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situated, and on behalf of the general public.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF ALAMEDA

ARNOLD GARCIA, on behalf of himself,
all others similarly situated, and on behalf
of the general public,

Plaintiffs,

v.

MCCOLLISTER'S TRANSPORTATION
SYSTEMS, INC.; MCCOLLISTER'S
GLOBAL SERVICES, INC.;
MCCOLLISTER'S AUTO TRANSPORT,
LLC; and DOES 1-100,

Defendants.

Case No. RG21112345

[Consolidated with Case No. RG21112189]

**PLAINTIFF'S MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT OF MOTION FOR FINAL
APPROVAL OF CLASS ACTION
SETTLEMENT, ATTORNEYS' FEES,
COSTS, CLASS REPRESENTATIVE
ENHANCEMENT PAYMENT, AND
ENTERING OF FINAL JUDGMENT**

Date: August 29, 2023
Time: 3:00 p.m.

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1 **I. INTRODUCTION**

2 This motion seeks final approval of a non-reversionary \$400,000 proposed wage and hour
3 class action settlement by Plaintiff Arnold Garcia (hereinafter “Plaintiff”) on behalf of himself and
4 all persons who contracted with Defendants McCollister’s Transportation Systems, Inc.,
5 McCollister’s Global Services, Inc., and McCollister’s Auto Transport, LLC. (“Defendants”)
6 (Plaintiff and Defendants are collectively referred to as the “Parties”) as an owner/operator to haul
7 freight, who worked a majority of their time under the contract in California and/or had their base
8 of operations in California, whom Defendants classified as independent contractors, and who
9 drove in California at any time between September 10, 2017, through January 7, 2023 (“Class
10 Period”). To date, there is a 100% participation rate amongst Class Members—that is, there were
11 no requests for exclusion, no objections, and no disputes. **The proposed settlement is projected**
12 **to pay an average estimated payment of \$7,388.62 per Class Member, with a high payment**
13 **of \$18,782.61.¹**

14 This case required 356 hours of attorney time from Class Counsel and sought relief for 29
15 individuals. This litigation involved investigations with Class Members throughout California,
16 extensive discovery, the production of hundreds of documents and thousands of lines of data by
17 Defendants, and a full day of mediation, with extensive post-mediation negotiations.

18 Plaintiff moves for final approval of attorneys’ fees in the amount of \$133,333.33, which
19 represents 33 1/3% of the Gross Settlement Amount (“GSA”). As will be demonstrated herein,
20 Plaintiff’s attorney fee request is supported using the percentage fee method and the lodestar
21 method. Second, Plaintiff moves for final approval of litigation costs in the amount of \$14,901.58
22 incurred in litigating this matter. Third, Plaintiff moves for final approval of the Class
23 Representative Enhancement Payment in the amount of \$7,500 to compensate the Class
24 Representative for a general release of his claims against Defendant, and for the time he spent on
25 and the risks absorbed in undertaking this case. Plaintiff played a vital role in representing the
26 other individuals in this case and spearheading the lawsuits to seek monetary relief for them.
27 Fourth, Plaintiff moves for final approval of payment of \$4,995 to the Settlement Administrator,

28

¹ Declaration of Taylor Mitzner (“Mitzner Dec.”) ¶ 14.

Phoenix Settlement Administrators (“Phoenix”) for the costs and fees of administering settlement. Fifth, Plaintiff moves for final approval of payment to the Labor and Workforce Development 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 payment, settlement administration costs, and PAGA payment were fully disclosed to the Class Members when the Class Notice was mailed to them on May 5, 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

Defendants are in the business of transporting freight for their customers. In order to accomplish this, Defendants contract with drivers who enter into independent contractor operating agreements with Defendants (“owner operators”) to provide the trucks and equipment to facilitate transport. Plaintiff Arnold Garcia contracted with Defendants as an owner operator. Declaration of David Mara, Esq. (“Mara Dec.”) ¶ 10.

On July 1, 2021, in compliance with Labor Code § 2699.3(a)(1), Plaintiff submitted written notice via online filing to the LWDA, setting forth the facts and theories of the violations alleged against Defendants, claiming that he and others were misclassified by Defendants as independent contractors. Plaintiff then filed a PAGA action against Defendants on September 9, 2021, in Alameda Superior Court, Case No. RG21112189, entitled *Arnold Garcia v. McCollister’s Transportation Systems, Inc., et al.* He alleged causes of action on behalf of himself and other owner operators seeking civil penalties under PAGA for: (1) Failure to Pay for All Time Worked;

² Mitzner Dec. ¶ 5, Ex. A

³ Mitzner Dec. ¶¶ 8-10.

(2) Failure to Provide Meal Periods; (3) Failure to Authorize and Permit Rest Periods; (4) Failure to Pay All Wages Due at Termination; (5) Failure to Provide Itemized Wage Statements; (6) Failure to Pay All Wages Owed Twice Per Month; (7) Failure to Reimburse Business Expenses; and (8) Willful Misclassification. Mara Dec ¶ 11.

Plaintiff also filed a class action against Defendants on September 10, 2021, in Alameda Superior Court, Case No. RG21112345, entitled *Arnold Garcia v. McCollister's Transportation Systems, Inc., et al.* Claiming that he and others were misclassified by Defendants as independent contractors, he alleged causes of action on behalf of himself and other owner operators for: (1) Failure to Pay for All Time Worked; (2) Failure to Provide Meal Periods; (3) Failure to Authorize and Permit Rest Periods; (4) Failure to Provide Itemized Wage Statements; (5) Failure to Pay All Wages Due at Termination; (6) Failure to Reimburse Business Expenses; and (7) Violation of Unfair Competition Law.⁴ Mara Dec ¶ 12.

