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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ALAMEDA

BOBBY BIRDI, individually, and on behalf of others similarly situated, and as an aggrieved employee and Private Attorney General, Plaintiff, vs. LUCID USA, INC., a Delaware corporation; and DOES 1 through 50, inclusive, Defendants.	Case No. 21CV003541 Honorable Mark Markman Department 23 **NOTICE OF MOTION AND MOTION FOR APPROVAL OF ATTORNEYS' FEES AND COSTS, ENHANCEMENT PAYMENT, AND SETTLEMENT ADMINISTRATION COSTS** Date: August 8, 2024 Time: 10:00 a.m. Dept.: 23 Complaint Filed: December 3, 2021 FAC Filed: February 1, 2022 Trial Date: Not Set

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT on **August 8, 2024 at 10:00 a.m.** in Department 23 of the above-captioned Court located at 1221 Oak Street, Oakland, California 94612, Plaintiff Bobby Birdi ("Plaintiff") will and hereby does move the Court for an Order (1) awarding Class Counsel's attorneys' fees in the amount of one-third (1/3) of the Gross Settlement Amount (i.e., $358,333.33); (2) awarding Class Counsel's actual litigation costs and expenses in the amount of Twenty-Nine Thousand One Hundred Fifty-Five Dollars and Fifty-Nine Cents ($29,155.59); (3) approving the Enhancement Payment in the amount of Seven Thousand Five Hundred Dollars and Zero Cents ($7,500.00) to Plaintiff in recognition of his services to the Class; and (4) approving the Settlement Administration Costs in the amount of Twelve Thousand Dollars and Zero Cents ($12,000.00).

This Motion is made pursuant to California Rules of Court, Rule 3.769, which requires court approval of the settlement of class actions. This Motion will be based on the Memorandum of Points and Authorities, the Joint Stipulation of Class Action and PAGA Settlement and Amendment No. 1 to Joint Stipulation of Class Action and PAGA Settlement, the Declarations of Class Counsel (Jonathan M. Genish and Miriam L. Schimmel), Class Representative (Bobby Birdi), and the Settlement Administrator (Chantal Soto-Najera of CPT Group, Inc.), the pleadings and other records on file with the Court in this matter, and such evidence or oral argument as may be presented at the hearing on this Motion.

Respectfully submitted,

Dated: July 17, 2024

BLACKSTONE LAW, APC

By: ______________________________

Jonathan M. Genish
Miriam L. Schimmel
Attorneys for Plaintiff Bobby Birdi
and the Class

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff Bobby Birdi ("Plaintiff" or "Class Representative") moves for an award of the Attorneys' Fees and Costs to Class Counsel, approval of the Enhancement Payment to Plaintiff as the Class Representative, and approval of the Settlement Administration Costs to CPT Group, Inc. ("CPT" or "Settlement Administrator"). As discussed in the Motion for Final Approval of Class Action and PAGA Settlement submitted concurrently herewith, Plaintiff and Defendant Lucid USA, Inc. ("Defendant") (together with Plaintiff, the "Parties") have settled the Released Class Claims and Released PAGA Claims as defined in the Parties' Joint Stipulation of Class Action and PAGA Settlement ("Original Agreement") and Amendment No. 1 to Joint Stipulation of Class Action and PAGA Settlement ("Amendment No. 1") (together, "Settlement Agreement" or "Settlement") for a total amount of One Million Seventy-Five Thousand Dollars and Zero Cents ($1,075,000.00) ("Gross Settlement Amount"). (*See* Declaration of Jonathan M. Genish in Support of Plaintiff's Motion for Final Approval of Class Action and PAGA Settlement ["Genish Decl."], ¶ 23 & 25, Exhibits 1 & 2 thereto).

The Court conditionally certified, for settlement purposes only, the Class defined as: "All current and former non-exempt employees of Defendant who worked within the State of California during the Class Period" ("Class" or "Class Members"). (Original Agreement, ¶ 6.b; Genish Decl., ¶ 27). The "Class Period" is defined as the period from December 3, 2017 through March 23, 2024. (Original Agreement, ¶ 6.f; Genish Decl., ¶ 27). The "Settlement Class Members" consist of all Class Members who did not submit a timely and valid Request for Exclusion. (Original Agreement, ¶ 6.mm; Genish Decl., ¶ 27). The "PAGA Employees" consist of "all current and former non-exempt employees of Defendant who worked within the State of California during the PAGA Period." (Original Agreement, ¶ 6.x; Genish Decl., ¶ 27). The "PAGA Period" is defined as the period from December 3, 2020 through March 23, 2024. (Original Agreement, ¶ 6.z; Genish Decl., ¶ 27).

There have been no objections to and only seven (7) requests to opt-out from the Class Settlement. (Declaration of Chantal Soto-Najera of CPT Group, Inc., Regarding Notice and Settlement Administration ["Soto-Najera Decl."], ¶¶ 11 & 12).

Because the Settlement achieves outstanding results for the Settlement Class Members, the PAGA Employees, and the State of California, Plaintiff respectfully requests, on behalf of the Class and without opposition from Defendant, that the Court approve the Settlement as fair, adequate, and reasonable, and enter judgment in accordance with the Settlement's terms.

