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

RICHARD DUARTE, on behalf of himself,
all others similarly situated, and on behalf
of the general public,

Plaintiffs,

v.

PTG LOGISTICS, LLC.; and DOES 1
through 100,

Defendants.

Case No. CIVSB2126799

[Consolidated with Case No. CIVSB2131398]

**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: December 1, 2023

Time: 8:30 a.m.

Judge: Hon. Jessica Morgan

Dept.: S26

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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 Richard Duarte (hereinafter “Plaintiff”) on behalf of himself
4 and all hourly, non-exempt truck workers, industrial truck workers, industrial truck drivers,
5 industrial vehicle drivers, truck drivers, professional drivers, transportation specialists, tanker
6 drivers, delivery drivers, industrial workers, or similar job designations and titles, and all other
7 similarly situated non-exempt, hourly employees who worked for Defendant PTG Logistics, LLC
8 (hereinafter “Defendant”) (hereinafter, Plaintiff and Defendant are collectively referred to as the
9 “Parties”) at any time from September 17, 2017 through July 14, 2023 (“Class Period”). To date,
10 there is a 100% participation rate amongst Class Members—that is, there were no valid requests
11 for exclusion, no objections, and no disputes. **The proposed settlement is projected to pay an**
12 **average estimated payment of \$2,076.53 per Class Member, with a high payment of**
13 **\$6,686.75.¹**

14 This case required 269 hours of attorney time from Class Counsel and sought relief for 102
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 Defendant, and a full day of mediation.

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 \$15,370.99
22 incurred in litigating this matter. Third, Plaintiff moves for final approval of the Class
23 Representative Enhancement Payment in the amount of \$10,000 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 \$4,490 to the Settlement Administrator,

28

¹ Declaration of Madely Nava (“Nava Dec.”) ¶ 16.

Apex Class Action LLC (“Apex”) 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 enhancement payment, settlement administration costs, and PAGA payment were fully disclosed to the Class Members when the Class Notice was mailed to them on August 14, 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 valid 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 enhancement 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 provides commercial trucks and truck drivers to deliver freight for its customers in the State of California. In order to carry out its business, Defendant employs hourly truck drivers, like Plaintiff and Class Members. Declaration of David Mara, Esq. (“Mara Dec.”) ¶ 9.

On August 26, 2021, Plaintiff 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 filed a putative class action complaint on September 17, 2021, against Defendant in the San Bernardino County Superior Court, Case No. CIVSB2126799, alleging causes of action for: (1) Failure to Pay All Straight Time Wages; (2) Knowing and Intentional Failure to Comply with Itemized Employee Wage Statement Provisions; (3) Failure to Pay All Wages Due at the Time of Termination of Employment; (4) Irregular Pay Periods; (5) Failure to Adopt a Compliant Sick Pay/Paid Time Off Policy; (6) Failure to Reimburse Business Expenses;

² Nava Dec. ¶ 7, Ex. A

³ Nava Dec. ¶¶ 11-13.

1 and (7) Violation of Unfair Competition Law. Plaintiff also filed a separate action alleging
2 identical violations of the California Labor Code and seeking civil penalties under the PAGA on
3 November 2, 2021, against Defendant in the San Bernardino County Superior Court, Case No.
4 CIVSB2131398. The Parties later agreed to consolidate both cases, with CIVSB2126799
5 designated as the lead case. Mara Dec. ¶ 10.

6 Defendant denies the allegations of the action in its entirety, deny any liability or
7 wrongdoing of any kind associated with the claims alleged in this action, and further deny that, for
8 any purpose other than settling this action, this matter is appropriate for class treatment. Defendant
9 further contends that they have complied with all applicable California laws, the California Labor
10 Code, the applicable California Wage Order(s), and the Unfair Competition Law. Defendant
11 finally contends that, if this matter were to be litigated further, they would have strong defenses to
12 oppose class certification and succeed on the merits of Plaintiff's causes of action. Mara Dec. ¶
13 11.

14 **a. Discovery and Investigation**

15 Through discovery, Plaintiffs sought numerous documents and substantial amounts of data
16 that were needed to evaluate the case. These documents included requests for time and wage
17 records for the Class, employee handbooks, policies, and practices in place during the class period,
18 as well as data surrounding the number of current and former employees. Mara Dec. ¶ 12.