Defendants deny the allegations of the actions in their entirety, deny any liability or wrongdoing of any kind associated with the claims alleged in these actions, and further deny that, for any purpose other than settling these actions, this matter is appropriate for class treatment. Defendants further contend that they have complied with all applicable California laws, the California Labor Code, the applicable California Wage Order(s), and the Unfair Competition Law. Defendants finally contend that, if this matter were to be litigated further, it would have strong defenses to oppose class certification and succeed on the merits of Plaintiff's causes of action. Mara Dec. ¶ 13.

a. Discovery and Investigation

Through discovery, Plaintiff sought numerous documents and substantial amounts of data that were needed to evaluate the case. These documents included the contracts entered into between Defendants and owner operators, records reflecting freight hauled by Class Members for Defendants during the Class Period, as well as what they were paid for delivering the freight, including any deductions taken from payment by Defendants, policies and practices in place during the class period, detailing requirements and expectations for Class Members when delivering

⁴ As part of the settlement process, the Parties have stipulated to consolidate these actions under the case number of the class action matter, RG21112345.

1 freight for Defendants’ customers, as well as data surrounding the number of current and former
2 employees. Mara Dec. ¶ 14.

3 **b. The Parties’ Staunchly Conflicting Positions**

4 The gravamen of Plaintiff’s claims is that Defendants misclassified Plaintiff, and other
5 owner operators, as independent contractors under both the test in *S. G. Borello & Sons, Inc. v.*
6 *Department of Industrial Relations* (1989) 48 Cal.3d 341, as well as the “ABC test” outlined in
7 the California Supreme Court decision in *Dynamex Operations West, Inc. v. Superior Court* (2018)
8 4 Cal.5th 903, denying them the protections provided to employees under California law. This
9 proposed Settlement was only possible following significant discovery and evaluation of
10 Defendants’ relevant policies, procedures, and records, which permitted Plaintiff’s Counsel to
11 engage in a comprehensive analysis of liability and potential damages to prepare for the mediation
12 and class certification. Mara Dec. ¶ 15.

13 Defendants vigorously deny Plaintiff’s contentions, claiming that Plaintiffs and putative
14 class members are not its employees, and that it does not control any aspect of how Plaintiff and
15 putative class members perform their jobs. Defendant claims it is lawfully contracting with the
16 owner operators, who are running their own separate businesses, to facilitate the delivery of the
17 customer’s freight, and do not control any aspect of the manner and means in which owner
18 operators utilize to complete these deliveries. Mara Dec. ¶ 16.

19 As evidenced above, the Parties took staunchly conflicting positions with respect to
20 Plaintiff’s claims.

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

22 The Parties agreed to attend mediation with respected wage and hour mediator Mark Rudy
23 on August 16, 2022. The matter did not settle at mediation. Mr. Rudy remained in regular contact
24 with the Parties to facilitate negotiations, culminating in Mr. Rudy issuing a mediator’s proposal,
25 which the Parties accepted on November 8, 2022. Since then, the Parties have met and conferred
26 regarding the terms of the settlement and finalized their agreement in the Settlement. The Parties
27 seek preliminary approval of the Settlement in the instant motion. Mara Dec. ¶ 17; **Exhibit 5**.

III. THE PROPOSED SETTLEMENT AND THE CLASS MEMBERS' RESPONSE

a. Terms of the Proposed Settlement

The Parties agreed (subject to and contingent upon the Court's approval) that this action be settled and compromised for the non-reversionary total sum of \$400,000 ("Gross Settlement Amount" or "GSA") which includes, subject to Court approval: (a) attorneys' fees of up to \$133,333.33 (33 1/3% of the GSA) to compensate Class Counsel for work already performed and all work remaining to be performed in documenting the settlement, administrating the settlement and securing Court approval; (b) litigation costs of \$14,827.58 (originally estimated not to exceed \$30,000); (c) Class Representative Enhancement Payment to the named class representative, Arnold Garcia, in a sum not to exceed \$7,500 in consideration for a general release of his claims against Defendants and for initiating and prosecuting this Class Action, serving as Class Representative, work performed, and risks undertaken for the payment of Defendants' attorneys' fees and costs in the event he had been unsuccessful in either matter; (d) claims administration fees and expenses to Phoenix, in the amount of \$4,995 (originally estimated not to exceed \$5,000); and (e) the \$25,000 allocated to Plaintiff's claims under the PAGA. Mara Dec. ¶ 18.

After all Court-approved deductions from the GSA, it is estimated that \$214,270.09, ("Net Settlement Amount" or "NSA"), less all applicable employee taxes, will be distributed to Class Members – **with an average estimated payment of \$7,388.62 per Class Member, and a high payment of \$18,782.61.** One hundred percent (100%) of the NSA will be paid to the Class Members, less taxes. Subject to the terms and conditions of the settlement, the NSA will be allocated among Settlement Class Members according to the number of weeks each Settlement Class Member contracted with and drove for Defendants during the Class Period as a *pro rata* portion of the total combined weeks that all the Settlement Class Members contracted with and drove for Defendants during the Class Period as derived from Defendant's records.

Furthermore, the Settlement allocates \$25,000 in consideration for the settlement of Plaintiff's PAGA claims, which is to be distributed separately from the NSA. Settlement Class Members who performed work for Defendant from July 1, 2020, one year prior to the submission of the written notice of Labor Code violations to the LWDA pursuant to Labor Code § 2699.3(a)(1), through January 7, 2023 ("PAGA Period") are also deemed "Aggrieved Employees" and able to

1 recover their share of the civil penalties under the settlement. 75% of this \$25,000, or \$18,750,
2 will be paid to the LWDA, while the remaining 25%, or \$6,250, will be distributed to the
3 Aggrieved Employees – with an average estimated payment of \$260.42 per Aggrieved Employee,
4 and a high payment of \$559.02. These payments will also be made according to the number of
5 weeks each Aggrieved Employee contracted with and drove for Defendants during the PAGA
6 Period as a *pro rata* portion of the total combined weeks of all the Aggrieved Employees that
7 contracted with and drove for Defendants during the PAGA Period. One day worked in a given
8 week will be credited as a workweek for purposes of this calculation.