Plaintiff seeks the Court's approval of an attorneys' fee award of one-third (1/3) of the Gross Settlement Amount (i.e., $358,333.33), plus reimbursement of $29,155.59 in actual litigation costs and expenses. Class Counsel's request for an award of attorneys' fees and costs is reasonable and appropriate in light of the outstanding work performed by Class Counsel in the matter, the contingent nature of this action, and the results achieved under the Settlement. *Lealao v. Beneficial California, Inc.* (2000) 82 Cal.App.4th 19.

Plaintiff also requests the Court confirm the amount of the Enhancement Payment agreed to be paid to Plaintiff in the amount of Seven Thousand Five Hundred Dollars and Zero Cents ($7,500.00). This amount proposed to be awarded to Plaintiff is fair and reasonable for the reasons Plaintiff provided in his declaration. (*See* Declaration of Plaintiff Bobby Birdi in Support of Motion for Final Approval of Class Action and PAGA Settlement ["Birdi Decl."] filed concurrently herewith). Courts approve incentive awards to plaintiffs when justified and appropriate to compensate plaintiffs for their time, effort, and inconvenience. (*See e.g., Van Vranken v. Atlantic Riclifield Co.* (N.D. Cal. 1995) 901 F. Supp. 294, 299).

Finally, Plaintiff requests that the Court approve the payment of Twelve Thousand Dollars and Zero Cents ($12,000.00) to the Settlement Administrator as compensation for its administration services it has and will provide in connection with the Settlement. (*See, generally,* Soto-Najera Decl.).

II. PROCEDURAL HISTORY AND FACTUAL BACKGROUND

Defendant is an American manufacturer of electric vehicles headquartered in Newark, California. Plaintiff was employed by Defendant as an hourly-paid, non-exempt Security Guard from approximately January 2021 to August 2021. (Birdi Decl., ¶ 2).

On December 3, 2021, Plaintiff provided written notice to the Labor and Workforce Development Agency ("LWDA") by online submission and to Defendant by U.S. Certified Mail, pursuant to California Labor Code Section 2699.3, of the specified provisions of the California Labor

Code alleged to have been violated by Defendant. (Genish Decl., ¶ 9).

On December 3, 2021, Plaintiff filed a Class Action Complaint in the action entitled *Bobby Birdi v. Lucid USA, Inc.*, Alameda County Superior Court Case No. 21CV003541 ("Action"), thereby commencing a putative class action against Defendant. (*Id.*, ¶ 10).

On December 20, 2021, Defendant propounded formal written discovery onto Plaintiff (specifically, Request for Production (Set One)), and noticed the deposition of Plaintiff. (*Id.*, ¶ 11). Thereafter, on December 28, 2022, Defendant served an amended notice of deposition of Plaintiff. (Ibid).

On January 3, 2022, Plaintiff propounded written formal discovery onto Defendant (specifically, Form Interrogatories – General (Set One), Special Interrogatories (Set One), and Requests for Production of Documents (Set One)), noticed the deposition of Defendant's Person Most Qualified, and served a proposed Belaire-West notice. (*Id.*, ¶ 12).

On January 21, 2022, Plaintiff served responses to Defendant's discovery requests along with a production of documents. (*Id.*, ¶ 13).

On February 1, 2022, the Court entered an Order, which granted Plaintiff leave to file a First Amended Class Action and Representative Action Complaint ("Operative Complaint") in the Action, which added a cause of action under PAGA. (*Id.*, ¶ 14). The Operative Complaint alleges eight (8) causes of action for violations of the California Labor Code for failure to pay overtime wages, failure to provide compliant meal periods and premium payments in lieu thereof, failure to provide compliant rest periods and premiums payments in lieu thereof, failure to pay minimum wages, failure to timely pay wages upon termination, and failure to provide accurate wage statements, for violations of California Business & Professions Code Section 17200, *et seq*. based on the aforementioned California Labor Code violations, and for civil penalties under PAGA based on the aforementioned California Labor Code violations. (Ibid). Pursuant to the Court's February 1, 2022 Order, the Operative Complaint was deemed filed as of the date of entry of the Order (i.e., February 1, 2022). (Ibid).

On February 14, 2022, Plaintiff served an objection to Defendant's notice of deposition of Plaintiff. (*Id.*, ¶ 15). On February 15, 2022, Plaintiff served supplemental responses to Defendant's discovery requests. (Ibid).

On March 11, 2022, Defendant served responses to Plaintiff's discovery requests (specifically, Form Interrogatories – General (Set One), Special Interrogatories (Set One), and Requests for Production of Documents (Set One)). (*Id*., ¶ 16). On July 1, 2022, Defendant served supplemental responses to Plaintiff's discovery requests (specifically, Form Interrogatories – General (Set One), Special Interrogatories (Set One), and Requests for Production of Documents (Set One)). (Ibid).

On July 7, 2022, a Belaire-West notice was mailed to four hundred and seventy-four (474) putative class members by a third-party administrator. (*Id*., ¶ 17). Thirty-five (35) putative class members timely opted out by the response deadline. (Ibid).

On July 19, 2022, Defendant served a production of documents in response to Plaintiff's discovery requests. (*Id*., ¶ 18). On July 29, 2022, Defendant served a production of documents in response to Plaintiff's discovery requests and a further supplemental response to Plaintiff's discovery requests (specifically, Requests for Production of Documents (Set One)). (Ibid). On November 28, 2022, Defendant served a third supplemental response to Plaintiff's discovery requests (specifically, Request for Production of Documents (Set One)). (Ibid).

