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ESCAMILLA, on behalf of themselves, all others
similarly situated and on behalf of the general public.

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

EDDIE ESCAMILLA, GUSTAVO
ESCAMILLA, and ARTURO
ESCAMILLA, on behalf of themselves, all
others similarly situated, and on behalf of
the general public,

Plaintiffs,

v.

KEYSTONE FREIGHT CORP.;
NATIONAL RETAIL
TRANSPORTATION, INC.; and DOES 2
through 100,

Defendants.

Case No. CIVDS1931366

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

Date: September 13, 2022
Time: 10:00 a.m.
Judge: Hon. David S. Cohn
Dept.: S26

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1 **I. INTRODUCTION**

2 This motion seeks final approval of a non-reversionary \$1,524,966.29 proposed wage and
3 hour class action settlement by Plaintiffs Eddie Escamilla, Gustavo Escamilla, and Arturo
4 Escamilla (hereinafter “Plaintiffs”) on behalf of themselves and all individuals that performed
5 work for Defendants National Retail Transportation, Inc. and Keystone Freight Corp.
6 (“Defendants”) (Plaintiffs and Defendants are collectively referred to as the “Parties”) in
7 California pursuant to owner-operator agreements (“Direct Contractors”) and/or pursuant to being
8 hired by Direct Contractors to perform the work under the owner-operator agreements without
9 being a party to the agreements (“Secondaries”) at any time between October 18, 2015, through
10 April 11, 2022 (“Class Period”). To date, there is a 100% participation rate amongst Class
11 Members—that is, there were no requests for exclusion, no objections, and no disputes. **The**
12 **proposed settlement is projected to pay an average estimated payment of \$3,794.33 per Class**
13 **Member, with a high payment of \$18,513.67.¹**

14 This case required 585 hours of attorney time from Class Counsel and sought relief for 235
15 individuals. This litigation involved investigations with Class Members throughout California,
16 extensive discovery, the production of thousands of documents and thousands of lines of data by
17 Defendants, a full day of mediation, and considerable settlement negotiations through the mediator
18 post-mediation.

19 Plaintiffs move for final approval of attorneys’ fees in the amount of \$508,322.10, which
20 one-third of the Maximum Settlement Amount (“MSA”). As will be demonstrated herein,
21 Plaintiffs’ attorney fee request is supported using the percentage fee method and the lodestar
22 method. Second, Plaintiffs move for final approval of litigation costs in the amount of \$17,727.06
23 incurred in litigating this matter. Third, Plaintiffs moves for final approval of the Class
24 Representative Enhancement Awards to the named class representatives, Eddie Escamilla and
25 Gustavo Escamilla, for \$10,000 each, and Arturo Escamilla for \$5,000 to compensate the them for
26 a general release of their claims against Defendants, and for the time they spent on and the risks
27 absorbed in undertaking this case. Plaintiffs played a vital role in representing the other individuals

28

¹ Declaration of Jarrod Salinas (“Salinas Dec.”) ¶ 11.

1 in this case and spearheading the lawsuits to seek monetary relief for them. Fourth, Plaintiffs move
2 for final approval of payment of \$7,250 to the Settlement Administrator, Phoenix Class Action
3 Administration Solutions (“Phoenix”) for the costs and fees of administering settlement. Fifth,
4 Plaintiffs move for final approval of payment to the Labor and Workforce Development Agency
5 (“LWDA”) under the Private Attorneys’ General Act (“PAGA”) in the amount of \$56,250 (75%
6 of \$75,000 allocated to PAGA penalties).

7 The requested amounts of attorneys’ fees, litigation costs, class representative service
8 awards, settlement administration costs, and PAGA payment were fully disclosed to the Class
9 Members when the Class Notice was mailed to them on May 16, 2022.² **Most importantly, the**
10 **Settlement and all its terms received universal support from Class Members, as there no**
11 **were objections, no disputes, and no requests for exclusion.**³ The Court is therefore respectfully
12 requested to honor the Class Members’ endorsement of the settlement and grant final approval of
13 the settlement, attorneys’ fees, litigation costs, class representative service awards, costs of
14 settlement administration, and payment to the LWDA pursuant to PAGA in the amounts as
15 preliminarily approved by this Court, as fully disclosed to the Class Members, and as requested
16 herein.

17 **II. BACKGROUND, INVESTIGATION, DISCOVERY**

18 Defendants are in the business of transporting freight for their customers. In order to
19 transport its customers’ freight, Defendants both contracts directly with entities or individuals to
20 provide these freight delivery services (“Direct Contractors”), as well as utilizes other individuals
21 who work for a Contract Carrier to either drive a truck and delivered freight for Defendants or
22 assisted a Driver on his or her route in the delivery of freight (“Secondaries”). Plaintiffs Eddie
23 Escamilla and Gustavo Escamilla contracted directly with Defendants as Direct Contractors, and
24 Plaintiff Arturo Escamilla worked as a Secondary. Declaration of David Mara (“Mara Dec.”) ¶ 10.

25 Plaintiffs filed this class action against Defendant on October 18, 2019. Claiming that they
26 and others were misclassified by Defendant as independent contractors, they alleged causes of
27

28 ² Salinas Dec. ¶ 5, Ex. A

³ Salinas Dec. ¶¶ 8-10.

1 action on behalf of themselves and other Direct Contractors and Secondaries for: (1) Failure to
2 Pay Straight Time Wages; (2) Failure to Pay Overtime; (3) Failure to Provide Meal Periods; (4)
3 Failure to Authorize and Permit Rest Periods; (5) Failure to Provide Accurate Wage Statements;
4 (6) Failure to Pay Wages Due at Termination; (7) Failure to Reimburse Business Expenses; and
5 (8) Violation of Unfair Competition Law. On November 27, 2019, Plaintiffs filed a First Amended
6 Complaint, removing Arturo Escamilla as a Plaintiff, and removing causes of action for Failure to
7 Pay Overtime, Failure to Provide Accurate Wage Statements and Failure to Pay Wages Due at
8 Termination. Mara Dec. ¶ 11.

9 In response, Defendant answered the complaint and filed a cross-complaint against J&G
10 Bros, LLC and Eddie Escamilla Trucking, Inc., the entities Plaintiffs Gustavo and Eddie Escamilla
11 operated when contracting with Defendant, in an attempt to hold Plaintiffs liable for the violations
12 alleged within the complaint. Plaintiffs demurred to Defendant's cross-complaint, which the Court
13 sustained without leave to amend on December 18, 2020. Mara Dec. ¶ 12.