9 **Under no circumstances will any portion of the \$400,000 settlement revert to**
10 **Defendant.** Mara Dec. ¶ 19.

11 **b. Released Claims**

12 In exchange for an individual settlement payment, Plaintiff and Class Members will release
13 the following claims:

14 [A]ll claims made or that could have been made based on the facts and circumstances
15 alleged in the Complaints, including claims under California Labor Code sections 201-
16 204, 205.5, 210, 218, 218.5, 221-223, 224, 226, 226.7, 510, 512, 558, 1174, 1175,
17 1194, 1194.2, 1197, 1197.1, 1199, 2810.5 and 2802; California Business and
18 Professions Code section 17200, et seq., California Wage Order No. 9-2001;
19 California Code of Regulations Title 8, section 11090; and any claim for attorneys’
20 fees and costs related to the above-referenced released claims.

21 Mara Dec., **Exhibit 5** at Section I, Paragraph 37. Furthermore, the LWDA and Plaintiff will release
22 PAGA Claims including, for the entire PAGA Period, the following claims:

23 [A]ll claims belonging to the State of California, the LWDA, and Plaintiff (as
24 representative of the State of California, the LWDA, and the general public) under
25 the California Private Attorney General Act (“PAGA”), Cal. Lab. Code § 2698, et
26 seq. to the extent such claims are predicated on claims made or that could have been
27 made based on the facts and circumstances alleged in the Complaints and Plaintiff’s
28 notice to the LWDA, including claims under California Labor Code sections 201-
204, 205.5, 210, 218, 218.5, 221-223, 224, 226, 226.7, 510, 512, 558, 1174, 1175,
1194, 1194.2, 1197, 1197.1, 1199, 2810.5 and 2802; California Business and
Professions Code section 17200, et seq., California Wage Order No. 9-2001;
California Code of Regulations Title 8, section 11090; and any claim for attorneys’
fees and costs related to the above-referenced released claims.

Mara Dec., **Exhibit 5** at Section I, Paragraph 38.

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

1 On April 10, 2023, the Court granted preliminary approval, conditionally certified the
2 Class, appointed Phoenix to act as the Settlement Administrator, approved the notice to be sent to
3 the Class, and directed that the notice be mailed to the Class by First Class U.S. Mail. On April
4 21, 2023, Phoenix received the class data file from Counsel for Defendant, which contained the
5 name, social security number, last known mailing address, employment dates, and the total number
6 of applicable workweeks worked for each Settlement Class Member. Mitzner Dec. ¶ 3. On April
7 25, 2023, Phoenix conducted a National Change of Address (“NCOA”) search in an attempt to
8 update the class list of addresses as accurately as possible. *Id.* at ¶ 4. A search of this database
9 provides updated addresses for any individual who has moved in the previous four (4) years and
10 notified the U.S. Postal Service of their change of address. *Id.* On May 5, 2023, the Notice was
11 mailed, via U.S First Class Mail, to all 29 individuals contained in the Class List. *Id.* at ¶ 5.

12 One (1) Notice was returned to Phoenix by the Post Office. Mitzner Dec. ¶ 6. Phoenix
13 performed a computerized skip trace on the returned Notice, which did not have a forwarding
14 address, in an effort to obtain an updated address for purpose of re-mailing the Notice. *Id.*
15 However, this one (1) Notice has been deemed undeliverable, as Phoenix was unable to obtain an
16 updated address through the computerized skip trace. *Id.* at ¶ 7.

17 In sum, the settlement was received with overwhelming support from the Class Members.
18 Specifically, there were no objections, disputes, and no requests for exclusion submitted by Class
19 Members. Mitzner Dec. ¶¶ 8-10. This means all 29 Class Members, or 100%, will receive a
20 settlement payment. *Id.* at ¶ 11.

21 **IV. ARGUMENT**

22 **a. The Settlement is Fair, Reasonable, and Adequate and Satisfies the Standard 23 for Final Approval**

24 California Rule of Court, Rule 3.769, requires court approval for class action settlements.
25 Cal. R. Ct. 3.769(g). California courts favor settlement. *Stambaugh v. Superior Court* (1976) 62
26 Cal. App. 3d 231, 236, *Potter v. Pacific Coast Lumber Co. of Cal.* (1951) 37 Cal. 2d 592, 602
27 (“[T]he law wisely favors settlements”). Accordingly, the Court must give “[due] regard to what
28 is otherwise a private consensual agreement between the parties.” *Wershba v. Apple Computer, 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. *Dunk*, 48 Cal.
13 App. 4th at 1802.

14 At the time of preliminary approval, the Court was provided with sufficient information to
15 satisfy three of the four *Dunk* factors, leaving the fourth factor, the number of objectors, unknown
16 until after the Class had an opportunity to respond to the Settlement as explained in the Class
17 Notice.⁵ Subject only to the Class’ reaction to the Settlement, the Court preliminarily presumed
18 the Settlement was fair, adequate and reasonable. Following dissemination of the Class Notice,
19 and adequate time provided to the Class to return an objection to the Settlement, no class members
20 objected to the Settlement. Mitzner Dec. ¶ 9. Thus, the proposed settlement is entitled to the
21 presumption that it is fair and in all other respects proper and should be finally approved.

22 **b. The Settlement is Fair and Reasonable Based on the Strengths of Plaintiff’s**
23 **Case and the Risks and Costs of Further Litigation**

24 **i. The Issue of Misclassification**

25 Based upon the discovery conducted, Plaintiff contends – and Defendants deny – that
26 Defendants misclassified Plaintiff, and other owner operators, as independent contractors, denying

27 ⁵ See Memorandum of Points and Authorities in Support of Preliminary Approval, filed on January
28 24, 2022. In 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 GSA amount in light of *Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116. *Id.*

1 them the protections provided to employees under California law. Based on documents and data
2 produced in this matter, Plaintiff contends that Defendants substantially control the Class Members
3 and would meet the factors delineated in the *Borello* test in *S. G. Borello & Sons, Inc. v.*
4 *Department of Industrial Relations* (1989) 48 Cal.3d 341, as well as the “ABC test” outlined in
5 the California Supreme Court decision in *Dynamex Operations West, Inc. v. Superior Court* (2018)
6 4 Cal.5th 903.

