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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

KASPER LEUZINGER, MICHAEL ALLEN
JENSEN, WILLIAM MATNEY-TATE, and
RICARDO AMEZCUA, on behalf of themselves
and all others similarly situated,

Plaintiffs,

vs.

GARDNER TRUCKING, INC., a California
corporation, GARDNER TRUCKING
CONVERSION, LLC, a California Limited
Liability Company; CRST EXPEDITED, INC.,
an Iowa Corporation; CRST THE
TRANSPORTATION SOLUTION, INC., an
entity of unknown formation; and DOES 1
through 50, inclusive,

Defendants.

Case No.: 4:21-cv-04952-YGR

Consolidated with:

4:21-cv-07474-YGR

4:21-cv-07741-YGR

4:22-cv-06501-YGR

[Related on July 27, 2021 to *Castro v.
Gardner Trucking, Inc.*, N.D. Cal. Case No.
4:20-cv-05473-YGR]

FRCP RULE 23 CLASS ACTION

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PLAINTIFFS' MOTION FOR FINAL
APPROVAL OF CLASS ACTION AND
PAGA SETTLEMENT AND
ATTORNEY FEES AND COSTS**

Date: February 18, 2025

Time: 2:00 p.m.

Place: Courtroom 1 – 4th Floor

Action Filed: June 28, 2021

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiffs Kasper Leuzinger, Michael-Allen Jensen, William Matney-Tate, and Ricardo Amezcua (collectively, “Plaintiffs”), individually and on behalf of the Conditionally Certified Class, move for final approval of a \$4,050,000.00 non-reversionary, Gross Settlement Amount (“GSA”) memorialized in the Parties’ Class Action and PAGA Settlement Agreement (“Settlement, “Settlement Agreement” or “S.A.”) ¹, which after deductions for attorneys’ fees and costs, the Class Representative Enhancement Award Payments, Administration fees, and the payment to the LWDA, will provide an estimated Net Class Settlement Amount (“NSA”) of \$2,463,108.07 as follows:

	Total Amount
<i>Gross Settlement Amount</i>	\$4,050,000.00
Attorneys’ Fees (30% percent of GSA)	\$1,215,000.00
Litigation Costs (Not to Exceed)	\$31,891.93
Administrator Costs (Not to Exceed)	\$100,000.00
PAGA Fund	\$200,000.00
Class Representative’s Service Award	\$40,000.00
<i>Net Class Settlement Amount</i>	\$2,463,108.07²

The NSA will be distributed to 12,493 Participating Class Members defined as:

Expedited Settlement Class: All California resident truck driver employees who worked for CRST as part of what is now known as Expedited Solutions at any time from August 10, 2017 through February 29, 2024 (the “Expedited Class Period”). (Agreement, ¶ 9.)

Gardner-Dedicated West Settlement Class: All California resident truck driver employees who worked for CRST as part of what is now known as Dedicated West at any time from April 6, 2016 though February 29, 2024, (the “Gardner-Dedicated West Class Period”). (Agreement, ¶ 12.)³

The Settlement was preliminarily approved on September 17, 2024. (Dkt. 130). On October 18, 2024 the Court-approved Notice Packet (consisting of the Notice of Class Action and PAGA Settlement, Change of Address form, and pre-printed return envelope) was sent to

¹ A true and correct copy of the Settlement Agreement is attached to the Declaration of James Hawkins In Support of Final Approval (“Hawkins Decl.”), and Amendment Thereto as **Exhibit A**.

² Hawkins Decl., ¶¶ 27-28.

³ Hawkins Decl., Ex. A at ¶¶ 9, 12, 21; Declaration of Nathalie Hernandez on behalf of ILYM Group, Inc., (“Hernandez Decl.”) ¶ 13.

12,495 Class Members informing them of their rights and benefits under the Settlement, including their estimated Settlement Payments if they did not request exclusion, and the January 21, 2025 deadline to dispute workweeks, request exclusion, or object to the Settlement. (Hernandez Decl. ¶¶7-12).

Support for the Settlement is strong. As of the filing of this Motion, two (2) Class Members requested exclusion to opt out of the Settlement and zero (0) Class Members have objected to the Settlement. (*Id.* at ¶¶11-12). The proposed Settlement will pay Participating Class Members based on the number of workweeks worked during the Class Period, paying Participating Class Members on average \$197.88 and highest payments of \$1,513.06. PAGA Employees who worked during the PAGA Period will also receive a proportional share of the Net PAGA Settlement Amount, paying on average \$4.00, with the highest PAGA Payment Share estimated at \$42.56. (*Id.* at ¶ 14).

Therefore, Plaintiffs respectfully request the Court grant final approval of the Settlement, attorneys' fees, litigation costs, Service Award Payments, Settlement Administration Costs, and payment to the LWDA in the amounts preliminarily approved by the Court and as fully disclosed to Class Members.

II. THE PARTIES AND BRIEF PROCEDURAL HISTORY

1. The Parties

Plaintiff Kasper Leuzinger is a California resident who worked for CRST as a truck driver in California from January 2019 to April 2023. Plaintiff Ricardo Amezcua is a California resident who worked for CRST as a truck driver and dispatcher in California from February 2018 to February 2020. Plaintiff Michael Allen Jensen is a California resident who worked for CRST as a truck driver in California from May 2019 to November 2019. Plaintiff William Matney-Tate worked for CRST as a driver in California from January 2021 to June 2021. (*See* Mtn for Prelim Appr., Dkt. 104, 2:25-28, 3:1-5).⁴

⁴ Hawkins Decl., ¶ 2.