19 This discovery, in conjunction with the Parties' meet and confer efforts, resulted in the
20 production of hundreds of documents and thousands of lines of data, including Defendant's
21 employee handbooks, policies, and practices, and a sampling of wage and time records for Plaintiff
22 and Class Members. Using the time and wage records for the Class provided and the data
23 surrounding the number of current and former employees, Plaintiff and his expert were able to
24 establish a potential exposure model in preparation for mediation. Mara Dec. ¶ 13.

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

26 The gravamen of Plaintiff's claims is that Defendant adopted a uniform policy which failed
27 to pay Class Members for all hours worked as defined in Wage Order 9-2001, failed to pay them
28 contractually promised overtime, and failed to reimburse them for business expenses in violation

of Labor Code section 2802. This proposed Settlement was only possible following significant discovery and evaluation of Defendant's relevant policies, procedures, and records, which permitted Plaintiff's Counsel to engage in a comprehensive analysis of liability and potential damages to prepare for the mediation and class certification. Mara Dec. ¶ 14.

Defendant vigorously denies Plaintiff's contentions, claiming that Class Members were paid for all time worked, were not contractually promised overtime, and did not incur any necessary business expenses that Defendant failed to reimburse. Defendant further contends that all of the challenged policies and practices comply with California law and that the limited individualized accusations of Plaintiff are complete outliers, rendering this matter unsuitable for class certification. Mara Dec. ¶ 15.

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

c. The Parties Attended Mediation Which Led to Settlement

The Parties agreed to attend mediation with mediator Lynn Frank, Esq. on April 18, 2023. After a full day of mediation, the Parties were able to reach a classwide settlement. Thereafter, the Parties met and conferred regarding all the terms of the settlement and finalized their agreement in the Settlement Agreement that the Parties now seek to finally approve. Mara Dec. ¶ 16; **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, the 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, administering the settlement and securing Court approval; (b) litigation costs of \$15,370.99 (originally estimated not to exceed \$25,000); (c) Class Representative Payment to the named class representative, Richard Duarte, in a sum not to exceed \$10,000 in consideration for a general release of his claims against Defendant and for initiating

1 and prosecuting this Class Action, serving as Class Representative, work performed, and risks
2 undertaken for the payment of Defendant's attorneys' fees and costs in the event he had been
3 unsuccessful in either matter; (d) claims administration fees and expenses to Apex, in the amount
4 of \$4,490 (originally estimated not to exceed \$7,500); and (e) PAGA payment of \$25,000 allocated
5 to Plaintiff's PAGA claims. Mara Dec. ¶ 17.

6 After all Court-approved deductions from the GSA, it is estimated that \$211,805.68, ("Net
7 Settlement Amount" or "NSA"), less all applicable employee taxes, will be distributed to Class
8 Members – **with an average estimated payment of \$2,076.53 per Class Member, and a high**
9 **payment of \$6,686.75.** One hundred percent (100%) of the NSA will be paid to the Class
10 Members, less taxes. Subject to the terms and conditions of the settlement, the NSA will be
11 allocated among Settlement Class Members according to the number of weeks each Settlement
12 Class Member worked for Defendant during the Class Period as a *pro rata* portion of the total
13 combined weeks that all the Settlement Class Members worked for Defendant during the Class
14 Period. The total number of workweeks worked by Settlement Class Members during the Class
15 Period is 7,222. Nava Dec. ¶¶ 15-16.

16 Furthermore, the Settlement allocates \$25,000 in consideration for the settlement of
17 Plaintiff's PAGA claims, which is to be distributed separately from the NSA. Settlement Class
18 Members who worked for Defendant from August 26, 2020, one year prior to the submission of
19 the written notice of Labor Code violations to the LWDA pursuant to Labor Code § 2699.3(a)(1),
20 through July 14, 2023 ("PAGA Period") are also deemed "Aggrieved Employees" and able to
21 recover their share of the civil penalties under the settlement. 75% of this \$25,000, or \$18,750,
22 will be paid to the LWDA, while the remaining 25%, or \$6,250, will be distributed to the
23 Aggrieved Employees – with an average estimated payment of \$74.40 per Aggrieved Employee,
24 and a high payment of \$188.75. These payments will also be made according to the number of
25 weeks each Aggrieved Employee worked for Defendant during the PAGA Period as a *pro rata*
26 portion of the total combined weeks of all the Aggrieved Employees that worked for Defendant
27 during the PAGA Period. The total number of workweeks worked by Aggrieved Employees during
28 the PAGA Period is 5,000. Nava Dec. ¶¶ 17-18.