7 Plaintiff contends that Defendants can terminate Class Members with or without cause,
8 which is “the strongest evidence of the right to control...” *Ayala v. Antelope Valley Newspapers,*
9 *Inc.* (2014) 59 Cal.4th 522, 531. For example, under the Independent Contractor Operating
10 Agreement (“ICOA”), the owner operators are subject to disqualification if Defendants deem them
11 to be “unsafe” under Defendants’ safety policies. Defendants, in their sole discretion, obtain the
12 customers and enter into agreements to deliver their freight, negotiate and set the rates the
13 customers are to pay, and assign and dispatch the Class Members directly to transport the freight.
14 Owner operators are also forbidden from subcontracting with anyone else to perform its deliveries,
15 denying owner operators the opportunity to independently manage their “businesses.” Mara Dec.
16 ¶ 20.

17
18 Furthermore, Defendants exert control over many other aspects of the owner operator’s job
19 performance. Defendants require owner operators to maintain certain wireless cell phone plans
20 that contains certain specifications mandated by Defendants. Owner operators must paint their
21 trailers white and place Defendants’ identifying information to their trailers, as well as wear
22 Defendants’ uniforms. Additionally, owner operators are required by Defendants to follow any
23 and all instructions they receive from Defendants’ (not the owner operators’) customers and must
24 submit their trucks and equipment for inspection with Defendants whenever Defendants so choose,
25 with any costs associated with these inspections to be borne by the owner operators. Mara Dec. ¶
26 21.

27 Defendants contend that Plaintiff and putative class members are not their employees, and
28 that they do not control Class Members’ hiring, firing, schedules, and/or pay. Defendants argue

1 that Class Members have independence in how to perform their jobs. Defendants contend that they
2 do not control what Class Members do or how they perform their jobs. Defendants argue that they
3 cannot simply unilaterally decide to “terminate” Class Members at will. Defendants claim they
4 can merely terminate the agreement entered into with owner operators through the very terms of
5 the agreement itself, severely limiting their ability to “terminate” owner operators at will. Mara
6 Dec. ¶ 22.

7 Additionally, Defendants state that the various “controls” exerted on Class Members and
8 “requirements” for how Class Members are to deliver freight are set forth either by the customers
9 or pursuant to various federal laws and regulations, and not from Defendants. As such, these things
10 cannot be considered as actions undertaken and/or controls asserted by the Defendants, and as a
11 result, Plaintiff would fail to satisfy any of the factors required under the *Borello* test. Mara Dec.
12 ¶ 23.

13 While Plaintiff believes in the strength of his arguments, he also recognizes the risk that
14 the Court may determine Plaintiff and the putative class were not employees of Defendants. **If the**
15 **Court ruled in favor of Defendants on this issue, all of Plaintiff’s claims below would be**
16 **extinguished, as they are all dependent upon the Court agreeing that Defendants are**
17 **Plaintiff’s and Class Members’ employer under California law.** Mara Dec. ¶ 24.

18 ii. Reimbursements and Deductions

19 Plaintiff claims that because Defendants misclassify Class Members as independent
20 contractors, Defendants force owner operators to pay for the costs of doing business in violation
21 of Labor Code § 2802. Labor Code § 2802 provides “[a]n employer shall indemnify his or her
22 employee for all necessary expenditures or losses incurred by the employee in direct consequence
23 of the discharge of his or her duties.” Labor Code § 2802 “is designed to prevent employers from
24 passing their operating expenses on to their employees.” *Gattuso v. Harte-Hanks Shoppers,*
25 *Inc.* (2007) 42 Cal.4th 554, 562.

26 Defendants require owner operators to shoulder the costs of insuring their trucks, fueling
27 their trucks, amongst various other costs. Here, Plaintiffs allege the Direct Contractors are
28

1 misclassified as independent contractors when, under California law, they should be classified as
2 employees. Just as Defendants could not charge their own employee drivers the cost of fuel,
3 insurance, and taxes in the furtherance of Defendants' business, it cannot do so to the owner
4 operators, as they, too, are Defendants' employees under California law. Mara Dec. ¶ 25.

5 Defendants argue that because owner operators are not employees and properly classified
6 as independent contractors, they do not need to reimburse them for business expenses. Defendants
7 argue that California Labor Code § 2802 only obligates an employer to indemnify its employee
8 for expenses that the employee incurred while performing his or her job duties. As Defendants
9 claim they are lawfully contracting with the owner operators to facilitate the delivery of the
10 customer's freight, these expenses are properly borne by the owner operators pursuant to the terms
11 of the agreements. Mara Dec. ¶ 26.

12 **iii. Meal and Rest Periods**

13 Plaintiff further contends that Defendants, as a result of their misclassification scheme,
14 completely fail to provide Class Members with meal and rest periods. Under California Labor
15 Code section 512, no employer shall employ any person for a work period of more than five hours
16 without providing a meal period of not less than thirty minutes. *See also Brinker Rest. Corp. v.*
17 *Superior Court* (2012) 53 Cal.4th 1004, 1037. Further, the IWC Wage Orders mandate that every
18 employer authorize and permit all employees to take rest periods at the minimum rate of a net ten
19 consecutive minutes for each four hour work period, or major fraction thereof.