14 As part of the settlement process, the Parties agreed to file a Second Amended Complaint
15 in this matter in order to re-allege claims for Failure to Provide Accurate Wage Statements and
16 Failure to Pay Wages Due at Termination, allege claims under the Private Attorneys General Act
17 of 2004 ("PAGA"), and re-add Arturo Escamilla as a Plaintiff. In compliance with Labor Code §
18 2699.3(a)(1), Plaintiffs submitted written notice via online filing to the LWDA, setting forth the
19 facts and theories of the violations alleged against Defendant, claiming that he and others were
20 misclassified by Defendant as independent contractors on February 16, 2022. The Second
21 Amended Complaint was submitted with Plaintiffs' preliminary approval motion and was deemed
22 filed by the Court at the time preliminary approval was granted, April 13, 2022. Mara Dec. ¶ 13.

23 Defendants deny the allegations of the action in its entirety, deny any liability or
24 wrongdoing of any kind associated with the claims alleged in this action, and further deny that, for
25 any purpose other than settling this action, this matter is appropriate for class treatment.
26 Defendants further contend that they have complied with all applicable California laws, the
27 California Labor Code, the applicable California Wage Order(s), and the Unfair Competition Law.
28 Defendants finally contend that, if this matter were to be litigated further, they would have strong

1 defenses to oppose class certification and succeed on the merits of Plaintiffs' causes of action.
2 Mara Dec. ¶ 14.

3 **a. Discovery and Investigation**

4 Through discovery, Plaintiffs sought numerous documents and substantial amounts of data
5 that were needed to evaluate the case. These documents included the contracts entered into
6 between Defendants and Direct Contractors, records detailing all of the routes driven by Class
7 Members for Defendants during the Claims Period, policies and practices in place during the class
8 period, detailing requirements and expectations for Class Members when delivering freight for
9 Defendants' customers, as well as data surrounding the number of current and former employees.
10 Mara Dec. ¶ 15.

11 To obtain these documents and data, the Parties engaged in extensive discovery. Plaintiffs
12 propounded three sets of special interrogatories and requests for production of documents on
13 Defendants, and Defendants propounded two sets of special interrogatories, form interrogatories,
14 requests for admission, and requests for production of documents on Plaintiffs. This discovery, in
15 conjunction with the Parties' meet and confer efforts, resulted in the production of nearly 4,000
16 documents and thousands of lines of data. Using the records detailing the routes driven by Class
17 Members and the data surrounding the number of current and former Class Members, Plaintiffs'
18 expert was able to provide numerous data points used in establishing a potential exposure model
19 in preparation for mediation. Mara Dec. ¶ 16.

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

21 The gravamen of Plaintiffs' claims is that Defendants misclassified Plaintiffs, and other
22 Direct Contractors and Secondaries, as independent contractors under both the test in *S. G. Borello*
23 *& Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341, as well as the "ABC test"
24 outlined in the California Supreme Court decision in *Dynamex Operations West, Inc. v. Superior*
25 *Court* (2018) 4 Cal.5th 903, denying them the protections provided to employees under California
26 law. This proposed Settlement was only possible following significant discovery and evaluation
27 of Defendants' relevant policies, procedures, and records, which permitted Plaintiffs' Counsel to
28 engage in a comprehensive analysis of liability and potential damages to prepare for the mediation

1 and class certification. Mara Dec. ¶ 17.

2 Defendants vigorously deny Plaintiffs' contentions, claiming that Plaintiffs and putative
3 class members are not its employees, and that it does not control any aspect of how Plaintiffs and
4 putative class members perform their jobs. Defendant claims it is lawfully contracting with the
5 Direct Contractors, who are running their own separate businesses, to facilitate the delivery of the
6 customer's freight, and that it leaves the hiring of Secondaries to accomplish these deliveries under
7 the sole discretion of the Direct Contractors. Mara Dec. ¶ 18.

8 As evidenced above, the Parties took staunchly conflicting positions with respect to
9 Plaintiffs' claims.

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

11 The Parties agreed to attend mediation with respected wage and hour mediator Jeff Ross
12 on August 12, 2021. The matter did not settle at mediation. Mr. Ross remained in regular contact
13 with the Parties to facilitate negotiations, culminating in Mr. Ross issuing a mediator's proposal,
14 which the Parties accepted on January 7, 2022. Thereafter, the Parties met and conferred regarding
15 all the terms of the settlement and finalized their agreement in the Joint Stipulation that the Parties
16 now seek to finally approve. Mara Dec. ¶ 19; **Exhibit 5**.

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

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

19 The Parties agreed (subject to and contingent upon the Court's approval) that this action
20 be settled and compromised for the non-reversionary total sum of \$1,524,966.29 ("Maximum
21 Settlement Amount" or "MSA") which includes, subject to Court approval: (a) attorneys' fees of
22 up to \$508,322.10 (one-third of the MSA) to compensate Class Counsel for work already
23 performed and all work remaining to be performed in documenting the settlement, administering
24 the settlement and securing Court approval; (b) litigation costs of \$17,727.06 (originally estimated
25 not to exceed \$20,000); (c) Class Representative Enhancement Awards to the named class
26 representatives, Eddie Escamilla and Gustavo Escamilla, for \$10,000 each, and Arturo Escamilla
27 for \$5,000 in consideration for a general release of their claims against Defendants and for
28 initiating and prosecuting this Class Action, serving as Class Representatives, work performed,

1 and risks undertaken for the payment of Defendants’ attorneys’ fees and costs in the event he had
2 been unsuccessful in either matter; (d) claims administration fees and expenses to Phoenix in the
3 amount of \$7,250.00 (originally estimated not to exceed \$15,000); and (e) \$75,000 allocated to
4 Plaintiffs’ claims under PAGA. Mara Dec. ¶ 20.

5 After all Court-approved deductions from the MSA, it is estimated that \$891,667.13 (“Net
6 Settlement Amount” or “NSA”), less all applicable employee taxes, will be distributed to Class
7 Members – **with an average estimated payment of \$3,794.33 per Class Member, and a high**
8 **payment of \$18,513.67.** For each Participating Class Member, the Participating Class Members
9 Individual Class Workweeks will be divided by the total number of Participating Class Member
10 Workweeks.⁴ The resulting number will then be multiplied by the Net Settlement Amount.
11 **Exhibit 5** attached to the Mara Dec. at Section VI, Paragraph 2.6(b). Participating Class Members
12 who were Direct Contractors are credited with six times the actual number of Workweeks worked
13 for Defendant during the Class Period. *Id.* at Section VI, Paragraph 1.4.