1 **Under no circumstances will any portion of the \$400,000 settlement revert to**
2 **Defendant.** Mara Dec. ¶ 18.

3 **b. Released Claims**

4 As of the Effective Final Settlement Date, the Class Representative and the Class Members
5 will release the Released Class Claims:

6 Any and all claims, debts, liabilities, demands, obligations, penalties,
7 guarantees, costs, expenses, attorney's fees, damages, action or causes of
8 action of whatever kind or nature, whether known or unknown, contingent
9 or accrued, that are alleged or could have been alleged based upon a
10 reasonable interpretation of the facts alleged in the Complaints against
11 Defendant, including, but not limited to, 1) Failure to Pay All Straight Time
12 Wages; 2) Knowing and Intentional Failure to Comply with Itemized
13 Employee Wage Statement Provisions (Cal. Lab. Code § 226); 3) Failure to
14 Pay all Wages Due at the Time of Termination (California Labor Code §
15 203); 4) Failure to Adopt a Compliant Sick Pay Policy (Cal. Lab. Code §
16 246); 5) Irregular Pay Periods (Cal. Lab. Code § 204); 6) Failure to
17 Reimburse Business Expenses (Cal. Lab. Code § 2802); 7) Violation of
18 Unfair Competition Law (Bus. & Prof. Code § 17200, et seq.); and 8)
19 Failure to Pay all Overtime (Cal. Lab. Code § 510). **Exhibit 5** attached to
20 the Mara Dec. at Section I (37).

21 As of the Effective Final Settlement Date, the Class Representative and the Aggrieved
22 Employees will release the Released PAGA Claims:

23 Any and all claims for civil penalties under the California Labor Code and the
24 Private Attorneys General Act predicated upon the Labor Code violations
25 asserted, as well as any potential penalties, interest or attorneys' fees associated
26 with those violations under California law, to the extent such claims are
27 predicated on claims made or that could have been made based on the facts and
28 circumstances alleged in the Complaints and Plaintiff's notice to the LWDA,
including, but not limited to, 1) Failure to Pay All Straight Time Wages; 2)
Knowing and Intentional Failure to Comply with Itemized Employee Wage
Statement Provisions (Cal. Lab. Code § 226); 3) Failure to Pay all Wages Due
at the Time of Termination (Cal. Lab. Code § 203); 4) Failure to Adopt a
Compliant Sick Pay Policy (Cal. Lab. Code § 246); 5) Irregular Pay Periods
(Cal. Lab. Code § 204); 6) Failure to Reimburse Business Expenses (Cal. Lab.
Code § 2802); 7) Violation of Unfair Competition Law (Bus. & Prof. Code §
17200, et seq.); and 8) Failure to Pay all Overtime (Cal. Lab. Code § 510).
Exhibit 5 attached to the Mara Dec. at Section I (38).

1 **c. Class Members Overwhelmingly Support the Settlement – No Objections, No**
2 **Valid Opt-Outs, and 100% of the Class Will Receive a Settlement Payment**

3 On July 14, 2023, the Court granted preliminary approval, conditionally certified the Class,
4 appointed Apex to act as the Settlement Administrator, approved the notice to be sent to the Class,
5 and directed that the notice be mailed to the Class by First Class U.S. Mail. On July 14, 2023,
6 Apex received the Court approved text for the Notice from Counsel for Plaintiff. Apex prepared
7 a draft of the formatted Notice, which was approved by the Parties' Counsel prior to mailing. Nava
8 Dec. ¶ 4. On July 31, 2023, Apex received the class data file from Counsel for Defendant, which
9 contained the name, social security number, last known mailing address, employment dates, and
10 the total number of applicable workweeks worked for each Settlement Class Member. The Class
11 List contained 102 individuals. *Id.* at ¶ 5. On August 14, 2023, the Notice was mailed, via U.S.
12 First Class Mail, to all 102 individuals contained in the Class List. *Id.* at ¶ 7.

13 One (1) Notice was returned to Apex by the Post Office. Nava Dec. ¶ 8. Apex performed
14 a computerized skip trace on the returned Notice that did not have a forwarding address, in an
15 effort to obtain an updated address for purpose of re-mailing the Notice. *Id.* The notice could not
16 be remailed, as the skip trace failed to obtain an updated address. *Id.* at ¶¶ 8-9. Ultimately, One (1)
17 Notice has been deemed undeliverable. *Id.* at ¶ 10.