On January 23, 2023, Blackstone Law, APC defended the deposition of Plaintiff. (*Id*., ¶ 19).

On February 22, 2023, Blackstone Law, APC took the deposition of Defendant's Person Most Knowledgeable (Director of People Operations). (*Id*., ¶ 20).

On February 23, 2023, Blackstone Law, APC took the deposition of Defendant's Person Most Knowledgeable (Senior Manager of Payroll). (*Id*., ¶ 21).

On November 28, 2023, the Parties participated in a formal mediation conducted by Steven J. Rottman, Esq.("Mediator"), a neutral and respected mediator with extensive experience in complex wage and hour matters. (*Id*., ¶ 22). After a full day of mediation, and with the help of the Mediator, the Parties were able to reach an agreement to resolve this dispute on a class and representative basis, and shortly thereafter executed a memorandum of understanding memorializing the key settlement terms. (Ibid). Following the mediation, the Parties worked diligently to negotiate and memorialize the terms in a long form settlement agreement. (Ibid).

On January 24, 2024, the Parties executed the Original Agreement. (*Id*., ¶ 23 & Exh. 1).

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On February 20, 2024, Plaintiff filed a Motion for Preliminary Approval of Class Action and PAGA Settlement ("Motion for Preliminary Approval") and supporting documents seeking approval of the settlement reached by the Parties. (*Id.*, ¶ 24). On March 12, 2024, the Court issued a tentative ruling ("March 12, 2024"), which provided direction to the Parties with regards to the Motion for Preliminary Approval. (Ibid). On March 13, 2024, the Court entered a Minute Order, which adopted its March 12, 2024 Tentative Ruling and continued the hearing on Plaintiff's Motion for Preliminary Approval to April 17, 2024 at 2:30 p.m. in Department 23 of the above-captioned Court. (Ibid).

On April 3, 2024, the Parties executed Amendment No. 1. (*Id.*, ¶ 25 & Exh. 2).

On April 8, 2024, Plaintiff filed a Supplemental Declaration of Jonathan M. Genish in Support of Plaintiff's Motion for Preliminary Approval of Class Action and PAGA Settlement. (*Id.*, ¶ 26). On April 18, 2024, the Court entered the Order Granting Preliminary Approval of Class Action and PAGA Settlement ("Preliminary Approval Order"), thereby preliminary approving the terms of the Settlement Agreement, the Notice of Class Action Settlement ("Class Notice"), and the proposed administration procedures and associated deadlines. (*Id.*, ¶ 26 & Exh. 3).

The Parties agree that the Class described herein may be certified for settlement purposes only. If for any reason the Settlement is not approved, the certification will have no force or effect and will immediately be revoked. The Parties further agree that certification for purposes of approving the Settlement Agreement is in no way an admission that class certification is proper under the more stringent standard applied for litigation and that evidence of this limited stipulation for settlement purposes only will not be admissible for any purpose in this or any other proceeding.

III. SUMMARY OF THE SETTLEMENT TERMS AND PLAN OF DISTRIBUTION

The Parties have agreed to settle the Class and PAGA claims at issue in the Action for a non-reversionary Gross Settlement Amount of One Million Seventy-Five Thousand Dollars and Zero Cents ($1,075,000.00), which is exclusive of employer-side payroll taxes. (Original Agreement, ¶ 6.p; Genish Decl., ¶ 29). The Gross Settlement Amount includes: (1) Class Counsel's fees in the amount of one-third (1/3) of the Gross Settlement Amount, equaling Three Hundred Fifty-Eight Thousand Three Hundred Thirty-Three Dollars and Thirty-Three Cents ($358,333.33); (2) Class Counsel's actual litigation costs and expenses, in the amount of Twenty-Nine Thousand One Hundred Fifty-Five

Dollars and Fifty-Nine Cents ($29,155.59); (3) Settlement Administration Costs in the amount of Twelve Thousand Dollars and Zero Cents ($12,000.00); (4) Enhancement Payment in the amount of Seven Thousand Five Hundred Dollars and Zero Cents ($7,500.00); and (5) PAGA Amount in the amount of Fifty Thousand Dollars and Zero Cents ($50,000.00). (Original Agreement, ¶¶ 9, 10, 11, & 12; Genish Decl., ¶ 29). After the above Court-approved amounts are deducted from the Gross Settlement Amount, the Settlement Class Members will share in a Net Settlement Amount of approximately Six Hundred Eighteen Thousand Eleven Dollars and Eight Cents ($618,011.08). (Original Agreement, ¶ 6.u; Genish Decl., ¶ 29).

The Settlement does not require Settlement Class Members to submit claims as a prerequisite to receiving their *pro rata* share of the Net Settlement Amount ("Individual Settlement Share") nor does it require PAGA Employees to submit claims as a prerequisite to receiving their *pro rata* share of the PAGA Employee Amount ("Individual PAGA Payment"). (Original Agreement, ¶¶ 6.q, 6.s, & 34; Genish Decl., ¶ 30). Individual Settlement Shares are calculated by the Settlement Administrator by dividing the Net Settlement Amount by the number of weeks each Settlement Class Member worked for Defendant as a non-exempt employee within the State of California ("Workweeks") to yield the "Final Workweek Value," and multiplying each Settlement Class Member's individual Workweeks by the Final Workweek Value. (Original Agreement, ¶¶ 6.nn & 14.b; Genish Decl., ¶ 30). Individual PAGA Payments are calculated by the Settlement Administrator by dividing the PAGA Employee Amount (i.e., 25% of the PAGA Amount) by the number of weeks each PAGA Employee worked for Defendant as a non-exempt employee within the State of California during the PAGA Period ("PAGA Workweeks") to yield the "PAGA Workweek Value," and multiplying each PAGA Employee's individual PAGA Workweeks by the PAGA Workweek Value. (Original Agreement, ¶¶ 6.bb &15; Genish Decl., ¶ 30).