2. Mediation

On October 16, 2023, the Parties participated in a second arm's-length mediation, this time with Hon. Amy D. Hogue (Ret.), a well-renowned and experienced wage and hour class action mediator and former presiding judge of the Civil Complex Litigation division of Los Angeles Superior Court. CRST provided class data updated from the Parties' first mediation session. At the mediation, the Parties debated their legal positions, the likelihood of certification of Plaintiffs' claims, and the legal bases for the claims and defenses. Ultimately, the Parties agreed to resolve the Action on a class-wide basis pursuant to a mediator's proposal. (*Id.* Dkt. 104, 3:10-16).⁵

On February 27, 2024, after thorough discussion and revisions, the Parties fully executed a Memorandum of Understanding that memorialized the major terms of the Settlement. (*Id.* Dkt. 104, 3:17-18).⁶

3. Preliminary Approval

On May 1, 2024, Plaintiffs' Motion for Preliminary Approval was filed and served on the LWDA. Following a July 9, 2024 hearing, on September 17, 2024, the Court issued its Order Granting Plaintiffs' Motion for Preliminary Approval and Conditional Certification of the Class, and approving proposed deadlines and filing dates thereon (Dkt. 130). Having evaluated the terms of the Settlement that provided for direct notice to the Class via First Class U.S. Mail, and a notice plan that included the Administrator's search of the National Change of Address database to update stale addresses prior to the initial mailing of the Notice Packet, and skip-tracing of returned and undelivered Notice Packets using the Class Member's social security number, the Court determined the Settlement's notice plan was reasonably calculated to reach the members of the Class (Dkt. 130).⁷

At the time of preliminary approval, the Court was provided with sufficient information to grant preliminary approval. Following dissemination of the Notice, and adequate time provided to the Class to object to the Settlement, zero class members submitted objections and

⁵ Hawkins Decl., ¶ 3.

⁶ Hawkins Decl., ¶ 4.

⁷ Hawkins Decl., ¶ 5.

two opted out of the settlement, presently *resulting in 99.98% participation rate from the Class*. (Hernandez Decl., ¶ 13). Thus, the proposed Settlement is entitled to the presumption that it is fair and in all other respects proper and should be finally approved.⁸

III. DEFENDANTS' CONTENTIONS AND DEFENSES

1. Unpaid Wages

Plaintiffs claim that they and the putative class were not paid all wages because Defendants made them perform work off-the-clock, rounded their recorded time worked on shifts downward more than upward, and used the incorrect regular rate of pay to calculate their overtime, double-time, and meal and rest break premium wages. Defendants generally deny these allegations and raise specific defenses to them. (Mtn for Prelim Appr., Dkt. 104, 4:13-17).⁹

Off-the-Clock Work. Plaintiffs claim that they were required to perform work while off-the-clock prior to their shifts by walking from their cars and to their vehicles from the office, filling out paperwork, inspecting their vehicles, and waiting for their Qualcomm systems to boot up. (*Id.* Dkt. 104, 4:18-20).¹⁰

Defendants contend that Plaintiffs' allegations do not apply to Expedited Solutions drivers because they are paid both a flat rate for all necessary tasks the estimated miles driven and ancillary pay for non-normal tasks and because they drive in teams, which leaves no "boot up" time, and Dedicated West drivers are paid based on the hours they themselves enter on their timesheets. Defendants further argue that under federal law, "preliminary" and "postliminary" activities, such as time spent logging in to trucks' onboard computers, are not compensable. (*Id.* Dkt. 104, 4:21-26)¹¹.

Rounding of Time Worked. Plaintiffs claim that Defendants rounded Class Members' time worked down more than they rounded up for the purposes of calculating wages, which resulted in the non-payment of minimum and overtime wages. Defendants contend that there is

⁸ Hawkins Decl., ¶ 6.

⁹ Hawkins Decl., ¶ 15.

¹⁰ Hawkins Decl., ¶ 16.

¹¹ Hawkins Decl., ¶ 17.

no evidence that CRST's timekeeping systems rounded time recorded downwards more than upwards and such a claim could not apply to any employees whose time was manually recorded. (*Id.*, Dkt. 104, 4:27-28; 5:1-4).¹²

Incorrect Regular Rate of Pay. Plaintiffs claim that Defendants failed to upwardly adjust Plaintiffs' and class members regular rates of pay by failing to incorporate the value of their non-discretionary bonuses and shift differentials when calculating the overtime and double-time rates of pay each pay period, which meant that they were not properly compensated for overtime and double-time hours worked or paid meal or rest break premiums at the correct rates of pay. Defendants contend that Plaintiffs are exempt from both FLSA and California overtime requirements and subject to Dept. of Transportation regulations that such claims as applied to meal and rest break premiums are preempted under the Supremacy Clause of the U.S. Constitution. (*Id.*, Dkt. 104, 5:5-12).¹³

2. Meal Break and Rest Break Violations

Plaintiffs claim that they were not provided legally required meal breaks and rest breaks during their shifts. First, they were consistently denied the opportunity to take meal periods in accordance with California law as demonstrated by time sheets reflecting shifts in excess of 11 and 12 hours with no second meal periods being taken. Second, both meal and rest breaks were regularly interrupted by work-related calls on their personal cell phones, which Plaintiffs were required to keep on and continuously monitor throughout their shifts, in line with Defendants' defective written rest break policy, which fails to require relief from all duty during designated rest breaks. Finally, the substantial pre-shift and off-the-clock work unlawfully delayed Class Members' meal and rest breaks. (*Id.*, Dkt. 104, 5:14-22).¹⁴

Defendants generally deny all of Plaintiffs' allegations. As noted above, Defendants contend Plaintiffs' meal and rest break claims are preempted by federal law. Specifically, in December 2018, the FMCSA issued an order concluding California's meal and rest break rules

¹² Hawkins Decl., ¶ 18.

¹³ Hawkins Decl., ¶ 19.

