¹ Therefore, as they are in line with those of the relevant
3 community, Class Counsels' hourly rates are reasonable.

4 **e. Class Counsels' Total Hours are Reasonable**

5 In determining a lodestar fee, reasonable hours include, in addition to time spent during
6 litigation, the time spent before the action was filed, including time spent interviewing clients,
7 investigating the facts and the law, and preparing the initial pleadings. *See New York Gaslight*
8 *Club, Inc. v. Carey* (1980) 447 U.S. 54, 62. The fee award should include fees incurred to establish
9 and defend the attorneys' fee claim. *Serrano v. Priest* (1982) 32 Cal.3d 621, 639.

10 To date, Plaintiffs' Counsel has expended a total of 823 hours litigating this case. The work
11 performed to achieve a settlement that will provide valuable consideration to the Class, **averaging**
12 **an estimated payment of \$2,312.60**¹², is summarized by Class Counsel in the declarations
13 submitted herewith. Mara Dec. ¶¶ 23-25, 27-28; Ex. 1; Botham Dec. ¶¶ 13-18; Tyson Dec. ¶¶ 3,
14 5-6. Counsel's many tasks, in summary form, included the following: Counsel's many tasks, in
15 summary form, included the following: pre-filing investigation and legal research; communicating
16 with the class representatives; interviewing and meeting with putative Class Members; research
17 and investigation of California's ever evolving wage and hour laws; investigation into Defendant's
18 pay-structures and policies for its hourly employees; drafting and filing pleadings; drafting and
19 filing notices to the LWDA; numerous conferences with Defendant's counsel regarding a variety
20 of issues throughout the litigation, mediation and settlement process; numerous interoffice
21 discussions about litigation strategy and theories of liability; appearing at hearings; review and
22 analyze documents produced by Defendants, create exhibits for use in the case; review case file
23 for mediation; draft mediation brief and exposure analysis; interoffice discussions about mediation
24 and mediation brief; prepare for and attend mediation; draft and revise long form settlement
25 agreement; draft motion for preliminary approval and supporting documents, communicate with
26 the settlement administrator throughout the administration process, and draft motion for final

27 ¹¹ Mara Dec. ¶¶ 25, 27, Ex. 2, Westlaw Court Express's Legal Billing Report, Volume 14, Number 3, California
28 Region for December 2012; Ex. 3, 2014 Declaration of Richard M. Pearl in *Hohnbaum v. Brinker Restaurant Corp.*
SDSC GIC834348; Ex. 4, 2012 National Law Journal Survey of Hourly Billing Rates for Partners and Associates).

¹² See Burns Dec. ¶ 13.

1 approval and supporting documents. All tasks and work performed were reasonable and necessary
2 to the prosecution of this case. The work performed was justified in light of the result achieved.
3 Mara Dec. ¶¶ 23-25, 27-28; Botham Dec. ¶¶ 13-18; Tyson Dec. ¶¶ 3, 5-6.

4 **f. Costs of Litigation**

5 Class Counsel seeks reimbursement of the litigation costs and expenses of \$17,006.94
6 (originally estimated not to exceed \$20,000). These costs were all reasonable and necessary to the
7 prosecution of this case and the results achieved and are fair, and reasonable. Mara Dec. ¶¶ 29-30,
8 **Ex. 1**; Botham Dec. ¶ 13.

9 **VI. THE CLASS REPRESENTATIVE SERVICE PAYMENTS ARE REASONABLE**

10 In addition, Plaintiffs agreed to a general release of their claims against Defendants in
11 exchange for the \$10,000 Class Representative Service Payments. Courts routinely approve
12 service payments, or incentive awards, to compensate a named plaintiff for the services he or she
13 provides and the risks he or she incurs during class litigation. *See In re Cellphone Fee Termination*
14 *Cases* (2010) 186 Cal.App.4th 1380, 1393; *see also Bell v. Farmers Ins. Exch.* (2004) 11
15 Cal.App.4th 715, 725-26 (upholding services payments to class representatives); *Munoz v. BCI*
16 *Coca-Cola Bottling Co. of Los Angeles* (2010) 186 Cal.App.4th 399, 412 (upholding incentive
17 awards to plaintiffs that, when added to their individual recoveries, amounted to more than twice
18 as much as the average payment to class members). Courts have regularly and routinely granted
19 approval of settlements containing such enhancements. *See, e.g., Staton v. Boeing*, 327 F.3d 938,
20 977 (9th Cir. 2003).¹³ In Class Counsel's experience, the typical enhancement award in wage and
21 hour class action settlements ranges from \$5,000 to \$75,000. Very commonly there is more than
22 one class representative who receives an award in the above range. Mara Dec. ¶ 31.

23 The requested payments are appropriate and reasonable and unopposed by Defendants.
24 This payment is made, in part, in exchange for Plaintiffs providing Defendant with a general
25 release of their claims. This general release is far greater than the release signed by class members.