18 In sum, the settlement was received with overwhelming support from the Class Members.
19 Specifically, there were no objections, disputes, and no valid requests for exclusion submitted by
20 Class Members. Nava Dec. ¶¶ 11-13. This means all 102 Class Members, or 100%, will receive a
21 settlement payment. *Id.* at ¶ 14.

22 **IV. ARGUMENT**

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

25 California Rule of Court, Rule 3.769, requires court approval for class action settlements.
26 Cal. R. Ct. 3.769(g). California courts favor settlement. *Stambaugh v. Superior Court* (1976) 62
27 Cal. App. 3d 231, 236, *Potter v. Pacific Coast Lumber Co. of Cal.* (1951) 37 Cal. 2d 592, 602
28 ("[T]he law wisely favors settlements"). Accordingly, the Court must give "[due] regard to what
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.⁴ 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. Nava Dec. ¶ 12. 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. Unpaid Wages**

25 Based upon the discovery conducted, Plaintiff contends – and Defendant denies – that
26 Defendant failed to pay all wages owed to Class Members. Employees must be paid for all “hours

27 ⁴ See Memorandum of Points and Authorities in Support of Preliminary Approval, filed on June
28 16, 2023. 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 worked,” as that phrase is defined in the Wage Orders and interpreted by California courts. Hours
2 worked is defined as “the time during which an employee is subject to the control of an employer,
3 and includes all the time the employee is suffered or permitted to work, whether or not required to
4 do so.” Wage Order 1-2001, Subd. 2(K); *see also Mendiola v. CPS Security Solutions, Inc.*, 60
5 Cal. 4th 833 (2015).

6 Under this standard, “it is only necessary that the worker be subject to the control of the
7 employer in order to be entitled to compensation.” *Morillion v. Royal Packing Co.*, 22 Cal. 4th
8 575, 584 (2000). The *Morillion* Court reasoned that an employee is under the employer’s control
9 and entitled to compensation when the employer “‘directs, commands or restrains’ an employee.”
10 *Morillion*, 22 Cal. 4th at 583 (*quoting Bono Enterprises, Inc. v. Bradshaw*, 32 Cal. App. 4th 968,
11 975 (1995)). The California Supreme Court further found that “[a]n employer that requires its
12 employees to work minutes off the clock on a regular basis or as a regular feature of the job may
13 not evade the obligation to compensate the employee for that time by invoking the de minimis
14 doctrine.” *Troester v. Starbucks Corp.*, 5 Cal. 5th 829, 847 (2018). Off-the-clock claims are
15 governed by a known or should have known standard. *See Brinker Restaurant Corp. v. Superior*
16 *Court* (2012) 53 Cal. 4th 1004, 1051 (“liability is contingent on proof [the employer] knew or
17 should have known off-the-clock work was occurring”) (citing *Morillion*, 22 Cal. 4th at 585).

18 Here, Plaintiff contends that Class Members were required to perform several work related
19 tasks prior to clocking in for the day and after clocking out at the end of the day without
20 compensation from Defendant. Prior to clocking in, Class Members must unlock the chains on
21 the gate to permit them to enter Defendant’s truck yard, open the gate, go inside the yard, and then
22 lock the gate back up behind them. Next, Class Members are instructed to go to their assigned
23 “box” to get their paperwork for the day, take their paperwork with them to their truck, open the
24 truck, and clock in for the day on the tablets given to them by Defendant that are stored in the
25 truck. After clocking out for the day, Class Members must then deliver paperwork back to their
26 assigned box, unlock the gate so they can leave the yard, and lock the gate again after exiting.
27 Mara Dec. ¶ 19.

28 Defendant argues that beyond the limited accusations of Plaintiff, there is no evidence that

1 Class Members performed *any* work-related tasks for which they were not compensated, and that
2 Defendant has uniform practices and policies *forbidding* employees from working off the clock.
3 Defendant claims that Plaintiff's "investigation" is wholly inaccurate, and that the time spent
4 engaging in the above tasks is grossly inflated by Plaintiff. Defendant argues that Class Members
5 are instructed to clock in before performing any work related tasks, and that they are trained on
6 how to accurately log their time so that they can be paid for all time worked. Mara Dec. ¶ 20.