14 Furthermore, the Settlement allocates \$75,000 in consideration for the settlement of
15 Plaintiffs’ PAGA claims, which is to be distributed separately from the NSA. Settlement Class
16 Members who performed work for Defendant from October 18, 2018 to April 11, 2022 (“PAGA
17 Period”) are also deemed “PAGA Employees” and able to recover their share of the civil penalties
18 under the settlement. 75% of this \$75,000, or \$56,250, will be paid to the LWDA, while the
19 remaining 25%, or \$18,750, will be distributed to the PAGA Employees – with an average
20 estimated payment of \$144.23 per PAGA Employee, and a high payment of \$389.46. The
21 Settlement Administrator will calculate and issue Individual PAGA Settlement Payments based
22 on the following formula: each PAGA Employees’ portion will be determined by dividing each
23 PAGA Employees Individual PAGA Workweeks, by the total amount of PAGA Workweeks,⁵ and
24 then multiplying the result by \$18,750. **Exhibit 5** attached to the Mara Dec. at Section VI,
25 Paragraph 2.6(a). PAGA Employees who were Direct Contractors are credited with six times the
26 actual number of Workweeks worked for Defendant during the PAGA Period. *Id.* at Section VI,
27 Paragraph 1.23.

28 ⁴ There were 20,672 workweeks during the Class Period.

⁵ There were 11,476 workweeks during the PAGA Period.

1 **Under no circumstances will any portion of the \$1,524,966.29 settlement revert to**
2 **Defendant.** Mara Dec. ¶ 21.

3 **b. Released Claims**

4 Under the terms of the Settlement, the Plaintiffs and the Settlement Class Members, release
5 any and all claims that are asserted in the Second Amended Complaint and which could have been
6 asserted based on the facts alleged in the complaint. A full recital of the released claims can be
7 found in **Exhibit 5** attached to the Declaration of David Mara, Esq., which is the Settlement, in
8 Section VI, Paragraphs 1.29 and 1.30

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

11 On April 13, 2022, the Court granted preliminary approval, conditionally certified the
12 Class, appointed Phoenix to act as the Settlement Administrator, approved the notice to be sent to
13 the Class, and directed that the notice be mailed to the Class by First Class U.S. Mail. On April
14 26, 2022, Phoenix received the class data file from Counsel for Defendants, which contained the
15 name, social security number, last known mailing address, and employment dates for each
16 Settlement Class Member. The Class List contained 235 individuals. Salinas Dec. ¶ 3. On May 16,
17 2022, the Notice was mailed, via U.S First Class Mail, to all 235 individuals contained in the Class
18 List.⁶

19 Twenty-six (26) Notices were returned to Phoenix by the Post Office. Salinas Dec. ¶ 6.
20 Phoenix performed a computerized skip trace on the returned Notices that did not have a
21 forwarding address, in an effort to obtain an updated address for purpose of re-mailing the Notice.
22 *Id.* Twenty-six (26) Notices were re-mailed as a result of the skip trace or obtaining a forwarding
23 address. *Id.* at ¶ 6. One (1) Notice has been deemed undeliverable. *Id.* at ¶ 7.

24 In sum, the settlement was received with overwhelming support from the Class Members.
25 Specifically, there were no objections, disputes, or requests for exclusion submitted by Class
26 Members. Salinas Dec. ¶¶ 8-10. This means all 235 Class Members, or 100%, will receive a
27 settlement payment.

28 _____
⁶ Salinas Dec. ¶ 5.

1 **IV. ARGUMENT**

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

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

9 In deciding whether to approve a class settlement, a court evaluates whether the proposed
10 settlement is “fair, adequate, and reasonable.” *Dunk v. Ford Motor Co.* (1996) 48 Cal. App. 4th
11 1794, 1801 (citing *Officers for Justice v. Civil Serv. Comm’n of City & Cnty. of S.F.* (9th Cir. 1982)
12 688 F.2d 615, 625); *Cho v. Seagate Tech. Holdings, Inc.* (2009) 177 Cal. App. 4th 734, 742 43. A
13 court enjoys broad discretion to make its fairness determination. *Dunk*, 48 Cal. App. 4th at 1801.

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

22 At the time of preliminary approval, the Court was provided with sufficient information to
23 satisfy three of the four *Dunk* factors, leaving the fourth factor, the number of objectors, unknown
24 until after the Class had an opportunity to respond to the Settlement as explained in the Class
25 Notice.⁷ Subject only to the Class’ reaction to the Settlement, the Court preliminarily presumed

26
27 ⁷ See Memorandum of Points and Authorities in Support of Preliminary Approval, filed on March
28 21, 2022. In addition to the *Dunk* factors, Class Counsel also detailed the other factors such as the
strengths of Plaintiffs’ case, risks and costs of further litigation, as well as the reasonableness of
the GSF amount in light of *Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116. *Id.*

1 the Settlement was fair, adequate and reasonable. Following dissemination of the Class Notice,
2 and adequate time provided to the Class to return an objection to the Settlement, no class members
3 objected to the Settlement. Salinas Dec. ¶ 9. Thus, the proposed settlement is entitled to the
4 presumption that it is fair and in all other respects proper and should be finally approved.

5 **b. The Settlement is Fair and Reasonable Based on the Strengths of Plaintiffs’**
6 **Case and the Risks and Costs of Further Litigation**

7 **i. The Issue of Misclassification**

8 Based upon the discovery conducted, Plaintiffs contend – and Defendant denies – that
9 Defendant misclassified Plaintiffs, and other Direct Contractors and Secondaries, as independent
10 contractors, denying them the protections provided to employees under California law. Based on
11 documents and data produced in this matter, Plaintiffs contend that Defendant substantially
12 controls the Class Members and would meet the factors delineated in the *Borello* test in *S. G.*
13 *Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341, as well as the
14 “ABC test” outlined in the California Supreme Court decision in *Dynamex Operations West, Inc.*
15 *v. Superior Court* (2018) 4 Cal.5th 903.