26 ¹³ *See, e.g., Cook v. Niedert*, 142 F.3d 1004, 1015 (7th Cir. 1998); *Roberts v. Texaco*, 979 F. Supp. 185 (S.D.N.Y.
27 1997) ("present or past employee whose present position or employment credentials or recommendation may be at
28 risk by reason of having prosecuted the suit, who therefore lends his or her name and efforts to the prosecution of
litigation at some personal peril, a substantial enhancement award is justified"); *Thornton v. East Texas Motor Freight*,
497 F.2d 416, 420 (6th Cir. 1974) ("We also think there is something to be said for rewarding those drivers who
protect and help to bring rights to a group of employees who have been the victims of discrimination.").

1 There is no question that this case would not have reached the same result but for Plaintiffs'
2 involvement and input at all stages of the litigation. Mara Dec. ¶ 32.

3 As representative for the absent class members, Plaintiffs risked a potential judgment taken
4 against them for attorneys' fees and costs if this matter had not been successfully concluded. *See*
5 *Early v. Superior Court*, 79 Cal.App.4th 1420, 1433 (2000) (losing party is liable for the prevailing
6 party's costs); California Labor Code § 218.5 (prevailing party is entitled to attorneys' fees).
7 Plaintiffs risked having a cost bill entered against them leaving them ultimately liable for
8 potentially hundreds of thousands of dollars in the unexpected possibility that Plaintiffs' counsel
9 did not meet their obligation to cover those costs.

10 Unfortunately, there have been several judgments entered against class representatives, e.g.
11 *Koehl v. Verio, Inc.* 142 Cal.App.4th 1313, 1328 (2006) (a wage and hour class action where
12 Defendant prevailed at trial, the named Plaintiffs were held liable, jointly and severally for the
13 Defendant's attorneys' fees); *Whiteway v. Fedex Kinkos Office & Print Services, Inc.*, 2007 U.S.
14 Dist. LEXIS 95398 (N.D. Cal. 2007) (a wage and hour misclassification case lost on summary
15 judgment, after the case was certified, the named Plaintiff was assessed costs in the sum of
16 \$56,788.). The risk of payment of Defendants' costs, in itself alone, is a sufficient basis for an
17 award of the requested enhancement sum. Few individuals are willing to take this risk, and it is
18 clear that the appointed Class Representative here championed a cause on behalf of others with
19 potentially huge monetary risks.

20 Additionally, it is common knowledge that the modern-day work force is quite mobile,
21 with employees holding several jobs in a career during their lifetime. It is also true that prospective
22 employers in this computer, high-tech age "Google" and/or do extensive background checks and
23 have access to Court databases to see if applicants have ever filed a lawsuit or have ever been sued.
24 Here, Plaintiffs litigated against Defendants for a substantial sum of money by their courage to
25 step forward to vindicate not only his own rights but also, those of the similarly situated
26 individuals, all of whom will now receive substantial payments due to the initiation of this action.
27 Such conduct will not be lost on a prospective employer who has to choose between an applicant
28 who has never sued an employer and one who has done so. The requested payment far from

1 compensates Plaintiffs for opportunities he may lose in the future because of the exercise of a
2 Constitutional right to petition the courts for redress of a grievance.

3 The payments request are modest for the work performed, risks undertaken for payment of
4 fees and costs if this case had not been successfully concluded, stigma on future employment
5 opportunities, and the benefits all members of the class as well as all current and future class
6 members will enjoy as a result of Plaintiffs efforts. Thus, the Court should approve the request.

7 **VII. THE ADMINISTRATION COSTS ARE REASONABLE**

8 The Parties agreed to hire Phoenix as the Administrator, and the Court approved this
9 choice. The Administrator was responsible for formatting, printing and mailing the Notice. It was
10 also responsible for updating addresses and re-mailing Notices returned as undeliverable,
11 responding to Class Member inquiries, answering questions from Counsel for the Parties, and
12 providing a declaration to document its duties and responsibilities under the settlement. Plaintiffs
13 now request that the Court finally approve the \$7,850 fee to Phoenix for services rendered and to
14 be rendered. Burns Dec. ¶ 16.

15 Following the grant of final approval, the Administrator's duties will continue in order to
16 calculate and mail the Individual Settlement Payment checks to Class Members, perform tax
17 reporting obligations, disburse other payments as ordered by the Court, and perform such other
18 duties as set forth in the Settlement Agreement. Phoenix's fee of \$7,850 for services rendered and
19 to be rendered is fair and reasonable and should be granted.

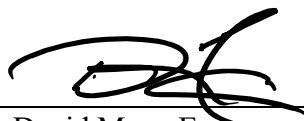
20 **VIII. CONCLUSION**

21 Based on the foregoing, Class Counsel respectfully requests the Court grant final approval
22 of the Class Action Settlement.

23
24 Dated: September 28, 2023

Respectfully submitted,

MARA LAW FIRM, PC

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