¹⁴ Hawkins Decl., ¶ 20.

are preempted by federal law as applied to property-carrying commercial motor vehicle drivers covered by the FMCSA's hours-of-services regulations (such as Plaintiffs and their putative class members). CRST contends its drivers haul freight moving in interstate commerce, and they are therefore all subject to the DOT hours of service regulations. The FMCSA's order would accordingly preempt their meal and rest break claims. (*Id.*, Dkt. 104, 5:23-28; 6:1-2).¹⁵

3. Unreimbursed Expenses

Plaintiffs claim that Defendants required Plaintiff and class members to incur necessary expenditures to execute their work duties but failed to reimburse them because they were required to use their personal cell phones to respond to calls and text messages from management throughout the workday, they were never provided with maps or a GPS system to help them navigate and had to use the GPS applications on their personal cell phones to map their routes, they were required to purchase their own tools to execute their work duties, and they were required to bear the cost of maintaining and cleaning their company-provided uniforms. (*Id.*, Dkt. 104, 6:4-10).¹⁶

Defendants generally deny all of Plaintiffs' allegations. Defendants contend Plaintiffs cannot establish that the expenses were "necessary" for or in "direct consequence" of their duties or that CRST ordered them to incur them. First, each truck had an onboard computer that drivers can use for work-related communication, rendering a cell phone unnecessary. Second, Plaintiffs will be unable to identify any policy showing that CRST required drivers to use their cell phones in light of this. Third, should drivers elect to use their cell phone when other forms of employer-provided communication systems are available, that is not a necessary business expense. Fourth, there are no records showing if, when, or how often drivers used their cell phones. Finally, Plaintiffs will be unable to certify a class because answering the question of necessity would require individual determination as to why each driver chose to use his or her cell phone for work related purposes and whether such a choice was reasonable under the circumstances.

¹⁵ Hawkins Decl., ¶ 21.

¹⁶ Hawkins Decl., ¶ 22.

1 Having already prevailed on this question in another case, Defendants contend there is no reason
2 to think there will be a different outcome here. (*Id.*, Dkt. 104, 6:11-23).¹⁷

3 **4. Unpaid Vested Vacation Wages**

4 Plaintiffs claim that Defendants failed to pay Plaintiffs and class members vested
5 vacation wages based on the following factual allegations: Plaintiffs and the putative class
6 accrued vacation wages during their employment with Defendants, which are considered a form
7 of wages under Labor Code section 200 and which cannot be subject to forfeiture without
8 compensation. Defendants maintained policies that provide for the unlawful forfeiture of vested
9 vacation pay. Upon termination or separation of employment, Defendants failed to pay Plaintiffs
10 and the putative class for all accrued vacation pay to which they are entitled. Defendants contend
11 CRST has longstanding policies and practices that comply with Section 227.3. For all relevant
12 times, Plaintiffs and Settlement Class members were paid all accrued (and vested) vacation time
13 upon termination and cannot show—nor have they alleged—specific evidence to the contrary.
14 (*Id.*, Dkt. 104, 6:25-28; 7:1-7).¹⁸

15 **5. Derivative Claims**

16 Plaintiffs allege claims for statutory penalties under Labor Code section 203 for failure
17 to timely pay all final wages and under Labor Code section 226 for failure to provide accurate
18 itemized wage statements, for restitution under Business & Professions Code section 17200 *et*
19 *seq.* for unfair competition, and for civil penalties under Labor Code section 2698 *et seq.*
20 (PAGA), which all derive from the alleged substantive Labor Code violations discussed above.
21 (*Id.*, Dkt. 104, 7:9-13).¹⁹

22 CRST contends Plaintiffs' derivative claims will fail for the same reasons as their
23 underlying, substantive claims. Additionally, CRST asserts that Plaintiffs cannot prove that any
24 nonpayment was willful—a requirement for recovery based on the failure to timely pay wages
25 owed under Section 203—since it has a good faith reason to believe that all wages have in fact
26

27 ¹⁷ Hawkins Decl., ¶ 23.

28 ¹⁸ Hawkins Decl., ¶ 24.

¹⁹ Hawkins Decl., ¶ 25.

1 been paid. Nor can Plaintiffs show CRST knowingly and intentionally failed to provide accurate
 2 wage statements in violation of Labor Code Section 226—required to recover penalties—
 3 because CRST has a good faith defense that Plaintiffs are not owed any wages based on their
 4 defenses to the underlying wage claims, including the overtime exemption, and FMCSA
 5 preemption of meal and rest break requirements. (*Id.*, Dkt. 104, 7:14-21).²⁰

6 In conclusion, each of the claims was thoroughly investigated and vehemently refuted
 7 and disputed by Defendants. (Hawkins Decl., ¶¶ 8-14; Setareh Decl., ¶¶ 22-31).

8 **IV. THE SETTLEMENT IS FAIR, REASONABLE, AND ADEQUATE**

9 **a. The Settlement Satisfies the Standard for Final Approval**

10 A class action may not be settled without court approval. Rule 23(e). To grant final
 11 approval to a class action settlement, a district court must find the proposed settlement is
 12 fundamentally fair, adequate, and reasonable. *Staton v. Boeing Co.*, 327 F. 938, 952 (9th Cir.
 13 2003).

14 Although the Court has discretion to determine whether a proposed class settlement is
 15 fair, the Ninth Circuit has “long deferred to the private consensual decision of the parties.”
 16 *Rodriguez v. West Publ’g Corp.*, 563 F.3d 948, 965 (9th Cir. 2009) (citing *Hanlon v. Chrysler*
 17 *Corp.*, 150 F.3d 1011, 1027 (9th Cir. 1998)). “[T]he court’s intrusion upon what is otherwise a
 18 private consensual agreement negotiated between the parties to a lawsuit must be limited to the
 19 extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or
 20 overreaching by, or collusion between, the negotiating parties, and that the Settlement, taken as
 21 a whole, is fair, reasonable and adequate to all concerned.” *Officers for Justice v. Civil Serv.*
 22 *Comm’n*, 688 F.2d at 625. “[T]he Court’s function is not to second guess the Settlement’s terms.”
 23 *Garner v. State Farm Auto Ins. Co.*, No. CV 08 1365 CW (EMC), 2010 U.S. Dist. Lexis 49477,
 24 *21 (N.D. Cal. Ap. 22, 2010).