IV. THE SETTLEMENT ADMINISTRATION PROCESS

The Court-approved Settlement Administrator has taken all necessary steps to effectuate the notice and settlement administration process, as set forth in the Preliminary Approval Order.

On April 18, 2024, CPT received the Court-approved text for the Class Notice from Class Counsel. (Soto-Najera Decl., ¶ 4).

On May 9, 2024, CPT received the Class List from Defendant's Counsel that contained the following information for each Class Member: full name, last known mailing address, Social Security number, number of Workweeks, and number of PAGA Workweeks. (*Id.*, ¶ 4). The Class List contained seven-hundred and ninety-seven (797) individuals identified as Class Members. (Ibid).

On May 13, 2024, CPT conducted an NCOA search for purposes of confirming and obtaining the most updated and accurate addresses on the Class List as possible. (*Id.*, ¶ 6). A search of this database provided updated addresses for any individual who had moved in the previous four years and notified the U.S. Postal Service of their change of address. (Ibid). As a result of the NCOA, CPT was able to locate seventy-five (75) updated addresses. (Ibid). After updating the mailing addresses through the NCOA, the Class Notices were enclosed in an envelope with the Class Member's name and known address printed on the envelope. (Ibid).

On May 16, 2024, the Class Notices were mailed via U.S. First Class Mail to all Class Members. (*Id.*, ¶ 7). Thirty-five (35) Class Notices were returned to CPT by the U.S. Post Office, two (2) of which had a forwarding address provided by the U.S. Post Office. (*Id.*, ¶ 9). CPT performed a skip trace on all returned mail without a forwarding address using Accurint, one of the most comprehensive address databases available. (Ibid). It utilizes hundreds of different databases supplied by credit reporting agencies, public records, and a variety of other national databases. (Ibid). As a result of skip trace effort, or re-mail requests from the Class Members themselves, a total of thirty (30) Class Notices were re-mailed to date. (Ibid). CPT reports five (5) undeliverable Class Notices. (Ibid).

Class Members had forty-five (45) calendar days to submit a Request for Exclusion, Notice of Objection, or and/or Workweeks Dispute ("Response Deadline"). (Original Agreement, ¶ 6.jj). The Response Deadline was July 1, 2024. (Soto-Najera Decl., ¶ 7). The Settlement Administrator did not receive any Workweeks Disputes or Notices of Objection and only seven (7) Requests for Exclusion. (*Id.*, ¶¶ 10-12).

To date, there are seven hundred and ninety (790) Class Members who did not submit timely and valid Requests for Exclusions and are therefore deemed to be Settlement Class Members, representing 99.12% of the Class. (*Id.*, ¶ 13). The total number of Workweeks worked by all Settlement Class Members is 47,974. (*Id.*, ¶ 15). The highest Individual Settlement Share is estimated to be $4,159.89, the average Individual Settlement Share is estimated to be $774.89, and the lowest Individual Settlement Share is estimated to be $12.76. (Ibid).[1] These amounts are subject to employee-side taxes and withholdings. (Ibid).

To date, there are six hundred and ninety-eight (698) individuals identified as PAGA Employees. (*Id*., ¶ 13). The total number of PAGA Workweeks worked by all PAGA Employees is 37,763. (*Id*., ¶ 16). The highest Individual PAGA Payment is estimated to be $57.27, the average Individual PAGA Payment is estimated to be $17.91, and the lowest Individual PAGA Payment is estimated to be $0.33. (*Id*., ¶ 16).

V. COMPLIANCE WITH PROCEDURAL REQUIREMENTS OF PAGA

On December 29, 2022, Class Counsel submitted a copy of the Settlement Agreement to the LWDA through its online submission portal in compliance with California Labor Code § 2699(l)(2). (Genish Decl., ¶ 26). The LWDA has not objected or otherwise responded to the submission. (Ibid).

VI. ARGUMENT

A. Class Counsel Requests an Award Under the Common Benefit Doctrine

1. The Requested One-Third (1/3) Fee Award is Reasonable Here

Class Counsel respectfully requests that this Court approve the fees and costs to be paid in this matter. This Motion is made pursuant to California Rules of Court, Rule 3.769 which requires court approval of the fees paid through settlement in a class action**.**

Class Counsel seeks Three Hundred Fifty-Eight Thousand Three Hundred Thirty-Three Dollars and Thirty-Three Cents ($358,333.33), representing one-third (1/3) of the Gross Settlement Amount under the "common fund" doctrine. Courts have long recognized the "common fund" or "common benefit" doctrine, under which attorneys who create a common fund or benefit for a group of persons may be awarded their fees and costs to be paid out of the fund. (*See Serrano v. Priest ("Serrano III")* (1977) 20 Cal.3d 25, 34, quoting *D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1; *Glendale City Employees' Association v. City of Glendale* (1975) 15 Cal.3d 328, 341 fn.19;

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[1] The actual highest, average, and lowest Individual Settlement Shares will be larger than the amounts stated in the Soto-Najera Decl. because the Net Settlement Amount is larger due to Class Counsel's request for reimbursement of litigation costs and expenses in an amount that is less than $35,000.00 (the difference between the amount sought and the amount authorized under the Settlement, i.e., $5,844.41 will be part of the Net Settlement Amount).