20 Defendants have no evidence they provided Class Members with meal or rest periods. They
21 have no meal or rest period policies they communicate to Class Members. They also have no
22 records of meal or rest periods. Thus, it will be fairly simple to show Defendants failed to provide
23 meal and rest periods to Class Members, who will be owed a 226.7 premium on every qualifying
24 shift. Mara Dec. ¶ 27.

25 Defendants again argue that because Class Members are not employees and, instead, are
26 properly classified as independent contractors, they are under no obligation to provide Class
27 Members with meal or rest periods, as California law only requires an "employer" to provide them
28 to its "employees." Defendants claim they are lawfully engaging with and utilizing Class Members

1 to facilitate the delivery of the through the use of the agreements they enter into with the owner
2 operators, and that the agreements clearly state that all of that any Class Member performing work
3 under the terms of the agreements are independent contractors, not employees. Mara Dec. ¶ 28.

4 Defendants also point out that the Federal Motor Carrier Safety Administration's
5 (FMCSA) December 21, 2018, determination wherein the FMCSA found that California's meal
6 and rest break laws are preempted as applied to drivers of property-carrying commercial motor
7 vehicles who are subject to the FMCSA's own break regulations would similarly extinguish all of
8 Plaintiff's meal and rest period claims. On January 15, 2021, the Ninth Circuit upheld the
9 FMCSA's determination that federal law preempted California's meal and rest break rules. *See*
10 *Int'l Bhd. of Teamsters, Local 2785 v. Fed. Motor Carrier Safety Admin.* (2021) 986 F.3d 841. As
11 such, Defendants argues that FMCSA's December 21, 2018, determination provides affirmative
12 preemption defenses to Plaintiff's claims for meal and rest break violations. Mara Dec. ¶ 29.

13 Plaintiff counters that the FMCSA's determination does not apply retroactively. In *Garcia*
14 *v. Superior Court* (2022) 80 Cal.App.5th 63, the Court of Appeal found the very language of the
15 preemption decision suggested prospective application only and did not bar claims arising from
16 conduct prior to the decision. In its ruling, the Court of Appeal held that "although the FMCSA had
17 the authority to provide that '[a] State *may not enforce*' its own laws (§ 31141(a)), the Preemption
18 Decision elected to use more limited language, by providing that 'California *may no longer*
19 *enforce* the [meal and rest break rules] with respect to drivers of property-carrying [commercial
20 motor vehicles] subject to FMCSA's [hours of service] rules.'" *Garcia v. Superior Court* (2022)
21 80 Cal.App.5th 63, 69 (citing Preemption Decision, 83 FR 67470, 67480) (italics added). "We
22 presume the FMCSA was aware of the statute's language and intentionally chose different
23 language." *Id.* "That language—'*may no longer enforce*'—strongly suggests prospective,
24 not retroactive, application." *Id.* (citing *North v. Superior Hauling & Fast Transit, Inc.* (C.D.Cal.
25 May 31, 2019, No. EDCV 18-2564 JGB (KKx)) 2019 U.S.Dist.LEXIS 217010 at *9). Mara Dec.
26 ¶ 30.

27 **iv. Unpaid Wages**

28 Plaintiff also alleges that Defendants failed to pay all wages owed to Class Members.

1 Regardless of how compensation is measured, California law mandates “[e]very employer shall
2 pay to each employee on the established payday for the period involved, not less than the
3 applicable minimum wage for all hours worked in the payroll period, whether the remuneration is
4 measured by time, piece, commission, or otherwise.” Wage Order 9-2001; Cal. Code Regs., Title
5 8, section 11040, subd. (4)(B); Cal. Lab. Code, section 1194; *Gonzalez v. Downtown LA Motors,*
6 *LP* (2013) 215 Cal.App.4th 36, 44; *Armenta v. Osmose, Inc.* (2005) 135 Cal.App.4th 314, 323.
7 Further, Labor Code sections 221, 222, & 223 “require an employer to pay all employee hours at
8 either the statutory or agreed rate and prohibit an employer from using any part of that rate as a
9 credit against its minimum wage obligation.” *Gonzalez*, 135 Cal.App.4th at 47-48; *Armenta*, 135
10 Cal.App.4th at 323.

11
12 Owner operators are paid by the load, they are not paid for time when “the wheels are not
13 moving,” but they are not stopped for a delivery, such as fueling up, sitting in traffic, for
14 breakdowns, etc. A piece-rate pay formula that does not “compensate for all time worked does not
15 comply with the California Labor Code, even if, averaged out, it would pay at least minimum wage
16 for all hours worked.” *Cardenas v. McLane Foodservices, Inc.* (C.D. Cal. 2011) 796 F.Supp.2d
17 1246, 1252; See also, *Gonzalez v. Downtown LA Motors, LP* (2013) 215 Cal.App.4th 36, 49;
18 *Armenta v. Osmose, Inc.* (2005) 135 Cal.App.4th 314, 320; *Reinhardt v. Gemini Motor Transport*
19 *(E.D. Cal.2012)* 869 F.Supp.2d 1158, 1168. Mara Dec. ¶ 31.

20 Defendants contend that as Class Members are properly classified as independent
21 contractors under California law, none of the authorities relied upon by Plaintiff renders
22 Defendants liable for any unpaid wages whatsoever. Defendants claim the only monetary
23 compensation they are required to provide to the Class Members at all at any point in time is solely
24 based on the provisions of the agreements it enters into with the owner operators, which
25 compensates them for all the hours and various tasks necessary in furtherance of the freight
26 deliveries. Mara Dec. ¶ 32.