25 Rule 23(e) settlement approval has three steps: (1) preliminary approval of the
 26 settlement; (2) notice of the settlement to Class Members; and (3) a final fairness hearing at

27
 28 ²⁰ Hawkins Decl., ¶ 26.

1 which Class Members may be heard and at which evidence and argument regarding the
 2 settlement may be considered. *Murillo v. Pac. Gas & Elec. Co.*, 266 F.R.D. 468, 473 (E.D. Cal.
 3 2010). This procedure safeguards Class Members’ due process rights and enables the Court to
 4 fulfill its role as a fiduciary, protecting interests of absent class members. *See* William
 5 Rubenstein, Alba Conte & Herbert Newberg, *4 Newberg on Class Actions* (5th ed. 2014)
 6 (“Newberg”), §§ 13:39, *et seq.*

7 **b. Class Notice Has Been Effectuated and Comports with Rule 23 and Due**
 8 **Process**

9 Before a class action can be finally approved, notice of the Settlement must be provided
 10 to the Class. Fed. R. Civ. P. 23(e)(1). Rule 23 requires that the Class receive “the best notice
 11 practicable under the circumstances, including individual notice to all members who can be
 12 identified through reasonable effort.” Fed. R. Civ. P. 23(c)(2)(B). Notice to the Class must be
 13 “reasonably calculated under all the circumstances, to apprise interested Parties of the pendency
 14 of the action and afford them an opportunity to present their objections.” *Mullane v. Central*
 15 *Hanover Bank and Trust Co.*, 339 U.S. 306, 314 (1950); *Saulic v. Symantec Corp.*, 596 F.
 16 Supp.2d 1323, 1327 (C.D. Cal. 2009).

17 The Court approved the Notice of Class and PAGA Settlement and found that it fairly
 18 and adequately advised the Class and PAGA Employees of the terms of the proposed Settlement,
 19 the benefits available to them, the Final Approval Hearing date, and the right to appear at the
 20 hearing, among other things. Preliminary Approval Order, (Dkt. 130). The Court found that the
 21 Notice described the essential terms of the Settlement, defined the class, set forth the procedures
 22 for opting out of the Class and filing objections to the proposed Settlement, and provided
 23 information on the date, time, and location of the final fairness hearing. These notice methods
 24 are reasonably calculated to afford the class members an opportunity to present any objections.
 25 *Id.*

26 **c. The Settlement is Entitled to the Presumption of Fairness**

27 “[I]n the Ninth Circuit, a court affords a presumption of fairness to a settlement if: ‘(1)
 28 the negotiations occurred at arms’ length; (2) there was sufficient discovery; (3) the proponents

of the Settlement are experienced in similar litigation; and (4) only a small fraction of the class objected.” (cite omitted) *Rodriguez v. West Publishing Corp.*, No. CV-05-3222 R(MCx) 2007 U.S. Dist. LEXIS 74849 at 32-33 (C.D. Cal. Sept. 10, 2007). The Preliminary Approval Motion thoroughly analyzed the terms of the Settlement in light of these factors showing that the proposed Settlement is in the Class’s best interest, is adequate and reasonable, and entitled to a presumption of fairness. (Dkt. 130). In granting preliminary approval, the Court found the first three *Rodriguez* factors satisfied; the fourth factor, the number of objectors, was unknown until the Class had an opportunity to respond to the Notice. Subject only to the Class’s reaction, the Court preliminarily presumed the Settlement was fair, adequate and reasonable. (Dkt. 130).

Two (2) Class Members opted-out of the Settlement and zero (0) Class Members objected. (Hernandez Decl., ¶¶ 11-12). This supports the presumption the Settlement is fair, adequate and reasonable. *Martin v. AmeriPride Servcs.*, 2011 U.S. Dist. Lexis 61796 at *21 (S.D. Cal. June 9, 2011); *In re: Omnivision Techs.*, 559 F. Supp.2d, 1036, 1043 (N.D. Cal. 2007) (“[T]he lack of objection of the Class Members favors approval of the Settlement.”); see also *Brown v. American Honda Motor Co., Inc.*, 2010 U.S. Dist. Lexis 145475, at *49 (C.D. Cal. July 29, 2010) (a low number of opt-outs indicates class members favor settlement and find it fair); *Boyd v. Bechtel Corp.*, 485 F. Supp. 610, 624 (N.D. Cal. 1979) (a lack of objections supports that the settlement is reasonable).

Nothing has changed since the Court granted preliminary approval of the settlement to negate the presumption of fairness. With the Class’s favorable reaction to the Settlement, Class Counsel remains convinced the Settlement is in the Class’s best interest based on detailed knowledge of the issues presented and the negotiations. The length and risks of trial and the perils of litigation that affect the value of the claims were all carefully weighed. The affirmative defenses asserted by Defendants, the uncertainty of obtaining and maintaining Rule 23 certification, the prospect of an adverse summary judgment ruling, the difficulties of complex litigation, the lengthy process of establishing damages, and the risks and delays of appeals, were all carefully considered by Class Counsel in arriving at the Settlement. (Hawkins Decl., ¶ 7).

V. THE COURT SHOULD APPROVE THE REQUESTED FEES AND COSTS

Class Counsel applies for an award of attorneys' fees in the sum of \$1,215,000.00 of the GSA with a modest multiplier of approximately 1.94, and litigation costs of \$31,891.93. (Hawkins Decl., ¶¶ 31-34, Ex. 1; Setareh Decl., ¶¶ 8-13, Ex. A).