16 Plaintiffs contend that Defendants can terminate Class Members with or without cause,
17 which is “the strongest evidence of the right to control...” *Ayala v. Antelope Valley Newspapers,*
18 *Inc.* (2014) 59 Cal.4th 522, 531. Defendants do not enter contractual agreements for any set
19 duration, instead entering into an agreement that acknowledges that Defendants can terminate their
20 “employment at any time, with or without cause and with or without prior notice.” Defendants, in
21 their sole discretion, obtains the customers and enters into agreements to deliver their freight,
22 negotiates and sets the rates the customers are to pay, and assigns and dispatches the Class
23 Members directly to transport the freight. Additionally, Defendants exert a tremendous amount of
24 control over Class Members in other aspects as well, as they must preplan their routes, are required
25 to avoid high crime areas, are not allowed to go off route, make stops that are not authorized by
26 Defendants, or leave a loaded trailer unattended, and they must remain in constant contact with
27 dispatch. Mara Dec. ¶ 22.

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

1 that that Class Members have independence on how to perform their jobs. Defendants contend that
2 they do not control what Class Members do or how they perform their jobs. Defendants argue that
3 they cannot simply unilaterally decide to “terminate” Class Members at will. Defendants claim
4 they can merely terminate the agreement entered into with Direct Contractors through the very
5 terms of the agreement itself, severely limiting their ability to “terminate” Direct Contractors at
6 will. Furthermore, Defendants state they have absolutely zero control over the hiring or firing of
7 Secondaries, as those tasks are clearly delegated to the Direct Contractors as a part of the
8 agreements. Defendants also points out that the various “controls” exerted on Class Members and
9 “requirements” for how Class Members are to deliver freight are set forth by the customers, not
10 Defendants, and as such, these things cannot be considered as actions undertaken by the
11 Defendants. Mara Dec. ¶ 23.

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

17 **ii. Reimbursements and Deductions**

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

25 Defendants require Direct Contractors to shoulder the costs of insuring their trucks, fueling
26 their trucks, amongst various other costs. Here, as Plaintiffs allege the Direct Contractors are
27 misclassified as independent contractors when, under California law, they should be classified as
28 employees. Just as Defendants could not charge their own employee drivers the cost of fuel and

1 insurance in the furtherance of Defendants' business, they cannot do so to the Direct Contractors,
2 as they, too, are Defendants' employees under California law. Mara Dec. ¶ 25.

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

10 **iii. Meal and Rest Periods**

11 Plaintiffs further contend that Defendants, as a result of their misclassification scheme,
12 completely fail to provide Class Members with meal and rest periods. Under California Labor
13 Code section 512, no employer shall employ any person for a work period of more than five hours
14 without providing a meal period of not less than thirty minutes. *See also Brinker Rest. Corp. v.*
15 *Superior Court* (2012) 53 Cal.4th 1004, 1037. Further, the IWC Wage Orders mandate that every
16 employer authorize and permit all employees to take rest periods at the minimum rate of a net ten
17 consecutive minutes for each four hour work period, or major fraction thereof. Mara Dec. ¶ 27.

18 Defendants have no evidence they provided Class Members with meal or rest periods. They
19 have no meal or rest period policies they communicate to Class Members. They also have no
20 records of meal or rest periods. Thus, it will be fairly simple to show Defendants failed to provide
21 meal and rest periods to Class Members, who will be owed a 226.7 premium on every qualifying
22 shift. Mara Dec. ¶ 28.

23 Defendants again argue that because Class Members are not employees and properly
24 classified as independent contractors, they are under no obligation to provide Class Members with
25 meal or rest periods, as California law only requires an "employer" to provide them to its
26 "employees." Defendants claims they are lawfully engaging with and utilizing Class Members to
27 facilitate the delivery of the through the use of the agreements it enters into with the Direct
28 Contractors, which clearly state that all of that any Class Member performing work under the terms

1 of the agreements are independent contractors, not employees. Mara Dec. ¶ 29.

2 Defendants also point out that the Federal Motor Carrier Safety Administration's
3 (FMCSA) December 21, 2018, determination wherein the FMCSA found that California's meal
4 and rest break laws are preempted as applied to drivers of property-carrying commercial motor
5 vehicles who are subject to the FMCSA's own break regulations would similarly extinguish all of
6 Plaintiffs' meal and rest period claims. On January 15, 2021, the Ninth Circuit upheld the
7 FMCSA's determination that federal law preempted California's meal and rest break rules. *See*
8 *Int'l Bhd. of Teamsters, Local 2785 v. Fed. Motor Carrier Safety Admin.* (2021) 986 F.3d 841. As
9 such, Defendants argue that FMCSA's December 21, 2018, determination provides affirmative
10 preemption defenses to Plaintiffs' claims for meal and rest break violations. Mara Dec. ¶ 30.

11 Plaintiffs argue that the FMCSA's determination does not apply retroactively. Federal
12 agency decisions and orders, like the FMCSA Order, are "subject to the presumption of
13 prospectivity that attends true exercises of legislative authority." *Gutierrez-Brizuela v. Lynch*, 834
14 F.3d 1142, 1144 (10th Cir. 2016) (citing *De Niz Robles v. Lynch*, 803 F.3d 1165 (10th Cir. 2015)).
15 Hence, as the United Supreme Court found over thirty years ago, administrative rules and orders
16 are not retroactively applied unless "the power to promulgate retroactive rules...is conveyed by
17 Congress in express terms." *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208 (1988).
18 Evaluating whether the preemption decision is retroactive requires determining whether the
19 decision explicitly states that it applies retroactively, and if it does not, determining whether the
20 decision would have a retroactive effect on the rights of private individuals. *See In re ADC*
21 *Telecoms., Inc. Sec. Litig.*, 409 F.3d 974, 976 (8th Cir. 2005). If the statute or regulation does not
22 explicitly state that it applies retroactively, and its application would have retroactive effect, the
23 court may not apply it retroactively. *Id.* As neither the decision nor its authorizing statute contain
24 any explicit language on retroactivity, and because retroactive application of the decision would
25 extinguish the rights of private individuals (namely, extinguishing Plaintiffs' claims for meal and
26 rest periods entirely), the preemption decision cannot be applied retroactively. Mara Dec. ¶ 31.