Quinn v. State of California (1995) 15 Cal.3d 162, 16 7; *see also Boeing Co. v. Van Gernert* (1980) 444 U.S. 472,478; *Mills v. Electric Auto-Lite Co.* (1970) 396 U.S. 375, 391-392).

The California Supreme Court has held that, "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 attorneys' fees out of the fund." (*Serrano III, supra,* 20 Cal.3d at 34, quoting *D'Amico,* 11 Cal.3d 1; *see also Boeing, supra,* 444 U.S. at 478 ("[A] lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole."); *Mills, supra,* 396 U.S. at 391-392 (United States Supreme Court endorsing the common fund approach in class actions)). California Practice Guide: Civil Trials and Evidence (The Rutter Group) at § 17:172.3 explains the common fund doctrine as follows:

> Where the lawsuit results in the recovery of a fund or property benefiting others as well as plaintiff (e.g., a class action), the court has inherent equitable power to order plaintiffs attorney fees paid out of the common fund or property [citations]. Such fee spreading assures that all of those benefited by the litigation pay their fair share of obtaining the recovery.

The percentage-of-the-fund approach appears to be the preferred method of awarding fees in traditional common fund cases, such as this case. Where the settlement amount is a "certain or easily calculable sum of money," use of the percentage-of-the-fund method is appropriate. (*Serrano III,* 20 Cal. 3d at 35).

In *Glendale City Employees' Association v. City of Glendale* (1975) 15 Cal.3d 328, 341 fn.19, the California Supreme Court upheld an attorneys' fee award based on a percentage of the common benefit obtained in a lawsuit by a city employees' association for retroactive wages:

> It is not necessary to find this suit a proper class action in order to uphold the portion of the judgment awarding counsel for plaintiffs 25 percent of all retroactive salaries and wages received. That award may be sustained under the rule that a litigant who creates a fund in which others enjoy beneficial rights may require those beneficiaries to pay their fair share of the expense of litigation. *(See Sprague v. Ticonic National Bank* (1939) 307 U.S. 161, 159; *Estate of Stauffer* (1959) 53 Cal.2d 124, 132).

In *Quinn v. State of California* (1995) 15 Cal.3d 162, 167, the California Supreme 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, 110-111, the California Supreme Court recognized that the common benefit 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."

Numerous appellate courts have similarly found. (*See e.g., Knoff v. City and County of San Francisco* (1969) 1 Cal.App.3d 184, 203-204 (court upheld a "contingent percentage" award of attorneys' fees in a representative action as the proper exercise of the court's broad equitable powers); *Rider v. County of San Diego* (1992) 1 I Cal.App.4th 1410, 1423 (attorneys' fees and expenses properly awarded from common benefit composed of illegally imposed sales and use tax); *Bank of America v. Cory* (1985) 164 Cal.App.3d 66, 89-92 (fees awarded from common benefit created by action compelling state to claim dormant bank accounts); *Parker v. Los Angeles* (1974) 44 Cal.App.3d 556, 567-568 (court upheld fee award equal to one-third of the damages to owners of residential property in an inverse condemnation action)).

Moreover, at least eight federal courts of appeal-the First, Third, Sixth, Seventh, Ninth, Tenth, and Eleventh and the D.C. Circuit-have endorsed the "percentage fee" method for determining reasonable attorneys' fees in common benefit cases. (*See e.g., In re Sumitomo Copper Litig.* (S.D.N.Y. 1999) 74 F. Supp. 2d 393, 396-398 (describing the overwhelming weight off federal authority in favor of the percentage fee method); *see also, Lealao, supra,* 82 Cal.App.4th at 30-31 (describing same)).

Attorneys' fees awards in line with the amount sought here are frequently upheld. (*See e.g., In re Activision Sec. Litig.* (9th Cir. 1989) 723 F. Supp. 1373, 1375). The California Supreme Court recently confirmed the validity of this position in the context of a similar wage and hour class action settlement:

> [U]se of the percentage method to calculate a fee in a common fund case, where the award serves to spread the attorney fee among all the beneficiaries of the fund, does not in itself constitute an abuse of discretion. We join the overwhelming majority of federal and state courts in holding that when class action litigation establishes a monetary fund for the benefit of the class members, and the trial court in its equitable powers awards class counsel a fee out of that fund, the court may determine the amount of a reasonable fee by choosing an appropriate percentage of the fund created. The recognized advantages of the percentage method-including relative ease of calculation, alignment of incentives between counsel and the class, a better approximation of market conditions in a contingency case, and the encouragement 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.

(*Laffitte v. Robert Half Intern. Inc.* (2016) I Cal.5th 480, 503 (internal citations omitted)).

The requested fee falls well within – even below – the percentages awarded in other class action litigation by this Court and numerous California trial courts. As the cases cited above demonstrate, attorneys' fee awards in the amount sought here are well-established by California law and practice. Accordingly, Class Counsel's fee request is fair and reasonable and is consistent with the awards in California and the Ninth Circuit. It is also reasonable given the history of this matter and the results obtained by Class Counsel.