27 Although Plaintiff is confident in the strengths of his claims and believes this case is
28 suitable for certification on the claimed basis that there are company-wide policies that Plaintiff

1 contends violate California law and uniformly affect the Class Members, Defendants’
2 counterarguments raise uncertainties with respect to both class certification and success on the
3 merits. As the California Supreme Court ruled in *Sav-On v. Superior Court* (2004) 34 Cal.4th 319,
4 class certification is always a matter of the trial court’s sound discretion. Decisions following *Sav-*
5 *On* have reached different conclusions, with respect to certification of wage and hour claims.⁶ In
6 light of Defendants’ defenses, supporting evidence, and position that the action is not suitable for
7 class treatment, the settlement amount of \$400,000 — **with an average settlement share**
8 **estimated at \$7,388.62, with a high payment of \$18,782.61** — Plaintiff and his counsel believe
9 this is a reasonable and fair settlement. Mara Dec. ¶ 33.

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

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

13 Class Counsel applies for an award of attorneys’ fees in the sum of \$133,333.33 (which is
14 33 1/3% of the GSA), and litigation costs of \$14,901.58 (originally estimated not to exceed
15 \$30,000). Mara Dec. ¶ 34. California courts have recognized an appropriate method for
16 determining an award of attorneys’ fees is based on a percentage of the total value of benefits to
17 Class Members by the settlement, also known as the “common fund” method. *Serrano v. Priest*
18 (1977) 20 Cal.3d 25, 34 (*Serrano III*) 34 (“when a number of persons are entitled in common to a
19 specific fund, and an action brought by a plaintiff or plaintiffs for the benefit of all results in the
20 creation or preservation of that fund, such plaintiff or plaintiffs may be awarded attorney’s fees
21 out of the fund.”); *Serrano v. Unruh*, 32 Cal.3d 621, 627 (1982) (in awarding a fee from the
22 common fund obtained for the benefit of all parties, the trial court acts within its equitable power
23 to prevent the other parties’ unjust enrichment.); *Rawlings v. Prudential-Bache Properties, Inc.*, 9
24 F.3d 513, 516 (6th Cir. 1993) (the percentage of the fund method for calculating attorney’s fees

25 ⁶ See, e.g., *Harris v. Superior Court* (2007) 154 Cal. App. 4th 164 (reversing decertification of
26 class claiming misclassification and ordering summary adjudication in favor of employees), *review*
27 *granted*, 171 P.3d 545 (2007) (not cited as precedent, but rather for illustrative purposes only);
28 *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 more accurately reflects the results achieved for the putative class than the lodestar method and
2 “establishes reasonable expectations on the part of plaintiffs’ attorneys as to their expected
3 recovery; and it encourages early settlement, which avoids protracted litigation.”); *In re Rite Aid*
4 *Corp. Securities Litigation*, 396 F.3d 294, 300 (3d Cir. 2005) (“The percentage-of-recovery
5 method is generally favored in common fund cases because it allows courts to award fees from the
6 fund ‘in a manner that rewards counsel for success and penalizes it for failure.’”).

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

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

25 The recognized advantages of the percentage method - including relative ease of
26 calculation, alignment of incentives between counsel and the class, a better
27 approximation of market conditions in a contingency case, and the encouragement
28 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.

1 *Id.* at 503 (internal citation omitted).⁷ Because there is a defined and traceable benefit to the Class,
2 the Court can base an award of attorneys' fees using a 'common fund' approach.

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

5 Several studies of class action fee awards have found that the median common fund fee
6 award is approximately one-third of the total settlement fund.⁸ The requested fee falls in the mid-
7 range of percentage class fee awards, which generally range from 20% to 50% of a common fund,
8 and it constitutes fair compensation for undertaking complex, risky, expensive, and time-
9 consuming litigation on a contingent basis and compensates Class Counsel for their efforts, as well
10 as the result achieved for the benefit of the Class. Numerous state and federal courts in California
11 routinely approve fee requests equal to or greater than 33% of the common fund. Indeed, courts
12 have found that an award of 33% of the common fund represents the "benchmark" in California.⁹
13 In short, Plaintiff's counsels' fee request of \$133,333.33 (33 1/3% of the GSA) is in line with
14 awards in similar cases in California and nationwide and demonstrates that Plaintiff's counsels'
15 fee request is consistent with market rates and is reasonable.

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

17 Class Counsel's fee request is reasonable when calculated using the lodestar method.
18 Under the lodestar method, a base fee amount is calculated from a compilation of time reasonably

19 ⁷ *Laffitte* also held trial courts have discretion to assess reasonableness of fee awards with tools
20 such as the lodestar cross-check, although they need not do so. *Laffitte*, 1 Cal.5th at 506 ("We hold
21 further that trial courts have discretion to conduct a lodestar cross-check on a percentage fee . . .
22 they also retain the discretion to forgo a lodestar cross-check and use other means to evaluate the
23 reasonableness of a requested percentage fee").

24 ⁸ *See, e.g., Chavez v. Netflix, Inc.* (2008) 162 Cal. App. 4th 43, 66, n.11 (numerous studies have
25 shown that "fee awards in class actions average around one-third of the recovery."); Reagan W.
26 Silber and Frank E. Goodrich, *Common Funds and Common Problems: Fee Objections and Class*
27 *Counsel's Response*, 17 Rev. Litig. 525, 546 ; T. Willging, L. Hooper and R. Niemic, *Empirical*
28 *Study of Class Actions in Four Federal District Courts: Final Report to the 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").

⁹ *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.").