7 **ii. Overtime**

8 Pursuant to Labor Code section 510, "[a]ny work in excess of eight hours in one workday
9 and any work in excess of 40 hours in any one workweek and the first eight hours worked on the
10 seventh day of work in any one workweek shall be compensated at the rate of no less than one and
11 one-half times the regular rate of pay for an employee." Under Wage Order 9-2001, Subd. 3(L),
12 however, because it is undisputed that Class Members are subject to the Hours of Service
13 requirements of the United States Department of Transportation Code of Federal Regulations, they
14 are properly exempt from receiving overtime under the Labor Code and Wage Orders.

15 Despite this, Plaintiff contends that Defendant has established an implied contract with
16 Class Members to pay them overtime. Civil Code section 1621 defines
17 an implied contract: "An implied contract is one, the existence and terms of which are manifested
18 by conduct." "An implied contract ... in no less degree than an express contract, must be founded
19 upon an ascertained agreement of the parties to perform it, the substantial difference between the
20 two being the mere mode of proof by which they are to be respectively established." *Gorlach v.*
21 *Sports Club Co.* (2012) 209 Cal.App.4th 1497, 1507 Although an implied in fact contract may be
22 inferred from the "conduct, situation or mutual relation of the parties, the very heart of this kind
23 of agreement is an *intent* to promise." *Id.* at 1507-1508 (citing *Friedman v. Friedman* (1993) 20
24 Cal.App.4th 876, 887, *italics added*).

25 Plaintiff argues that Defendant tells Class Members that they will receive overtime pay
26 anyway when they work over 8 hours in a day or 40 hours in a week, essentially creating an implied
27 contract: "You work for us, we will pay you more then we have to by law." Based on the record
28 sampling produced, Plaintiff points out that Defendant does, in fact, regularly pay Class Members

overtime when they work over 40 hours in a week, and creates clear evidence of an implied contract, or “promise,” to pay the Class Members overtime. Thus, for all the instances where a Class Member did work over 8 hours in a day or 40 hours in a week and was not paid overtime, Defendant would be liable for this amount. Mara Dec. ¶ 21.

Defendant disputes the entirety of Plaintiff’s argument and the denies that it is liable for any overtime at all. First, Defendant argues that there is no contract with Class Members to pay them overtime at all, and that Plaintiff cannot point to any written agreement or policy that conveys any such message, nor is there any evidence that this purported “promise” was ever conveyed by Defendant to Class Members. Second, simply because Defendant decides in certain limited circumstances to pay Class Members overtime on occasion does not result in the formation of any kind of implied contract. Defendant is not legally obligated to pay Class Members overtime, and it is completely up to Defendant if it decides to do so on occasion. As such, Defendant claims that Class Members are being paid *more* than they are legally entitled to, not less. Mara Dec. ¶ 22.

iii. Reimbursement

Plaintiffs further contend that Defendant fails to reimburse Class Members for business expenses. Under Labor Code § 2802, Plaintiff argues that Defendant is required to reimburse Plaintiff and Class Members for a portion of their personal cell phone bills and the costs of laundering their uniforms. Labor Code § 2802(a) reads:

An employer shall indemnify his or her employee for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties, or of his or her obedience to the directions of the employer, even though unlawful, unless the employee, at the time of obeying the directions, believed them to be unlawful.

Plaintiff contends that the primary method of communication Defendant uses to contact Plaintiff and Class Members throughout the day is their personal cell phones, and that Defendant is liable for a reasonable percentage of their cell phone bills under § 2802,. Plaintiff further contends that because Defendant requires Plaintiff and Class Members to launder and care for Defendant’s uniforms, Defendant is also liable for a reasonable percentage of those costs as well. Mara Dec. ¶ 23.

Defendant contends that it never has required Plaintiff or other Class Members to use their

1 personal cell phone for business purposes. Defendant claims that it provides Class Members with
2 company issued tablets that it expects Class Members to use to communicate with Defendant as
3 needed throughout the workday. Defendant further contends that it expects Class Members to use
4 the company provided phones when communicating with their supervisors and that any use of a
5 Class Members' personal cell phone for these communications was solely that Class Members'
6 choice, and that Defendant never mandated or required the use of personal cell phones for business
7 purposes. Defendant also contends that their uniforms do not require any special care or
8 maintenance, and can simply be washed as part of the Class Members' regular laundry, which
9 absolves Defendant from any responsibility for any related expenses. Mara Dec. ¶ 24.