The Ninth Circuit has identified a number of factors the Court may consider in assessing whether an award is reasonable and whether an upward departure from the standard benchmark is warranted, including: (1) the results achieved; (2) the risk of litigation; (3) the skill required and quality of work; (4) the contingent nature of the fee; (5) the financial burden carried by the plaintiffs; and (6) awards made in similar cases. *Singer v. Becton Dickinson & Co.*, 08-CV-821-IEG (BLM), 2010 WL 2196104 at *8 (S.D. Cal. June 1, 2010) (citing *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1048-50 (9th Cir. 2002)).

The Ninth Circuit has established "25 percent of the fund as the benchmark for a reasonable fee award" in common fund cases." *In re Bluetooth Headset Prods. Liab. Lit.*, 654 F.3d 935, 942 (9th Cir. 2011); *In Re National Collegiate Athletic Association Grant-in-Aid Cap Antitrust Litigation*, 2017 WL 6040065, *2 (N.D. Cal. 2017) (the 25% benchmark is "presumptively reasonable."). However, despite the fact that the Ninth Circuit has generally established 25% of a common fund as the "benchmark" award for attorney fees, *Vizcaino*, 290 F.3d at 1043, it has also held that benchmark is only the starting point for the analysis and that the exact percentage to be awarded varies based on the facts of the case but that "in most common fund cases, the award exceeds that benchmark." *In Re NCAA*, 2017 WL 6040065 at *2. Finally, 33.33% percent fee is within the range typically awarded by California state courts. *See Laffitte v. Robert Half Internat., Inc.*, 1 Cal. 5th 480, 503 (2016) (the California Supreme Court affirmed percentage awards for attorney fees from common funds, and then upheld a 33.33% attorney fee award from the common fund in a wage and hour class action); *see also Chavez v. Netflix, Inc.* 162 Cal. App. 4th 43, 66 n.11 (2008) ("fee awards in class actions average around one-third of the recovery"); *see also, e.g., Betancourt v. Advantage Human Resourcing, Inc.*, 2016 WL 344532 at * 9 (N.D. Cal. 2016) (awarding 34.3% of settlement fund in wage and hour class action); *Wren v. RGIS Inventory Specialists*, 2011 WL 1230826 at *29 (N.D. Cal. 2011)

(awarding fees that “amount to just under 42% of the settlement amount” in a wage and hour class action); *Knight v. Red Door Salons, Inc.*, 2009 WL 248367 at *5–6 (N.D. Cal. 2009) (approving of a 30% fee award in a wage and hour class action settlement); *Romero v. Producers Dairy Foods, Inc.*, 2007 WL 3492841 at *4 (E.D. Cal. 2007) (approving a 33% fee award in a wage and hour class action settlement).

Plaintiffs respectfully submit that given that the California Supreme Court declined to adopt a 25% benchmark in *Laffitte*, 1 Cal. 5th at 503-06, the 25% benchmark should no longer apply in cases in which California law governs the fee motion. In *Vizcaino*, the lead Ninth Circuit decision adopting the 25% benchmark, both the claims and the fee motion were governed by Washington law, and the Ninth Circuit relied on a Washington Supreme Court decision in which a 25% benchmark was adopted. *Vizcaino*, 290 F.3d at 1047 (citing *Bowles v. Dep't of Ret. Sys.*, 847 P.2d 440, 451 (Wash. 1993)). Thus, after *Laffitte*, there is no reason for the Ninth Circuit to continue to apply this benchmark in cases governed by California law.

In any event, the upward departure from the 25% benchmark is justified here given the skill displayed by counsel in securing an excellent \$4,050,000.00 settlement for thousands of employees involving complex issues on a purely contingent basis.

a. The Results Achieved Were Substantial

The Supreme Court has said that in an award of attorney’s fees the “most critical factor is the degree of success obtained.” *Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983). The “benefit obtained for the class” is considered the “foremost” consideration in determining the appropriate fee in a common fund case. *In Re Bluetooth*, 654 F.3d at 942. Thus, ultimately the reasonableness of the fee “is determined primarily by reference to the *level of success* achieved by the plaintiff.” *McCown v. City of Fontana*, 565 F.3d 1097, 1102 (9th Cir. 2009) (emphasis added). Indeed, the Ninth Circuit has held that the relevant circumstances that could justify an *upward* departure from the 25 percent benchmark include the achievement of “exceptional results” for the class. *Glass v. UBS Financial Services, Inc.*, 2007 WL 221862, *16 (N.D. Cal. 2007) (italics in original). Here, the results achieved fully warrant the fee request.

First, Class Counsel recovered a significant aggregate sum on behalf of the Settlement

1 Class Members and through these efforts approximately 12,493 Class Members will receive
2 payment. (Hawkins Decl., ¶ 29). The Net Settlement Amount remaining for the Individual
3 Settlement Payments is estimated to be \$2,463,109.07. (Hernandez Decl., ¶14). The average
4 award is estimated to be \$197.88. (*Id.*, ¶ 14).

5 Class Counsel respectfully submits that this excellent result was only achieved because
6 Class Counsel tenaciously litigated this matter in state and federal court in this dynamic area of
7 wage and hour law. (Hawkins Decl., ¶ 30; Setareh Decl., ¶¶4-7, 21). All of these efforts
8 ultimately culminated in the instant settlement. Without this dogged pursuit by Class Counsel
9 and Plaintiffs, and the investment of substantial resources and time, the Settlement Class may
10 have received nothing. At all times, Defendants mounted factual and legal challenges, and
11 asserted numerous defenses which threatened all recovery, as it argued that it complied with all
12 applicable laws at all times.

13 In sum, the substantial results achieved in this matter and the superior work to achieve
14 these results supports a 30% approval of requested attorneys' fee.

15 **b. The Risk of Litigation Was Significant**

16 The risk factor also supports the requested fee percentage. In accepting this case, Class
17 Counsel committed to a long and arduous fight against a sophisticated Defendant with
18 experienced counsel, Scopelitis, Garvin, Light, Hanson & Feary, P.C., and Fisher & Phillips
19 LLP. Plaintiffs' claims involved complex and disputed legal issues and fact-specific arguments
20 which the Parties litigated heavily since inception of the actions.