1 spent on the case and the reasonable hourly compensation of the attorney. *Serrano v. Priest* (1977)
2 20 Cal. 3d 25, 48. The court then enhances this lodestar figure by a “multiplier” to account for a
3 range of factors, such as the novelty and difficulty of the case, its contingent nature, and the degree
4 of success achieved. *Id.*, at 49; see also *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1132-36; *PLCM*
5 *Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1096; *Thayer v. Wells Fargo Bank* (2001) 92
6 Cal.App.4th 819, 834, (“[t] there is no ... rule limiting the factors that may justify an exercise of
7 judicial discretion to [adjust the] lodestar”)

8 As of the date of filing this Motion for Final Approval, Plaintiff’s counsel has worked a
9 total of 356 hours on this case and calculated the base lodestar at \$264,600 at rates reflecting those
10 currently earned in the marketplace. Mara Dec. ¶¶ 35-36, 38-39; **Exhibit 1**; Declaration of Hunter
11 Pyle, Esq. (“Pyle Dec.”) ¶¶ 22, 25. All of the work and tasks performed by Plaintiff’s counsel were
12 reasonable and necessary to the prosecution of this case. Mara Dec. ¶¶ 35-36, 38-39; Pyle Dec. ¶¶
13 22, 25. As Class Counsel’s lodestar fee is in excess of their fee request, a multiplier on their
14 lodestar fee is not sought herein. Mara Dec. ¶ 40. In fact, the requested fee results in a so-called
15 “negative multiplier” which suggests the percentage of the fund amount is reasonable and fair. *See*
16 *Chun-Hoon v. McKee Foods Corp.* (N.D. Cal. 2010) 716 F.Supp.2d 848, 854; *In re Portal*
17 *Software, Inc. Securities Litigation* (N.D. Cal. 2007) 2007 U.S. Dist. LEXIS 88886, 2007 WL
18 4171201, at *16.

19 **d. Class Counsel’s Hourly Rates Are Reasonable**

20 Plaintiffs’ counsels’ hourly rates are between \$600 and \$900 and are in line with rates
21 typically approved in wage and hour class action litigation and which rates have been approved by
22 Courts in California in the Los Angeles, Sacramento, San Francisco, Alameda, Orange and San
23 Diego County Superior Courts.¹⁰ A reasonable hourly rate is the prevailing rate charged by
24 attorneys of similar skill and experience in the relevant community. *PLCM Group, Inc v. Drexler*
25 (2000) 22 Cal. 4th 1084, 1095. When determining a reasonable hourly rate, courts may consider
26 factors such as skill and experience, the nature of the work performed, the relevant area of expertise

27 ¹⁰ Mara Dec. ¶¶ 31, 34, 37; **Ex. 2** Westlaw Court Express’s Legal Billing Report, Volume 14,
28 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 and the attorney's customary billing rates. *Flannery v. California Highway Patrol* (1998) 61 Cal.
2 App. 4th 629, 632.

3 Plaintiff's counsels' skill and experience support their hourly rates. Their practice is limited
4 exclusively to litigation, focusing on the representation of employees in wage and hour and
5 consumer class action matters. Mara Dec. ¶¶ 2-9, 37; Pyle Dec. ¶¶ 2-14. As prominent attorneys
6 in the field of wage and hour class action litigation, Plaintiffs' counsel continually monitors the
7 prevailing market rates charged by both defense and plaintiff law firms and set the billing rates of
8 their attorneys and paralegals to be consistent with the prevailing market rates in the private sector
9 for attorneys and staff of comparable skill, qualifications and experience. Other wage and hour
10 attorneys working as class counsel before California courts charge comparable if not higher rates.¹¹
11 Therefore, as they are in line with those of the relevant community, Class Counsels' hourly rates
12 are reasonable.

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

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

19 To date, Plaintiffs' Counsel has expended a total of 356 hours litigating this case. The work
20 performed to achieve a settlement that will provide valuable consideration to the Class, averaging
21 an estimated payment of \$7,388.62¹², is summarized by Class Counsel in the declarations
22 submitted herewith. Mara Dec. ¶¶ 35, 38; **Ex. 1**; Pyle Dec. ¶ 22, 25. Counsel's many tasks, in
23 summary form, included the following: pre-filing investigation and legal research; communicating
24 with the class representatives; interviewing and meeting with putative Class Members; research
25

26 ¹¹ Mara Dec. ¶¶ 36, 39, **Ex. 2**, Westlaw Court Express's Legal Billing Report, Volume 14, Number
27 3, California Region for December 2012; **Ex. 3**, 2014 Declaration of Richard M. Pearl in
28 *Hohnbaum v. Brinker Restaurant Corp.* SDSC GIC834348; **Ex. 4**, 2012 National Law Journal
Survey of Hourly Billing Rates for Partners and Associates; Pyle Dec. ¶ 22.

¹² *See* Mitzner Dec. ¶ 14.

1 and investigation of California's ever evolving wage and hour laws; investigation into Defendants'
2 pay-structures and policies for its hourly employees; drafting and filing pleadings; drafting and
3 filing notice to the LWDA; numerous conferences with Defendants' counsel regarding a variety
4 of issues throughout the litigation, mediation and settlement process; numerous interoffice
5 discussions about litigation strategy and theories of liability; appearing at hearings; drafting and
6 propounding discovery; review and analyze documents produced by Defendants, create exhibits
7 for use in the case; review case file for mediation; draft mediation brief and exposure analysis;
8 interoffice discussions about mediation and mediation brief; prepare for and attend mediation;
9 extensive post-mediation settlement negotiations; draft and revise long form settlement agreement;
10 draft motion for preliminary approval and supporting documents, communicate with the settlement
11 administrator throughout the administration process, and draft motion for final approval and
12 supporting documents. All tasks and work performed were reasonable and necessary to the
13 prosecution of this case. The work performed was justified in light of the result achieved. Mara
14 Dec. ¶¶ 35, 38; Ex. 1; Pyle Dec. ¶ 22, 25.

15 **f. Costs of Litigation**

16 Class Counsel seeks reimbursement of the litigation costs and expenses of \$14,901.58
17 (originally estimated not to exceed \$30,000). These costs were all reasonable and necessary to the
18 prosecution of this case and the results achieved and are fair, and reasonable. Mara Dec. ¶¶ 41-42,
19 Ex. 1; Pyle Dec. ¶ 27.