10 Although Plaintiff is confident in the strengths of his claims and believes this case is
11 suitable for certification on the claimed basis that there are company-wide policies that Plaintiff
12 contends violate California law and uniformly affect the Class Members, Defendant's
13 counterarguments raise uncertainties with respect to both class certification and success on the
14 merits. As the California Supreme Court ruled in *Sav-On v. Superior Court* (2004) 34 Cal.4th 319,
15 class certification is always a matter of the trial court's sound discretion. Decisions following *Sav-*
16 *On* have reached different conclusions, with respect to certification of wage and hour claims.⁵ In
17 light of Defendant's defenses, supporting evidence, and position that the action is not suitable for
18 class treatment, the settlement amount of \$400,000—**with an average settlement share**
19 **estimated at \$2,076.53, with a high payment of \$6,686.75**—Plaintiff and his counsel believe
20 this is a reasonable and fair settlement. Mara Dec. ¶ 25.

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

22 **a. The Requested Fee Award is Fair and Reasonable, Calculated as a Percentage** 23 **of a Common Fund**

24 Class Counsel applies for an award of attorneys' fees in the sum of \$133,333.33 (which is

25 ⁵ 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).

33 1/3% of the GSA), and litigation costs of \$15,370.99 (originally estimated not to exceed \$25,000). *Mara Dec.* ¶ 26. California courts have recognized an appropriate method for determining an award of attorneys' fees is based on a percentage of the total value of benefits to Class Members by the settlement, also known as the "common fund" method. *Serrano v. Priest* (1977) 20 Cal.3d 25, 34 (*Serrano III*) 34 ("when a number of persons are entitled in common to a specific fund, and an action brought by a plaintiff or plaintiffs for the benefit of all results in the creation or preservation of that fund, such plaintiff or plaintiffs may be awarded attorney's fees out of the fund."); *Serrano v. Unruh*, 32 Cal.3d 621, 627 (1982) (in awarding a fee from the common fund obtained for the benefit of all parties, the trial court acts within its equitable power to prevent the other parties' unjust enrichment.); *Rawlings v. Prudential-Bache Properties, Inc.*, 9 F.3d 513, 516 (6th Cir. 1993) (the percentage of the fund method for calculating attorney's fees more accurately reflects the results achieved for the putative class than the lodestar method and "establishes reasonable expectations on the part of plaintiffs' attorneys as to their expected recovery; and it encourages early settlement, which avoids protracted litigation."); *In re Rite Aid Corp. Securities Litigation*, 396 F.3d 294, 300 (3d Cir. 2005) ("The percentage-of-recovery method is generally favored in common fund cases because it allows courts to award fees from the fund 'in a manner that rewards counsel for success and penalizes it for failure.'").

The purpose of the common fund/percentage approach is to "spread litigation costs proportionally among all the beneficiaries so that the active beneficiary does not bear the entire burden alone." *Vincent v. Hughes Air West, Inc.* (9th Cir. 1977) 557 F.2d 759, 769. In *Quinn v. State of California* (1995) 15 Cal.3d 162, 167, the Court stated: "[O]ne who expends attorneys' fees in winning a suit which creates a fund from which others derive benefits may require those passive beneficiaries to bear a fair share of the litigation costs." Similarly, in *City and County of San Francisco v. Sweet* (1995) 12 Cal.4th 105, 110, the California Supreme Court recognized that the common fund doctrine has been applied "consistently in California when an action brought by one party creates a fund in which other persons are entitled to share." The reasons for applying the common fund doctrine include: "...fairness to the successful litigant, who might otherwise receive no benefit because his recovery might be consumed by the expenses; correlative prevention of an

1 unfair advantage to the others who are entitled to share in the fund and who should bear their share
2 of the burden of its recovery; encouragement of the attorney for the successful litigant, who will
3 be more willing to undertake and diligently prosecute proper litigation for the protection or
4 recovery of the fund if he is assured that he will be properly and directly compensated should his
5 efforts be successful.” *Id.*

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

8 The recognized advantages of the percentage method - including relative ease of
9 calculation, alignment of incentives between counsel and the class, a better
10 approximation of market conditions in a contingency case, and the encouragement
11 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.