21 Defendants vigorously challenged all aspects of the Action from the inception.
22 Defendants asserted numerous defenses which threatened all recovery, and argued that it
23 complied with all applicable laws at all times. Nevertheless, Class Counsel negotiated this
24 substantial settlement for the Class.

25 In short, Plaintiffs' counsel proceeded with this litigation under a significant risk of no
26 recovery and with some aspects of their case uncertain. Negotiating a settlement "while the state
27 of the law remain[s] uncertain" is the kind of difficult litigation and assumption of risk that
28 "should be fully rewarded." *Glass v. UBS Fin. Services, Inc.*, C-06-4068 MMC, 2007 WL

221862 at *16 (N.D. Cal. Jan. 26, 2007) *aff'd*, 331 F. App'x 452 (9th Cir. 2009), *cert. denied* *D'Aria v. Glass*, 130 S. Ct. 797 (2009) and *Evans v. Glass*, 130 S. Ct. 801 (2009).

Class Counsel assumed the risk that they would not be paid and that they would lose all costs and time invested if this case failed. Despite these real and substantial risks, significant monetary relief was secured for the class. This significant risk supports the requested fee award. *See In re Pac. Enterprises Sec. Litig.*, 47 F.3d 373, 379 (9th Cir. 1995) (approving 33 1/3% fee award “because of the complexity of the issues and the risks” involved); *Vizcaino*, 290 F.3d at 1048 (*citing In re Pac. Enterprises* and noting that “Risk is a relevant circumstance.”).

c. The Contingent Nature of the Fee and the Financial Burden Carried by the Plaintiffs Justifies the Request

The contingent nature of this representation also supports the requested fee. Plaintiffs’ counsel took on this case, and the out-of-pocket costs prosecuting it, with no remuneration and with the understanding that they would be compensated only if they succeeded. Specifically, Plaintiffs’ Counsel dedicated 878 hours and incurred \$31,891.93 in costs in bringing this action on behalf of Plaintiffs. (Hawkins Decl., ¶¶ 31-34, Ex. 1; Setareh Decl., ¶¶ 8-13, 19, Ex. A). Courts have recognized the need to reward counsel who accept a case on a contingent fee basis because of the risk of non-payment that they face:

It is an established practice in the private legal market to reward attorneys for taking the risk of non-payment by paying them a premium over their normal hourly rates for winning contingency cases. *See Richard Posner, Economic Analysis of Law* §21.9, at 534-35 (3d ed. 1986). Contingent fees that may far exceed the market value of the services if rendered on a non-contingent basis are accepted in the legal profession as a legitimate way of assuring competent representation for plaintiffs who could not afford to pay on an hourly basis regardless of whether they win or lose.

In re Washington Pub. Power Supply Sys. Sec. Litig., 19 F.3d 1291, 1299, 1300-01 (9th Cir. 1994). The Court should not overlook the real risks that counsel incur by accepting contingent fee cases, such as this one. *See, e.g., Aichele*, 2015 WL 5286028 at *5 (describing Federal Judicial Center report which found that 31.7% or less of the filed class cases in four districts resulted in successful class outcomes for plaintiffs). Large-scale wage and hour actions of this type are, by their very nature, complicated and time-consuming. Any law firm undertaking

representation of a large number of class members inevitably must be prepared to make a tremendous investment of time, energy, and resources. Due also to the contingent nature of the customary fee arrangement, lawyers must be prepared to make this investment with the very real possibility of an unsuccessful outcome and no fee of any kind. The demands and risks of this type of litigation overwhelm the resources – and deter participation – of many traditional claimants’ firms. The fact that Plaintiffs’ counsel accepted this financial burden supports the reasonableness of the requested fee percentage. *See Vizcaino*, 290 F.3d at 1050 (“These burdens are relevant circumstances”) (citing *Six (6) Mexican Workers*, 904 F.2d at 1311; *Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1377 (9th Cir.1993), *Bebchick v. Wash. Metro. Area Transit Comm’n*, 805 F.2d 396, 408 (D.C.Cir.1986)).

d. Awards Made in Similar Cases

The Ninth Circuit has also found it appropriate to “to examine lawyers’ reasonable expectations, which are based on the circumstances of the case and the range of fee awards out of common funds of comparable size” in assessing a fee request. *Vizcaino*, 290 F.3d at 1050. Thirty-three percent of a common fund is an award well within the range of awards made in similar cases:

The Ninth Circuit has held that 25% of the gross settlement amount is the benchmark for attorneys’ fees awarded under the percentage method, with 20 to 30% as the usual range in common fund cases where the recovery is between \$50 and \$200 million. Other case law surveys suggest that 50% is the upper limit, with 30-50% commonly being awarded in cases in which the common fund is relatively small. Indeed, California cases in which the common fund is small, tend to award attorneys’ fees above the 25% benchmark. More particularly, a review of California cases in other districts reveals that courts usually award attorneys’ fees in the 30-40% range in wage and hour class actions that result in recovery of a common fund under \$10 million. Overall, although this [30%] percentage is slightly higher than the 25% benchmark for fees in class action cases, it is consistent with other wage and hour class actions where the recovery is less than \$10 million.