2. The Circumstances of this Case Support a One-Third (1/3) Fee Award

Given the significant results achieved under the circumstances of this litigation, the requested fee award is reasonable. As discussed in *Sumitomo Copper Litigation, supra,* 74 F. Supp. 2d at 396:

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

In that vein, this Court should consider the contingent nature of this case, the uncertainty of the outcome, the quality of the counsel, and the preclusion from other employment.

3. The Contingent Nature of This Matter

From the outset of the Action to the present, prosecution of this matter has involved significant financial risk for Class Counsel. Class Counsel undertook this matter solely on a contingent basis, with no guarantee of recovery. Class Counsel has placed its own resources at risk to prosecute this matter with no guarantee of success. The risks of this matter are apparent in that class certification would likely have been a hard-fought issue, especially given the uncertainty regarding certification of cases such as this. Moreover, even if class certification were granted over Defendant's opposition, there was no assurance that Plaintiff would succeed at trial. (Genish Decl., ¶¶ 37-39). Despite such challenges, Class Counsel was able to persuade Defendant that it faced significant liability exposure such that it was willing to pay $1,075,000.00 to settle the Class Members' claims.

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4. The Experience, Reputation, Ability of Counsel, and Skill in Litigation

Class Counsel has substantial experience in wage-and-hour and other class action litigation, including litigation involving the legal issues in this matter. (Declaration of Miriam L. Schimmel in Support of Motion for Approval of Attorneys' Fees and Costs, Enhancement Payment, and Settlement Administration Costs ["Schimmel Decl."], ¶¶ 4-12; Genish Decl., ¶¶ 3-8). Class Counsel's skill in developing a factual record and convincing Defendant of its litigation exposure under California law was essential to achieving the Settlement. Through its skill and reputation, Class Counsel was able to obtain a settlement that provides an outstanding result for Class Members. (*See generally* Schimmel Decl.).

5. The Results Achieved

The excellent results achieved by the Settlement support Class Counsel's request for attorneys' fees. Class Members' support for the results achieved by Class Counsel is demonstrated by the absence of any objections to either the Class Settlement or to Class Counsel's request for fees, both of which were described clearly in the Class Notice. As of the date of this Motion, Settlement Class Members will be paid, on average, approximately $774.89 each, which is intended to compensate them for the alleged wage and hour violations they suffered during their employment. (Genish Decl., ¶ 31). This is a significant benefit for the Settlement Class Members here as it represents a recovery for highly disputed claims. Equally important is the fact that the State of California will receive $37,500.00 for enforcement of labor laws and education of employers. (*Id.*, ¶ 46).

Furthermore, the efficiency with which this litigation was conducted and resolved should be rewarded. After preparing and investigating the case prior to filing the Action, Class Counsel strongly litigated and then resolved the case in an efficient manner. The Class Members will directly benefit from the prompt and fair resolution of their claims. They will be receiving a significant award in a relatively short period of time, as opposed to waiting years to recover some undetermined amount if they succeeded at trial, which is an uncertainty in itself.

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6. Preclusion of Other Employment

As California law recognizes, Class Counsel's commitment to this litigation should not be assessed in a vacuum. (*See Serrano, supra,* 20 Cal.3d at 49). A relevant factor in determining attorneys' fees is whether the litigation required Class Counsel to forego other employment. (*See ibid*). Class Counsel had to consider its workload during this litigation when considering taking on additional work that was available, and which Class Counsel had to forego in order to devote the time necessary to pursue this litigation. (Schimmel Decl., ¶ 14).

B. The Requested Fees Are Also Justified Under the Lodestar Method

Fee calculations under the lodestar method would result in a similar award, demonstrating the fairness of Class Counsel's percentage fee request. Under the lodestar method, a base fee amount is calculated from a compilation of time reasonably spent on the case and the reasonable hourly compensation of the attorney. The base amount is then adjusted by use of a multiplier in light of various factors. (*Serrano 111, supra,* 20 Cal.3d at 48). Class Counsel's hourly rates are summarized in the Declaration of Miriam L. Schimmel at ¶¶ 6-11.

One difficulty in determining the hourly rate of attorneys of similar skill and experience in the relevant community is the scarcity of hourly fee-paying clients in class action litigation. (Schimmel Decl., ¶ 13). As a practical matter, few if any employees or consumers pay attorneys' fees on an hourly basis for such extensive litigation, and thus retainer agreements in such cases are based on a stepped-up contingency fee (with the percentage increasing from one third to forty-five – and sometimes even fifty percent, which is on par with personal injury contingency fee agreements – if the case goes to trial). (Ibid). Therefore, there is no customary hourly billing rate for work that is routinely based on a contingent fee relationship, but the nature of class action work should be strongly considered by the Court. (Ibid). Wage and hour work presents a specialized and challenging area of law that is not within the knowledge of many lawyers. (Ibid). This kind of class action work requires specialized learning and the willingness to take large risks. (Ibid).