27 **iv. Unpaid Wages**

28 Plaintiffs also allege that Defendants failed to pay all wages owed to Class Members.

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

11 Direct Contractors are paid by the mile and by the delivery, they are not paid for time when
12 “the wheels are not moving,” but they are not stopped for a delivery, such as fueling up, sitting in
13 traffic, for breakdowns, etc. A piece-rate pay formula that does not “compensate for all time
14 worked does not comply with the California Labor Code, even if, averaged out, it would pay at
15 least minimum wage for all hours worked.” *Cardenas v. McLane Foodservices, Inc.* (C.D. Cal.
16 2011) 796 F.Supp.2d 1246, 1252; See also, *Gonzalez v. Downtown LA Motors, LP* (2013) 215
17 Cal.App.4th 36, 49; *Armenta v. Osmose, Inc.* (2005) 135 Cal.App.4th 314, 320; *Reinhardt v.*
18 *Gemini Motor Transport* (E.D. Cal.2012) 869 F.Supp.2d 1158, 1168. Mara Dec. ¶ 32.

19 Secondaries are paid a daily flat rate. In California, wage structures that do not compensate
20 by the hour, like a salary or a commission, are only said to compensate for *non-overtime hours*.
21 *Alvarado v. Dart Container Corp. of California* (2018) 4 Cal.5th 542, 565 (“[T]he flat sum
22 compensates the worker for only non- overtime hours worked.”). Put differently, flat daily rates
23 earned are only compensation for eight daily hours and forty weekly hours. For any work over 8
24 daily or 40 weekly, employees are receiving no compensation under the flat rate pay structure. To
25 find otherwise, meaning piece-rate and flat rate pay structures also pay for hours in excess of eight
26 daily or forty weekly, would mean employees paid via these compensation methods would be paid
27 *less* money per hour for overtime work, which is an interpretation that does not favor the protection
28 of the employee’s interest or discourage employers from imposing overtime work and cannot

stand. *Id.* at 562 (“...[W]e are obligated to prefer an interpretation that discourages employers from imposing overtime work that favors the protection of the employee’s interests.”). Because these pay structures – like all non-hourly pay systems – can only pay for non-overtime hours, Secondaries are not paid for any hours worked in excess of eight in a single day. Mara Dec. ¶ 33.

Defendants contend that as Class Members are properly classified as independent contractors under California law, none of the authorities relied upon by Plaintiffs renders Defendants liable for any unpaid wages whatsoever. Defendants claim the only monetary compensation it is required to provide to the Class Members at all at any point in time is solely based on the provisions of the agreements it enters into with the Direct Contractors, which compensates them for all the hours and various tasks necessary in furtherance of the freight deliveries. Furthermore, while Defendants acknowledge that the agreements call for it to provide the Direct Contractors with certain forms of compensation pursuant to the terms of the agreements, Defendants are under no duty to provide compensation to the Secondaries. Mara Dec. ¶ 34.

Although Plaintiffs are confident in the strengths of their claims and believes this case is suitable for certification on the claimed basis that there are company-wide policies and practices that Plaintiffs contend violate California law and uniformly affect the Class Members, Defendants’ counterarguments raise uncertainties with respect to both class certification and success on the merits. As the California Supreme Court ruled in *Sav-On v. Superior Court* (2004) 34 Cal.4th 319, class certification is always a matter of the trial court’s sound discretion. Decisions following *Sav-On* have reached different conclusions, with respect to certification of wage and hour claims.⁸ In light of Defendants’ defenses, supporting evidence, and position that the action is not suitable for class treatment, the settlement amount of \$1,524,966.29—**with an average settlement share estimated at \$3,794.33, with a high payment of \$18,513.67**—Plaintiffs and their counsel believe

⁸ See, e.g., *Harris v. Superior Court* (2007) 154 Cal. App. 4th 164 (reversing decertification of class claiming misclassification and ordering summary adjudication in favor of employees), *review granted*, 171 P.3d 545 (2007) (not cited as precedent, but rather for illustrative purposes only); *Walsh v. IKON Solutions, Inc.* (2007) 148 Cal. App. 4th 1440 (affirming decertification of class claiming misclassification); *Aguilar v. Cintas Corp. No. 2* (2006) 144 Cal. App. 4th 121 (reversing denial of certification); *Dunbar v. Albertson’s Inc.* (2006) 141 Cal. App. 4th 1422 (affirming denial of certification).

1 this is a reasonable and fair settlement. Mara Dec. ¶ 35.

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

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

5 Class Counsel applies for an award of attorneys' fees in the sum of \$508,322.10 (which is
6 one-third of the MSA), and litigation costs of \$17,727.06 (originally estimated not to exceed
7 \$20,000). Mara Dec. ¶ 36. California courts have recognized an appropriate method for
8 determining an award of attorneys' fees is based on a percentage of the total value of benefits to
9 Class Members by the settlement, also known as the "common fund" method. *Serrano v. Priest*
10 (1977) 20 Cal.3d 25, 34 (*Serrano III*) 34 ("when a number of persons are entitled in common to a
11 specific fund, and an action brought by a plaintiff or plaintiffs for the benefit of all results in the
12 creation or preservation of that fund, such plaintiff or plaintiffs may be awarded attorney's fees
13 out of the fund."); *Serrano v. Unruh*, 32 Cal.3d 621, 627 (1982) (in awarding a fee from the
14 common fund obtained for the benefit of all parties, the trial court acts within its equitable power
15 to prevent the other parties' unjust enrichment.); *Rawlings v. Prudential-Bache Properties, Inc.*, 9
16 F.3d 513, 516 (6th Cir. 1993) (the percentage of the fund method for calculating attorney's fees
17 more accurately reflects the results achieved for the putative class than the lodestar method and
18 "establishes reasonable expectations on the part of plaintiffs' attorneys as to their expected
19 recovery; and it encourages early settlement, which avoids protracted litigation."); *In re Rite Aid*
20 *Corp. Securities Litigation*, 396 F.3d 294, 300 (3d Cir. 2005) ("The percentage-of-recovery
21 method is generally favored in common fund cases because it allows courts to award fees from the
22 fund 'in a manner that rewards counsel for success and penalizes it for failure.'").