Cicero v. DirecTV, Inc., EDCV 07-1182, 2010 WL 2991486 (C.D. Cal. July 27, 2010) (citations omitted); *see also Espinosa*, 2018 WL 1705955 at *8 (approving 30% fee); *Beaver v. Tarsadia Hotels*, No. 11-CV-01842-GPC-KSC, 2017 WL 4310707, at *9 (S.D. Cal. Sept. 28, 2017) (“California courts routinely award attorneys’ fees of 33.33% of the common fund.”); *Wert v. U.S. Bancorp*, No. 13-CV-3130-BAS-AGS, 2017 WL 5167397, at *7 (S.D. Cal. Nov. 7, 2017)

1 (“Awarding 30% of the common fund for attorneys' fees is typical in wage and hour cases.”);
 2 *Aichele*, 2015 WL 5286028, at *5 (“...[I]n cases under \$10 million, the awards more frequently
 3 will exceed the 25% benchmark, and indeed go above 30%.”); *Smith v. CRST Van Expedited,*
 4 *Inc.*, No. 10-CV-1116- IEG WMC, 2013 WL 163293, at *5 (S.D. Cal. Jan. 14, 2013) (“Under
 5 the percentage method, California has recognized that most fee awards based on either a lodestar
 6 or percentage calculation are 33 percent and has endorsed the federal benchmark of 25
 7 percent.”); *Barbosa v. Cargill Meat Sols. Corp.*, 297 F.R.D. 431, 450 (E.D. Cal. 2013)
 8 (collecting cases approving 30% or 33% of common fund); *Singer*, 2010 WL 2196104 at *8
 9 (stating that “the request for attorneys' fees in the amount of 33.33% of the common fund falls
 10 within the typical range of 20% to 50% awarded in similar cases” and citing *Ingalls v. Hallmark*
 11 *Mktg. Corp.*, 08cv4342 VBF (Ex), Doc. No. 77, ¶ 6 (C.D. Cal. Oct. 16, 2009) (awarding 33.33%
 12 fee on a \$5.6 million wage and hour class action); *Knight v. Red Door Salons, Inc.*, 08-01520
 13 SC, 2009 WL 248367 (N.D. Cal. Feb. 2, 2009) (finding award of 30% reasonable in wage and
 14 hour case); *In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1047-48 (N.D. Cal. 2008)
 15 (stating that “in most common fund cases” the award is more than 25% and citing cases
 16 approving 30%); *Birch v. Office Depot, Inc.*, No. 06cv1690 DMS (WMC), Doc. No. 48, ¶13
 17 (S.D. Cal. Sept. 28, 2007) (awarding 40% fee on a \$16 million wage and hour class action);
 18 *Rippee v. Boston Mkt. Corp.*, No. 05cv1359 BTM (JMA), Doc. No. 70, at 7-8 (S.D. Cal. Oct.
 19 10, 2006) (awarding 40% fee on a \$3.75 million wage and hour class action)); and *In re*
 20 *Activision Sec. Litig.*, 723 F. Supp. 1373 (N.D. Cal. 1989) (collecting cases and stating “as
 21 documented by the lengthy list of cases below, this court finds that in most recent cases the
 22 benchmark is closer to 30%”).

23 Accordingly, the requested 30% fee percentage is well within that approved in similar
 24 cases. (Setareh Decl., ¶¶ 14-15).

25 **e. The Lodestar Multiplier In This Matter Is Reasonable**

26 The Attorneys’ Fees requested by Plaintiffs are reasonable and fair because the lodestar
 27 for the work performed is \$626,892.00 with a modest multiplier of approximately 1.94 resulting
 28 in an amount of 1,215,000.00. (Hawkins Decl., ¶¶ 31-33; Setareh Decl., ¶¶ 14-18).

Courts applying a discretionary lodestar crosscheck commonly approve fees reflecting significant multipliers ranging up to 9 and considerably higher. *See, e.g., Steiner v. Am. Broadcasting Co.*, 248 Fed. App'x 780, 783 (9th Cir. 2007) (cross-check multiplier of 6.85 was “well within the range of multipliers the courts have allowed”); *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1051 (9th Cir. 2002) (cross-check multiplier of 3.65); *In re Wells Fargo & Co. Shareholder Deriv. Litig.*, __ Fed. App'x __, 2021 WL 1511501 (9th Cir. Apr. 16, 2021) (affirming 3.8 multiplier); NCAA, 2017 WL 6040065, at *9 (collecting cases with multipliers of 3.41-9.3); *Craft v. Cnty. of San Bernardino*, 624 F. Supp. 2d 1113, 1125 (C.D. Cal. 2008) (approving cross-check multiplier of 5.2; collecting cases with multipliers from 4.5 to 19.6); *Beckman v. KeyBank, N.A.*, 293 F.R.D. 467, 481-82 (S.D.N.Y. 2013) (“Courts regularly award lodestar multipliers of up to eight times the lodestar, and in some cases, even higher multipliers.”); *In re Beverly Hills Fire Litig.*, 639 F.Supp. 915, 924 (E.D.Ky.1986) (5 times multiplier); *In re Sumitomo Copper Litig.*, 74 F. Supp. 2d 393, 399–400 (S.D.N.Y. 1999) (“Reference may be made also to the record-breaking employment discrimination settlement with Texaco. In that situation, a multiplier was utilized of 5.5 times lodestar.”)

The facts and circumstances of this case – including the novel issues of law, extreme risks to Counsel, and the exceptional results discussed - easily justify the modest lodestar multiplier. The multiplier requested by Counsel of 1.94 falls well within the “typical” range accepted by our courts.

f. Costs of Litigation are Reasonable

Plaintiff's counsel also requests \$31,891.00 from the Gross Settlement Amount as reimbursement for their costs and expenses as provided for under the terms of the Settlement Agreement. (Hawkins Decl., ¶ 34, Ex. 1; Setareh Decl., ¶ 19, Ex. A). This request is less than the \$35,000.00 of costs and expenses preliminarily approved by this Court. The difference will remain part of the Net Settlement Amount to be distributed to Participating Class Members. “There is no doubt that an attorney who has created a common fund for the benefit of the class is entitled to reimbursement of reasonable litigation expenses from that fund.” *In re Heritage Bond Litig.*, No. 02-ML-1475 DT, 2005 WL 1594403, at *23 (C.D. Cal. June 10, 2005) (*quoting*