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

14 **b. The Requested Attorneys’ Fee and Cost Award is Within the Range of Fees**
15 **Approved in Comparable Common Fund Cases**

16 The requested fee falls in the mid-range of percentage class fee awards, which generally
17 range from 20% to 50% of a common fund, and it constitutes fair compensation for undertaking
18 complex, risky, expensive, and time-consuming litigation on a contingent basis and compensates
19 Class Counsel for their efforts, as well as the result achieved for the benefit of the Class. Numerous
20 state and federal courts in California routinely approve fee requests equal to or greater than 33
21 1/3%. In short, Plaintiff’s counsels’ fee request of \$133,333.33 (33 1/3% of the GSA) is in line
22 with awards in similar cases in California and nationwide and demonstrates that Plaintiff’s
23 counsels’ fee request is consistent with market rates and is reasonable.

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

25 Class Counsel’s fee request is reasonable when calculated using the lodestar method.

26 ⁶ *Laffitte* also held trial courts have discretion to assess reasonableness of fee awards with tools
27 such as the lodestar cross-check, although they need not do so. *Laffitte*, 1 Cal.5th at 506 (“We hold
28 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 Under the lodestar method, a base fee amount is calculated from a compilation of time reasonably
2 spent on the case and the reasonable hourly compensation of the attorney. *Serrano v. Priest* (1977)
3 20 Cal. 3d 25, 48. The court then enhances this lodestar figure by a “multiplier” to account for a
4 range of factors, such as the novelty and difficulty of the case, its contingent nature, and the degree
5 of success achieved. *Id.*, at 49; see also *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1132-36; *PLCM*
6 *Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1096; *Thayer v. Wells Fargo Bank* (2001) 92
7 Cal.App.4th 819, 834, (“[t] there is no ... rule limiting the factors that may justify an exercise of
8 judicial discretion to [adjust the] lodestar”).

9 As of the date of filing this Motion for Final Approval, Plaintiff’s counsel has worked a
10 total of 269 hours on this case and calculated the base lodestar at \$198,650 at rates reflecting those
11 currently earned in the marketplace. Mara Dec. ¶¶ 27-28, 30-31; **Exhibit 1**. All of the work and
12 tasks performed by Plaintiff’s counsel were reasonable and necessary to the prosecution of this
13 case. Mara Dec. ¶¶ 27-28, 30-31. As Class Counsel’s lodestar fee is in excess of their fee request,
14 a multiplier on their lodestar fee is not sought herein. Mara Dec. ¶ 32. In fact, the requested fee
15 results in a so-called “negative multiplier” which suggests the percentage of the fund amount is
16 reasonable and fair. See *Chun-Hoon v. McKee Foods Corp.* (N.D. Cal. 2010) 716 F.Supp.2d 848,
17 854; *In re Portal Software, Inc. Securities Litigation* (N.D. Cal. 2007) 2007 U.S. Dist. LEXIS
18 88886, 2007 WL 4171201, at *16.

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

20 Plaintiffs’ counsels’ hourly rates are between \$600 and \$850 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.⁷ 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 ⁷ Mara Dec. ¶¶ 28, 31; **Ex. 2** Westlaw Court Express’s Legal Billing Report, Volume 14, Number
28 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. ¶¶ 2-8, 29. As prominent attorneys in the field of wage
6 and hour class action litigation, Plaintiffs' counsel continually monitors the prevailing market rates
7 charged by both defense and plaintiff law firms and set the billing rates of their attorneys and
8 paralegals to be consistent with the prevailing market rates in the private sector for attorneys and
9 staff of comparable skill, qualifications and experience. Other wage and hour attorneys working
10 as class counsel before California courts charge comparable if not higher rates.⁸ Therefore, as they
11 are in line with those of the relevant community, Class Counsels' hourly rates are reasonable.

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

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

18 To date, Plaintiffs' Counsel has expended a total of 269 hours litigating this case. The work
19 performed to achieve a settlement that will provide valuable consideration to the Class, **averaging**
20 **an estimated payment of \$2,076.53,**⁹ is summarized by Class Counsel in the declarations
21 submitted herewith. Mara Dec. ¶ 27, 30; **Ex. 1.** Counsel's many tasks, in summary form, included
22 the following: pre-filing investigation and legal research; communicating with the class
23 representatives; interviewing and meeting with putative Class Members; research and
24 investigation of California's ever evolving wage and hour laws; investigation into Defendant's
25 pay-structures and policies for its hourly employees; drafting and filing pleadings; drafting and

26 ⁸ Mara Dec. ¶¶ 28, 31, **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.