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Class Counsel has spent approximately 252.50 total hours litigating these claims to date.[2] (Schimmel Decl., ¶ 11). Class Counsel expects to spend another 10 hours in connection with the final approval process (including finalizing the Motions and supporting documents, preparing for and attending the Final Approval Hearing, and managing the Settlement through its conclusion, including anticipated communications with defense counsel, the Settlement Administrator, our client, and Class Members). (*Id*., ¶ 12). In addition to time spent during litigation, reasonable hours also include the time spent before the Action was filed, including time spent interviewing the client, investigating the facts and the law, preparing the initial pleadings, as well as litigating the case. (*Webb v. Board of Educ.* (1985) 471 U.S. 234). Further, the fee award should include fees incurred to establish and defend the attorneys' fee claim. (*Serrano v. Priest* (1982) 32 Cal .3d 621, 639 ("*Serrano IV*")). Based on the rates of Class Counsel, the total fees incurred to date are $213,570. (Schimmel Decl., ¶ 11). By the conclusion of this matter, the total fees are estimated to be approximately $224,070. (Schimmel Decl., ¶ 12).

In cases where a common fund analysis is not used, once the court establishes the lodestar amount, it should adjust the fee award by a multiplier in order to make an appropriate fee award. (*Serrano III, supra,* 20 Cal.3d at 48). In applying the multiplier, *Newberg on Class Actions* states that "[m]ultiples ranging from one to four frequently are awarded in common fund cases when the lodestar method is applied. A large common fund award may warrant an even larger multiplier." (4 *Newberg on Class Actions* 4th (4th ed. 2002) § 14.6). If the class members paid the fees that the market would bear, they would pay a fee of anywhere from one-third to forty-five percent of any recovery. Since this is the market rate, the lodestar calculation should be enhanced to reflect what the class members would pay on the open market. (*Lealao, supra,* 82 Cal.App.4th at 47-48).

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[2] In *Martino v. Denevi* (1986) 182 Cal.App.3d 553, 559, the court addressed the issue of what evidence is required in California to support a fee application. The court held: "Testimony of an attorney as to the number of hours worked on a particular case is sufficient evidence to support an award of attorney fees, even in the absence of detailed time records." *Id.* There is no need to attach the voluminous invoices prepared in a case as a basis for an award of fees and costs. *Id.* Through Class Counsel's declarations in support of this application, however, Plaintiff presents a thorough breakdown of the hours spent and costs incurred in prosecuting this class action. Pursuant to *Martino, supra,* this presentation is sufficient to support the amount requested.

In *Lealao,* the court held that trial courts should award lodestar fees by examining the percentage-of-the-benefit and adjusting the lodestar calculation accordingly. (*Id.* at 49 & 53). The court indicated that this is an upward adjustment and should be akin to a contingency fee recovery; the court stated, "[a]n adjustment reflecting the amount of the class recovery is not significantly different from an adjustment reflecting a percentage of that amount; and California courts have evaluated a lodestar as a percentage of the benefit." (*Id.* at 46). The *Lealao* method appears particularly appropriate because class actions generally are contingency fee cases for plaintiffs - and the class action clients do not expect to pay an hourly fee.

The rationale of *Lealao* comports with the purpose of the multiplier. The multiplier is "primarily to compensate the attorney for the prevailing party at a rate reflecting the risk of nonpayment in contingency cases." (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1138). The *Lealao* court reasoned:

> Given the unique reliance of our legal system on private litigants to enforce substantive provisions of law through class and derivative actions, attorneys providing the essential enforcement services must be provided incentives roughly comparable to those negotiated in the private bargaining that takes place in the legal marketplace, as it will otherwise be economic for defendants to increase injurious behavior. It has therefore been urged (most persistently by Judge Richard Posner) that in defining a reasonable fee in such representative actions, the law should mimic the market.
>
> In the class action context, that would mean attempting to award the fee that informed private bargaining, if it were truly possible, might have reached. The simplest way for the law to duplicate the bargain that informed parties would reach if agency costs were low is to look to fee award levels in actions brought by sophisticated private parties under the same or comparable statutes.

(*Lealao,* 82 Cal.App.4th at 47-48 (internal citations and quotations omitted)). The court added:

> [T]rial judges need the flexibility *Serrano III* provides, as it enables them to relate fee awards to the economic realities that determine the efficacy of the private enforcement contemplated by our civil justice system.
>
> Accordingly, we hold that, in cases in which the value of the class recovery can be monetized with a reasonable degree of certainty and it is not otherwise inappropriate, a trial court has discretion to adjust the basic lodestar through the application of a positive or negative multiplier where necessary to ensure that the fee awarded is within the range of fees freely negotiated in the legal marketplace in comparable litigation.

(*Id.* at 49-50).

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In looking at similar cases, including those set forth above, Class Counsel's requested fee comports to the market. Based on the reasonable hourly rates suggested by Class Counsel and the collective hours worked in this matter, the requested fee award would represent a multiplier of about 1.68 over the current total fee lodestar – an amount well within, and even below, the accepted range for class action cases. In this regard, Class Counsel's fee request is reasonable.

C. No Class Member Objected to the Requested Attorneys' Fee Award

Class Counsel's intention to request the Court's approval for payment of attorneys' fees was clearly disclosed to each Class Member in the Court-approved Class Notice. (*See Genish Decl.,* ¶ 43; *See also,* Soto-Najera Decl., Exhibit A). As of the filing of this Motion, there has not been a single objection to the request for attorneys' fees. (Soto-Najera Decl., ¶ 11). It is fair to conclude that the Class approves of/does not take issue with the requested award of attorneys' fees. Based thereon, Class Counsel's request for Three Hundred Fifty-Eight Thousand Three Hundred Thirty-Three Dollars and Thirty-Three Cents ($358,333.33) in attorneys' fees-representing one-third (1/3) of the Gross Settlement Amount should be granted.