In re Gen. Instrument Sec. Litig., 209 F. Supp. 2d 423, 434 (E.D. Pa. 2001)). Courts have found that expenses are routinely reimbursed in contingency cases in addition to the fee award. *See, e.g., In re Businessland Sec. Litig.*, 1991 WL 427887 at *2 (collecting cases where expenses were awarded in addition to 30-33% of a common fund). The Ninth Circuit and other California courts have explained that plaintiffs' counsel in contingency cases may recover reasonable out-of-pocket expenses "that would normally be charged to a fee paying client." *Hoffman v. Constr. Protective Services, Inc.*, EDCV03-01006VAPSGLX, 2006 WL 6105638 at *8 (C.D. Cal. Aug. 31, 2006) (citing *Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir.1994)). The expenses that Plaintiffs' counsel seeks here are of that nature. Plaintiffs' counsel have incurred their expenses without remuneration and accepted the risk that they would never be repaid if the case was not successfully resolved. Moreover, it was clearly communicated to Class Members in the Class Notice that Plaintiffs' counsel would request costs not to exceed \$35,000.00 to reimburse costs actually incurred. Accordingly, Plaintiffs' request for costs in the amount of \$31,891.00 should be granted.

VI. THE SERVICE AWARD PAYMENT IS REASONABLE

Class Counsel seeks approval of \$10,000.00 in Service Award Payments to each of the named Plaintiffs/Class Representatives, totaling \$40,000.00. The requested enhancement awards are reasonable in light of the general releases of all claims Plaintiffs agreed to, greater than the release given by Class Members, the benefits Plaintiff conferred upon the entire Class resulting in payments to all Class Members, the time spent assisting counsel with the investigation and prosecution of these claims and consenting to the proposed Settlement. Furthermore, in pursuing this action on behalf of the Class, Plaintiffs risked a judgment for attorneys' fees and costs in the event this matter had been lost. (Hawkins Decl., ¶¶ 35-36; Setareh Decl., ¶¶ 32-33; *See also* declarations of Plaintiffs previously submitted in Support of Preliminary Approval, Dkts. 104-4, 104-5, 104-6, 104-7).

Courts routinely approve service payments, or incentive awards, to compensate named Plaintiffs for the services they provide and the risks they incur during class litigation. *See In re Cellphone Fee Termination Cases* (2010) 186 Cal. App. 4th 1380, 1393; *see also Bell v. Farmers*

Ins. Exch. (2004) 115 Cal. App. 4th 715, 725-26 (upholding service payments to class representatives); Manual § 21.62 n.971 (noting that service payments are warranted). Based on the foregoing, the requested \$10,000.00 in Service Award Payments to each named Plaintiff continues to be fair, appropriate, and justified as part of the overall settlement. (Hawkins Decl., ¶¶ 35-36; Setareh Decl., ¶¶ 32-33).

VII. THE SETTLEMENT ADMINISTRATION COSTS ARE REASONABLE

The Parties agreed to hire ILYM Group Inc., as the administrator, and the Court approved this choice. The Administrator was responsible for formatting, printing and mailing the Notice. It was also responsible for updating addresses and re-mailing Notices returned as undeliverable, responding to Class Member inquiries, answering questions from Counsel for the Parties, and providing a declaration to document its duties and responsibilities under the settlement. Plaintiffs now request that the Court approve the \$100,000.00 fee to ILYM Group Inc., for services rendered and to be rendered. (Hernandez Decl., ¶15). Following the grant of final approval, the Administrator's duties will continue in order to calculate and mail the Individual Settlement Payment checks to Class Members, perform tax reporting obligations, disburse other payments as ordered by the Court, and perform such other duties as set forth in the Settlement Agreement. The fee of \$100,000.00 for services rendered and to be rendered is fair and reasonable and should be granted.

VIII. THE SETTLEMENT PENALTIES UNDER PAGA ARE REASONABLE

The PAGA Fund payment of \$200,000.00 with 75% to the LWDA (\$150,000.00) and 25% to the aggrieved employees (\$50,000.00) is reasonable under the circumstances. The Parties negotiated a good faith amount for PAGA penalties. The PAGA penalties allocation is not the result of self-interest at the expense of other Class Members. The LWDA was also provided notice of the Settlement with the concurrently filing of the preliminary approval motion and the instant motion. Plaintiffs did not receive a response or objection to the Settlement from the LWDA. Thus, Plaintiffs request the Court finally approve the PAGA allocation in the amount of \$200,000.00 with 75% being paid to the LWDA (i.e. \$150,000.00) and the remaining 25% (i.e. \$50,000.00) being distributed to the aggrieved employees.

IX. CONCLUSION

Based on the foregoing, Class Counsel respectfully requests the Court grant final approval of the Class Action Settlement, award (1) Class Counsels' fees in the sum of \$1,215,000.00 and litigation costs in the amount of \$31,891.00; (2) award the Service Award Payments in the sum of 40,000.00 (i.e. \$10,000.00 to each named Plaintiff); (3) award \$ 100,000.00 to ILYM Group Inc., for settlement administration services, and (4) approve the PAGA Payment of \$200,000.00 with a \$150,000.00 of that sum paid to the LWDA and the remaining \$50,000.00 paid to the Aggrieved Employees.

Respectfully submitted,
JAMES HAWKINS APLC
SETAREH LAW GROUP

DATED: November 27, 2024

By: /s/ Gregory Mauro
James R. Hawkins
Gregory Mauro
Michael Calvo
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Jose Maria D. Patino, Jr.
Tyson Gibb

Attorneys for Plaintiffs and the Settlement Class

CERTIFICATE OF SERVICE

I hereby certify that on November 27, 2024 I electronically filed the foregoing with the Clerk of the Court for the U.S. District Court, for the Northern District of California using the CM/ECF system. All participants are registered CM/ECF users, and will be served by the CM/ECF system.

Dated: November 27, 2024 /s/ Gregory Mauro
Gregory Mauro

Served Via LWDA Website Only

Labor and Workforce Development Agency
Attn: PAGA Administrator
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