23 The purpose of the common fund/percentage approach is to "spread litigation costs
24 proportionally among all the beneficiaries so that the active beneficiary does not bear the entire
25 burden alone." *Vincent v. Hughes Air West, Inc.* (9th Cir. 1977) 557 F.2d 759, 769. In *Quinn v.*
26 *State of California* (1995) 15 Cal.3d 162, 167, the Court stated: "[O]ne who expends attorneys'
27 fees in winning a suit which creates a fund from which others derive benefits may require those
28 passive beneficiaries to bear a fair share of the litigation costs." Similarly, in *City and County of*
San Francisco v. Sweet (1995) 12 Cal.4th 105, 110, the California Supreme Court recognized that

1 the common fund doctrine has been applied “consistently in California when an action brought by
2 one party creates a fund in which other persons are entitled to share.” The reasons for applying the
3 common fund doctrine include: “...fairness to the successful litigant, who might otherwise receive
4 no benefit because his recovery might be consumed by the expenses; correlative prevention of an
5 unfair advantage to the others who are entitled to share in the fund and who should bear their share
6 of the burden of its recovery; encouragement of the attorney for the successful litigant, who will
7 be more willing to undertake and diligently prosecute proper litigation for the protection or
8 recovery of the fund if he is assured that he will be properly and directly compensated should his
9 efforts be successful.” *Id.*

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

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

18 *Id.* at 503 (internal citation omitted).⁹ Because there is a defined and traceable benefit to the Class,
19 the Court can base an award of attorneys’ fees using a ‘common fund’ approach.

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

22 Several studies of class action fee awards have found that the median common fund fee
23 award is approximately one-third of the total settlement fund.¹⁰ The requested fee falls in the mid-

24 ⁹ *Laffitte* also held trial courts have discretion to assess reasonableness of fee awards with tools
25 such as the lodestar cross-check, although they need not do so. *Laffitte*, 1 Cal.5th at 506 (“We hold
26 further that trial courts have discretion to conduct a lodestar cross-check on a percentage fee . . .
27 they also retain the discretion to forgo a lodestar cross-check and use other means to evaluate the
28 reasonableness of a requested percentage fee”).

¹⁰ See, e.g., *Chavez v. Netflix, Inc.* (2008) 162 Cal. App. 4th 43, 66, n.11 (numerous studies have
shown that “fee awards in class actions average around one-third of the recovery.”); Reagan W.
Silber and Frank E. Goodrich, *Common Funds and Common Problems: Fee Objections and Class
Counsel’s Response*, 17 Rev. Litig. 525, 546 ; T. Willging, L. Hooper and R. Niemic, *Empirical
Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee
on Civil Rules*, 90 (1996) (finding that attorneys’ fees in class litigation “were generally in the
traditional range of approximately one-third of the total settlement”).

1 range of percentage class fee awards, which generally range from 20% to 50% of a common fund,
2 and it constitutes fair compensation for undertaking complex, risky, expensive, and time-
3 consuming litigation on a contingent basis and compensates Class Counsel for their efforts, as well
4 as the result achieved for the benefit of the Class. Numerous state and federal courts in California
5 routinely approve fee requests equal to or greater than 33% of the common fund. Indeed, courts
6 have found that an award of 33% of the common fund represents the “benchmark” in California.¹¹
7 In short, Plaintiffs’ counsels’ fee request of \$508,322.10 (one-third of the MSA) is in line with
8 awards in similar cases in California and nationwide and demonstrates that Plaintiffs’ counsels’
9 fee request is consistent with market rates and is reasonable.

10 **c. A Lodestar Cross-Check with a Modest Multiplier Confirms the**
11 **Reasonableness of the Requested Fee**

12 Class Counsel’s fee request is reasonable when calculated using the lodestar method.
13 Under the lodestar method, a base fee amount is calculated from a compilation of time reasonably
14 spent on the case and the reasonable hourly compensation of the attorney. *Serrano v. Priest* (1977)
15 20 Cal. 3d 25, 48. The court then may enhance this lodestar figure by a “multiplier” to account for
16 a range of factors, such as the novelty and difficulty of the case, its contingent nature, and the
17 degree of success achieved. *Id.* at 49; *see also Ketchum v. Moses*, 24 Cal.4th 1122, 1132-36 (2001);
18 *Thayer v. Wells Fargo Bank*, 92 Cal.App.4th 819, 834 (2001), [“[t]here is no...rule limiting the
19 factors that may justify an exercise of judicial discretion to [adjust the] lodestar”]. Courts
20 “routinely enhance[] the lodestar to reflect the risk of non-payment in common fund cases.”
21 *Vizcaino v. Microsoft Corp.* (9th Cir. 2002) 290 F.3d 1043, 1051; *Graham v. DaimlerChrysler*
22 *Corp.* (2004) 34 Cal.4th 553, 579 (“One of the most common fee enhancers [...] is for contingency
23 risk.”) Such an enhancement “mirrors the established practice in the private legal market of
24 rewarding attorneys’ fees for taking the risk of nonpayment by paying them a premium over their
25 normal hourly rates for winning contingency cases.” *Vizcaino, supra*, 220 F.3d at 1051; *Ketchum*,

26 ¹¹ *Smith v. CRST Van Expedited, Inc.* (S.D. Cal. Jan. 14, 2013) 10-CV-1116- IEG WMC, 2013
27 WL 163293, *5 (“These percentages compare favorably with both California (33%) and federal
28 (25%) benchmarks.”); *Dennis v. Kellogg Co.* (S.D. Cal. Nov. 14, 2013) 09-CV-1786-L WMC,
2013 WL 6055326, at *7 (“This percentage compares favorably with both California (33%) and
federal (25%) benchmarks and the requested fee compares well with a lodestar cross-check as
well.”).

24 Cal.4th at 1132-33. A risk multiplier also serves to bring the financial incentives for enforcing important rights “into line with incentives [attorneys] have to undertake claims for which they are paid on a fee-for-service basis. *Ketchum*, 24 Cal.4th at 1132. In determining whether or not to enhance or reduce the lodestar, California courts take into account multiple factors, including: the time and labor required; the skill requisite to perform the legal services properly; the preclusion of other employment by the attorney due to the acceptance of the case; the contingent nature of the fee; the amount involved and results obtained; the experience, reputation, and ability of the attorney; and awards in similar cases. *Cates v. Chiang* (2013) 213 Cal.App.4th 791, 822.

As of the date of filing this Motion for Final Approval, Plaintiffs’ counsel has worked a total of 585 hours on this case and calculated the base lodestar at \$400,750 at rates reflecting those currently earned in the marketplace, which would require a modest 1.27 multiplier. Mara Dec. ¶¶ 37-39, 41-42, **Exhibit 1**. All of the work and tasks performed by Plaintiffs’ counsel were reasonable and necessary to the prosecution of this case. Mara Dec. ¶¶ 37-39, 41-42.