D. Class Counsel's Request for Costs and Expenses Is Reasonable

Pursuant to the Settlement Agreement, Class Counsel may request reimbursement of reasonable costs and expenses not more than Thirty-Five Thousand Dollars and Zero Cents ($35,000.00). (Original Agreement, ¶ 9). Class Counsel seeks reimbursement of Twenty-Nine Thousand One Hundred Fifty-Five Dollars and Fifty-Nine Cents ($29,155.59) in costs and expenses in this matter, which includes reasonable future costs for filing the Motions. (Genish Decl., Exh. 4). These costs were reasonably incurred in prosecution of this matter.

E. The Requested Enhancement Payment is Also Reasonable

The named Plaintiff should be awarded an Enhancement Payment in the amount of Seven Thousand Five Hundred Dollars and Zero Cents ($7,500.00) for his services as the Class Representative and the risks in connection with that role. (Genish Decl., ¶ 44). Enhancement awards in wage and hour cases typically range from $5,000.00 to $20,000.00, although some awards are higher. (Ibid). Often, multiple class representatives receive awards in the above range. (*See e.g.*, *Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles* (2010) 186 Cal.App.4th 399, 412 [approving an enhancement request of $10,000.00 per named plaintiff in a 188 member class]; *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998); *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."]). Here, the requested Enhancement Payment is modest, reasonable, and should be approved.

Plaintiff's actions establish that: (1) he sought to protect the interests of the Class above his own personal interests; (2) the Settlement Class Members will be benefitted from his actions by receiving a payment without having to do anything; and (3) Plaintiff has put forth a significant amount of time and effort pursuing the litigation and seeing it through to resolution. (*See*, generally, Birdi Decl.; *see also Clark v. American Residential Services LLC* (2009) 175 Cal.App.4th 785, 804 (discussing the criteria for determining class representative enhancement awards in concluding that a requested award of $25,000 for two class representatives was too high)).

The requested award for Plaintiff is also reasonable given the financial and personal risk he took in commencing the Action, and in light of the benefits that his actions have conferred upon the Class. (Birdi Decl., ¶ 7; *See also Van Vranken v. Atl. Richfield Co.* (N.D.Cal. 1995) 901 F.Supp. 294, 299-300). Additionally, in considering a requested class representative enhancement award, courts take into consideration a plaintiff's reasonable fear of retaliation. (*Staton v. Boeing Co*. (9th Cir. 2003) 327 F.3d 938, 977). Here, it is easy to see that a potential future employer could expend little effort to discover Plaintiff brought the lawsuit – and based thereon, decline to offer Plaintiff employment.

In sum, Plaintiff has performed considerable services on behalf of the Class during the litigation. (*See*, generally, Birdi Decl.). Class Counsel cannot understate the importance of the role of an employee who is willing to search out an attorney and step forward to assume the risk of litigation and retaliation in order to represent a class and put the interests of the class before his or her interests. Plaintiff has understood that this is a class action where he is serving as the Cass Representative and must protect the Class Members' interests. (Birdi Decl., ¶ 10). Plaintiff was the catalyst to the benefit reached for the Class Members, and has actively protected the Class Members' interests during the pendency of this matter and will continue to do so even if the case was required to go to trial. (Ibid). Plaintiff spent numerous hours participating in this matter by searching for an attorney, communicating with his attorneys on numerous occasions, searching for and producing relevant documents related to his employment, responding to his attorneys' telephone inquiries, assisting his attorneys with responding to written discovery, preparing for and attending his deposition, reviewing the settlement documents, and approving the Settlement on behalf of all Class Members. (*See*, generally, Birdi Decl.).

In contrast, without having to take on any of the risk incurred by Plaintiff or time spent by Plaintiff in litigating this matter, Settlement Class Members will automatically be issued a payment for their claims. It appears that the Settlement Class Members recognize this enhancement was justified because since the time the Class received notice of the requested Enhancement Payment, no one has objected to the request. Thus, the Enhancement Payment to Plaintiff is warranted to compensate him for his time and effort, the fear and stress associated with assuming the responsibility of serving as the Class Representative, and the concrete risks he assumed as the Class Representative.

F. The Requested Settlement Administration Costs Are Reasonable

In Plaintiff's Motion for Preliminary Approval, Plaintiff requested, and the Court approved, Settlement Administration Costs not to exceed Fourteen Thousand Dollars and Zero Cents ($14,000.00). (Genish Decl., ¶ 45). CPT is the approved Settlement Administrator. (Ibid). It is an experienced class administrator and has adequately performed the administration tasks required by the Preliminary Approval Order. CPT's *actual* costs to administer the Settlement are only Twelve Thousand Dollars and Zero Cents ($12,000.00). (Soto-Najera Decl., ¶ 17 & Exh. B). Based thereon, the requested costs should be approved.

VII. CONCLUSION

For all of the foregoing reasons, Plaintiff respectfully requests that this Court approve: (1) Class Counsel's request of $358,333.33 as an award of attorneys' fees; (2) the requested litigation cost award of $29,155.59; (3) the requested Enhancement Payment to Plaintiff in the amount of $7,500.00; and (4) the payment of $12,000.00 in Settlement Administration Costs to CPT.

Dated: July 17, 2024

Respectfully submitted,
BLACKSTONE LAW, APC

By: ______________________________
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