20 **VI. THE CLASS REPRESENTATIVE PAYMENT IS REASONABLE**

21 In addition, Plaintiff agreed to a general release of his claims against Defendants in
22 exchange for the \$7,500 Class Representative Payment. Courts routinely approve service
23 payments, or incentive awards, to compensate a named plaintiff for the services he or she provides
24 and the risks he or she incurs during class litigation. *See In re Cellphone Fee Termination Cases*
25 (2010) 186 Cal.App.4th 1380, 1393; *see also Bell v. Farmers Ins. Exch.* (2004) 11 Cal.App.4th
26 715, 725-26 (upholding services payments to class representatives); *Munoz v. BCI Coca-Cola*
27 *Bottling Co. of Los Angeles* (2010) 186 Cal.App.4th 399, 412 (upholding incentive awards to
28 plaintiffs that, when added to their individual recoveries, amounted to more than twice as much as
the average payment to class members). Courts have regularly and routinely granted approval of

1 settlements containing such enhancements. *See, e.g., Staton v. Boeing*, 327 F.3d 938, 977 (9th Cir.
2 2003).¹³ In Class Counsel’s experience, the typical enhancement award in wage and hour class
3 action settlements ranges from \$5,000 to \$75,000. Very commonly there is more than one class
4 representative who receives an award in the above range. Mara Dec. ¶ 43.

5 The requested payment is appropriate and reasonable and unopposed by Defendants. This
6 payment is made, in part, in exchange for Plaintiff providing Defendants with a general release of
7 his claims. This general release is far greater than the release signed by class members. In addition,
8 in to support of the enhancement request, Plaintiff submitted a declaration detailing the efforts he
9 expended on behalf of the class in order to advance this case to its successful conclusion. *See*
10 *generally* Declaration of Arnold Garcia. There is no question that this case would not have reached
11 the same result but for Plaintiff’s involvement and input at all stages of the litigation.

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

19 Unfortunately, there have been several judgments entered against class representatives, e.g.,
20 *Koehl v. Verio, Inc.* 142 Cal.App.4th 1313, 1328 (2006) (a wage and hour class action where
21 Defendant prevailed at trial, the named Plaintiffs were held liable, jointly and severally for the
22 Defendant’s attorneys’ fees); *Whiteway v. Fedex Kinkos Office & Print Services, Inc.*, 2007 U.S.
23 Dist. LEXIS 95398 (N.D. Cal. 2007) (a wage and hour misclassification case lost on summary
24

25 ¹³ *See, e.g., Cook v. Niedert*, 142 F.3d 1004, 1015 (7th Cir. 1998); *Roberts v. Texaco*, 979 F. Supp.
26 185 (S.D.N.Y. 1997) (“present or past employee whose present position or employment credentials
27 or recommendation may be at risk by reason of having prosecuted the suit, who therefore lends his
28 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 judgment, after the case was certified, the named Plaintiff was assessed costs in the sum of
2 \$56,788.). The risk of payment of Defendants' costs, in itself alone, is a sufficient basis for an
3 award of the requested enhancement sum. Few individuals are willing to take this risk, and it is
4 clear that the appointed Class Representative here championed a cause on behalf of others with
5 potentially huge monetary risks.

6 Additionally, it is common knowledge that the modern-day work force is quite mobile,
7 with employees holding several jobs in a career during their lifetime. It is also true that prospective
8 employers in this computer, high-tech age "Google" and/or do extensive background checks and
9 have access to Court databases to see if applicants have ever filed a lawsuit or have ever been sued.
10 Here, Plaintiff litigated against Defendants for a substantial sum of money by their courage to step
11 forward to vindicate not only his own rights but also, those of the similarly situated individuals,
12 all of whom will now receive substantial payments due to the initiation of this action. Such conduct
13 will not be lost on a prospective employer who has to choose between an applicant who has never
14 sued an employer and one who has done so. The requested payment far from compensates Plaintiff
15 for opportunities he may lose in the future because of the exercise of a Constitutional right to
16 petition the courts for redress of a grievance.

17 The payment request is modest for the work performed, risks undertaken for payment of
18 fees and costs if this case had not been successfully concluded, stigma on future employment
19 opportunities, and the benefits all members of the class as well as all current and future class
20 members will enjoy as a result of Plaintiff's efforts. Thus, the Court should approve the request.

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

22 The Parties agreed to hire Phoenix as the Administrator, and the Court approved this
23 choice. The Administrator was responsible for formatting, printing and mailing the Notice. It was
24 also responsible for updating addresses and re-mailing Notices returned as undeliverable,
25 responding to Class Member inquiries, answering questions from Counsel for the Parties, and
26 providing a declaration to document its duties and responsibilities under the settlement. Plaintiff
27 now requests that the Court finally approve the \$4,995 (estimated not to exceed \$5,000) fee to
28 Phoenix for services rendered and to be rendered. Mitzner Dec. ¶ 17.

1 Following the grant of final approval, the Administrator's duties will continue in order to
2 calculate and mail the Individual Settlement Payment checks to Class Members, perform tax
3 reporting obligations, disburse other payments as ordered by the Court, and perform such other
4 duties as set forth in the Settlement Agreement. Phoenix's fee of \$4,995 for services rendered and
5 to be rendered is fair and reasonable and should be granted.

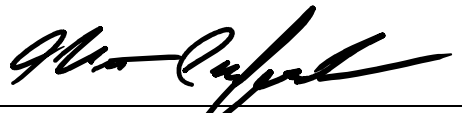
6 **VIII. CONCLUSION**

7 Based on the foregoing, Class Counsel respectfully requests the Court grant final approval
8 of the Class Action Settlement, award Class Counsel's attorneys' fees in the sum of \$133,333.33
9 and litigation costs of \$14,901.58, award to the named Plaintiff the class representative
10 enhancement payment in the sum of \$7,500, award Phoenix \$4,995 for settlement administration
11 services, and approve of a payment to the LWDA in the amount of \$18,750.

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13 Respectfully submitted,

14 Dated: August 7, 2023

MARA LAW FIRM, PC

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17 David Mara, Esq.
18 Matthew Crawford, Esq.
19 Attorneys for Plaintiff
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