Courts “routinely enhance[] the lodestar to reflect the risk of non-payment in common fund cases.” *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1051 (9th Cir. 2002); *Graham v. DaimlerChrysler Corp.*, 34 Cal.4th 553, 579 (2004) (“One of the most common fee enhancers [...] is for contingency risk.”) Such an enhancement “mirrors the established practice in the private legal market of rewarding attorneys’ fees for taking the risk of nonpayment by paying them a premium over their normal hourly rates for winning contingency cases.” *Vizcaino*, 220 F.3d at 1051. A risk multiplier also serves to bring the financial incentives for enforcing important rights “into line with incentives [attorneys] have to undertake claims for which they are paid on a fee-for-service basis.” *Ketchum*, 24 Cal.4th at 1132. In determining whether or not to enhance or reduce the lodestar, California courts take into account multiple factors, including: the time and labor required; the skill requisite to perform the legal services properly; the preclusion of other employment by the attorney due to the acceptance of the case; the contingent nature of the fee; the amount involve and results obtained; the experience, reputation, and ability of the attorney; and awards in similar cases. *Cates v. Chiang* (2013) 213 Cal. App. 4th 791, 822.

1 As discussed above, this was a highly-contested matter which required a significant amount
2 of time and labor. Class Counsel had to investigate and analyze thousands of pages of documents
3 and thousands of lines of data. The litigation also required a considerable amount of time
4 interviewing class members about their experiences, as well as fighting off cross-complaints from
5 Defendants which attempted to hold Plaintiffs liable for the very violations of California law they
6 alleged against Defendants. Mara Dec. ¶ 43.

7 In addition, into the above investigation and analysis, Class Counsel had to marshal the
8 evidence in a manner in which it could be adjudicated on a class-wide basis, an endeavor which
9 cannot be underscored. So often, lawyers unskilled in the class action aspect of wage and hour
10 cases do not pay attention to or put the work into how the evidence must be presented for class-
11 wide adjudication. Strong class-wide cases perish in the hands of inexperienced counsel because
12 the case has not been worked up to succeed at certification. Class Counsel here has considerable
13 experience in class litigation and, from the beginning of the case, is marshalling the evidence with
14 a sharp focus on class-wide proof needed for the matter to get certified. This case was no different.
15 Throughout the matter, as evidence was being gathered through documents and witness interviews,
16 Plaintiff were reducing the data to a “living class certification motion.” This filtering of
17 voluminous evidence into class-wide proof while keeping an eye on the merits of the litigation
18 resulted in a considerable amount of attorney time and skill. Mara Dec. ¶ 44.

19 Most importantly, all services were performed by Class Counsel on a contingent basis.
20 Both California and federal courts recognize that attorneys should be compensated for taking on
21 such contingent risks and provided with financial incentives to enforce important rights and
22 protections like those at issue in this case. See, e.g., *Vizcaino*, 290 F.3d at 1051; *Ketchum*, 24
23 Cal.4th at 1132-33. Here, Class Counsel bore the risk that, in spite of all of their efforts and skill
24 employed, there may be no recovery. Thus, a risk multiplier is appropriate. Mara Dec. ¶ 45.

25 Class Counsel respectfully requests a fee of \$508,322.10, which, based on the total attorney
26 hours expended and rates, would require a modest 1.27 multiplier to raise the generated fees of
27 \$400,750 to the requested amount. Far greater multipliers have been awarded in similar cases, and
28 the total amount of fees sought by Class Counsel is also reasonable compared to fees awarded in

1 like cases. Courts routinely enhance lodestar amounts based on multipliers that “range from 2 to 4
2 or even higher.”¹² Thus, consideration of the lodestar method as a cross-check to the percentage
3 figure sought strongly supports the reasonableness of the requested fee award. Class Counsel
4 moves for and respectfully requests that the Court grant attorneys’ fees in the amount of
5 \$508,322.10.

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

7 Plaintiffs’ counsels’ hourly rates are between \$550 and \$800 are in line with rates typically
8 approved in wage and hour class action litigation and which rates have been approved by Courts
9 in California in the Los Angeles, Sacramento, San Francisco, Alameda, Orange and San Diego
10 County Superior Courts.¹³ A reasonable hourly rate is the prevailing rate charged by attorneys of
11 similar skill and experience in the relevant community. *PLCM Group, Inc v. Drexler* (2000) 22
12 Cal. 4th 1084, 1095. When determining a reasonable hourly rate, courts may consider factors such
13 as skill and experience, the nature of the work performed, the relevant area of expertise and the
14 attorney’s customary billing rates. *Flannery v. California Highway Patrol* (1998) 61 Cal. App. 4th
15 629, 632.

16 Plaintiffs’ counsels’ skill and experience support their hourly rates. Their practice is limited
17 exclusively to litigation, focusing on the representation of employees in wage and hour and
18 consumer class action matters. Mara Dec. ¶¶ 1-9, 40. As prominent attorneys in the field of wage
19 and hour class action litigation, Plaintiffs’ counsel continually monitors the prevailing market rates
20 charged by both defense and plaintiff law firms and set the billing rates of their attorneys and
21 paralegals to be consistent with the prevailing market rates in the private sector for attorneys and
22 staff of comparable skill, qualifications and experience. Other wage and hour attorneys working

23 ¹² *Wershba v. Apple Computer, Inc.*, 91 Cal.App.4th 224, 255 (2001); *see, e.g., Vizcaino*, 290 F.3d
24 at 1051 (approving multiplier of 3.65); *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 123
25 (2d Cir. 2005) (approving multiplier of 3.5); *Craft v. County of San Bernardino*, 624 F. Supp. 2d
26 1113, 1125 (C.D. Cal. 2008) (awarding multiplier of 5.2 and collecting cases with cross-check
multipliers ranging from 4.5 to 19.6); *Glendora Community Redevelopment Agency v. Demeter*,
155 Cal.App.3d 465, 479-80 (1984) (approving fee award with multiplier of 12).