⁹ See Nava Dec. ¶ 16.

1 filing notice to the LWDA; numerous conferences with Defendant's counsel regarding a variety
2 of issues throughout the litigation, mediation and settlement process; numerous interoffice
3 discussions about litigation strategy and theories of liability; appearing at hearings; drafting and
4 propounding discovery; responding to discovery requests; meeting and conferring over discovery
5 responses; review and analyze documents produced by Defendant, create exhibits for use in the
6 case; review case file for mediation; draft mediation brief and exposure analysis; interoffice
7 discussions about mediation and mediation brief; prepare for and attend mediation; draft and revise
8 memorandum of understanding; draft and revise long form settlement agreement; draft motion for
9 preliminary approval and supporting documents, communicate with the settlement administrator
10 throughout the administration process, and draft motion for final approval and supporting
11 documents. All tasks and work performed were reasonable and necessary to the prosecution of this
12 case. The work performed was justified in light of the result achieved. Mara Dec. ¶ 27, 30.

13 **f. Costs of Litigation**

14 Class Counsel seeks reimbursement of the litigation costs and expenses of \$15,370.99
15 (originally estimated not to exceed \$25,000). These costs were all reasonable and necessary to the
16 prosecution of this case and the results achieved and are fair, and reasonable. Mara Dec. ¶ 33, Ex.
17 1.

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

19 In addition, Plaintiff agreed to a general release of his claims against Defendant in
20 exchange for \$10,000 Class Representative Enhancement Payment. Courts routinely approve
21 service payments, or incentive awards, to compensate a named plaintiff for the services he or she
22 provides and the risks he or she incurs during class litigation. *See In re Cellphone Fee Termination*
23 *Cases* (2010) 186 Cal.App.4th 1380, 1393; *see also Bell v. Farmers Ins. Exch.* (2004) 11
24 Cal.App.4th 715, 725-26 (upholding services payments to class representatives); *Munoz v. BCI*
25 *Coca-Cola Bottling Co. of Los Angeles* (2010) 186 Cal.App.4th 399, 412 (upholding incentive
26 awards to plaintiffs that, when added to their individual recoveries, amounted to more than twice
27 as much as the average payment to class members). Courts have regularly and routinely granted
28 approval of settlements containing such enhancements. *See, e.g., Staton v. Boeing*, 327 F.3d 938,

1 977 (9th Cir. 2003).¹⁰ In Class Counsel's experience, the typical enhancement award in wage and
2 hour class action settlements ranges from \$5,000 to \$75,000. Very commonly there is more than
3 one class representative who receives an award in the above range. Mara Dec. ¶ 34.

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

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

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

25 ¹⁰ *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 \$56,788.). The risk of payment of Defendant's costs, in itself alone, is a sufficient basis for an
2 award of the requested enhancement sum. Few individuals are willing to take this risk, and it is
3 clear that the appointed Class Representative here championed a cause on behalf of others with
4 potentially huge monetary risks.

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

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

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

21 The Parties agreed to hire Apex as the Administrator, and the Court approved this choice.
22 The Administrator was responsible for formatting, printing and mailing the Notice. It was also
23 responsible for updating addresses and re-mailing Notices returned as undeliverable, responding
24 to Class Member inquiries, answering questions from Counsel for the Parties, and providing a
25 declaration to document its duties and responsibilities under the settlement. Plaintiff now requests
26 that the Court finally approve the \$4,490 (estimated not to exceed \$7,500) fee to Apex for services
27 rendered and to be rendered. Nava Dec. ¶ 19.

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. Apex's fee of \$4,490 for services rendered and to
5 be rendered is fair and reasonable and should be granted.

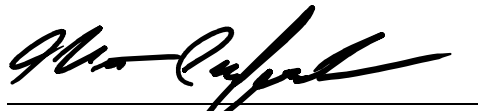
6 **VIII. CONCLUSION**

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 \$15,370.99, award to the named Plaintiff the class representative
10 enhancement payment in the sum of \$10,000, award to Apex the requested \$4,490 for settlement
11 administration services, and approve of a payment to the LWDA in the amount of \$18,750.

12
13 Respectfully submitted,

14 Dated: November 6, 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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