27 ¹³ Mara Dec. ¶¶ 39, 42; **Ex. 2** Westlaw Court Express’s Legal Billing Report, Volume 14, Number
28 3, California Region for December 2012; **Ex. 3**, 2014 Declaration of Richard M. Pearl in
Hohnbaum v. Brinker Restaurant Corp. SDSC GIC834348; **Ex. 4**, 2012 National Law Journal
Survey of Hourly Billing Rates for Partners and Associates.

as class counsel before California courts charge comparable if not higher rates.¹⁴ Therefore, as they are in line with those of the relevant community, Class Counsels' hourly rates are reasonable.

e. Class Counsels' Total Hours are Reasonable

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

To date, Plaintiffs' Counsel has expended a total of 585 hours litigating this case. The work performed to achieve a settlement that will provide valuable consideration to the Class, **averaging an estimated payment of \$3,794.33¹⁵**, is summarized by Class Counsel in the declarations submitted herewith. Mara Dec. ¶¶ 37-39, 41-42; **Ex. 1**. Counsel's many tasks, in summary form, included the following: pre-filing investigation and legal research; communicating with the class representatives; interviewing and meeting with putative Class Members; research and investigation of California's ever evolving wage and hour laws; investigation into Defendants' pay-structures and policies for its hourly employees; drafting and filing pleadings; numerous conferences with Defendants' counsel regarding a variety of issues throughout the litigation, mediation and settlement process; numerous interoffice discussions about litigation strategy and theories of liability; preparing for and appearing at hearings; extensive legal research into indemnity issues involving misclassification claims; draft two demurrers and motion for sanctions, along with supporting paperwork and supplemental briefing; propounding and responding to voluminous amounts of discovery and engaging in substantial meet and confer efforts throughout the discovery process; review and analyze documents and data produced by Defendants, create exhibits for use in the case; review case file for mediation; draft mediation brief and exposure analysis; interoffice discussions about mediation and mediation brief; prepare for and attend

¹⁴ Mara Dec. ¶¶ 39, 42, **Ex. 2**, Westlaw Court Express's Legal Billing Report, Volume 14, Number 3, California Region for December 2012; **Ex. 3**, 2014 Declaration of Richard M. Pearl in *Hohnbaum v. Brinker Restaurant Corp.* SDSC GIC834348; **Ex. 4**, 2012 National Law Journal Survey of Hourly Billing Rates for Partners and Associates).

¹⁵ See Salinas Dec. ¶ 11.

1 mediation; conduct post mediation settlement discussions through the mediator; review and revise
2 memorandum of understanding; review and revise long form settlement agreement; draft motion
3 for preliminary approval and supporting documents, communicate with the settlement
4 administrator throughout the administration process, and draft motion for final approval and
5 supporting documents. All tasks and work performed were reasonable and necessary to the
6 prosecution of this case. The work performed was justified in light of the result achieved. Mara
7 Dec. ¶¶ 37-39, 41-42.

8 **f. Costs of Litigation**

9 Class Counsel seeks reimbursement of the litigation costs and expenses of \$17,727.06
10 (originally estimated not to exceed \$20,000). These costs were all reasonable and necessary to the
11 prosecution of this case and the results achieved and are fair, and reasonable. Mara Dec. ¶ 46, Ex.
12 1.

13 **VI. THE CLASS REPRESENTATIVE SERVICE AWARDS ARE REASONABLE**

14 In addition, Plaintiffs Eddie Escamilla and Gustavo Escamilla agreed to a general release
15 of their claims against Defendants in exchange for \$10,000 each, and Plaintiff Arturo Escamilla
16 agreed to a general release of his claims against Defendants in exchange for \$5,000, as Class
17 Representative Enhancement Awards. Courts routinely approve service payments, or incentive
18 awards, to compensate a named plaintiff for the services he or she provides and the risks he or she
19 incurs during class litigation. *See In re Cellphone Fee Termination Cases* (2010) 186 Cal.App.4th
20 1380, 1393; *see also Bell v. Farmers Ins. Exch.* (2004) 11 Cal.App.4th 715, 725-26 (upholding
21 services payments to class representatives); *Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles*
22 (2010) 186 Cal.App.4th 399, 412 (upholding incentive awards to plaintiffs that, when added to
23 their individual recoveries, amounted to more than twice as much as the average payment to class
24 members). Courts have regularly and routinely granted approval of settlements containing such
25 enhancements. *See, e.g., Staton v. Boeing*, 327 F.3d 938, 977 (9th Cir. 2003).¹⁶ In Class Counsel's

26 ¹⁶ *See, e.g., Cook v. Niedert*, 142 F.3d 1004, 1015 (7th Cir. 1998); *Roberts v. Texaco*, 979 F. Supp.
27 185 (S.D.N.Y. 1997) (“present or past employee whose present position or employment credentials
28 or recommendation may be at risk by reason of having prosecuted the suit, who therefore lends his
or her name and efforts to the prosecution of litigation at some personal peril, a substantial
enhancement award is justified”); *Thornton v. East Texas Motor Freight*, 497 F.2d 416, 420 (6th

1 experience, the typical enhancement award in wage and hour class action settlements ranges from
2 \$5,000 to \$75,000. Very commonly there is more than one class representative who receives an
3 award in the above range. Mara Dec. ¶ 47.

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

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

19 Unfortunately, there have been several judgments entered against class representatives, e.g.
20 *Koehl v. Verio, Inc.* 142 Cal.App.4th 1313, 1328 (2006) (a wage and hour class action where
21 Defendant prevailed at trial, the named Plaintiffs were held liable, jointly and severally for the
22 Defendant's attorneys' fees); *Whiteway v. Fedex Kinkos Office & Print Services, Inc.*, 2007 U.S.
23 Dist. LEXIS 95398 (N.D. Cal. 2007) (a wage and hour misclassification case lost on summary
24 judgment, after the case was certified, the named Plaintiff was assessed costs in the sum of
25 \$56,788.). The risk of payment of Defendants' costs, in itself alone, is a sufficient basis for an
26 award of the requested enhancement sum. Few individuals are willing to take this risk, and it is
27

28 Cir. 1974) ("We also think there is something to be said for rewarding those drivers who protect
and help to bring rights to a group of employees who have been the victims of discrimination.").

1 clear that the appointed Class Representatives here championed a cause on behalf of others with
2 potentially huge monetary risks.

3 In particular, Plaintiffs Eddie Escamilla and Gustavo Escamilla bore incredible risks in
4 bringing this matter against Defendants. Shortly after the filing of this matter, Defendants filed
5 cross-complaints against the company's Eddie and Gustavo had used when contracting with
6 Defendants as owner operators in an attempt to hold them personally responsible, through their
7 companies, for the very wage and hour violations they had alleged against Defendants. However,
8 Eddie and Gustavo were not intimidated and decided to continue the fight. Even though Plaintiffs'
9 counsel was eventually able to have the cross-complaints dismissed, there was always the specter
10 of uncertainty surrounding the issue. Despite all of this, Eddie and Gustavo pushed forward, and
11 obtained considerable compensation for their fellow class members, **averaging an estimated**
12 **payment of \$3,794.33.**

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

24 The payment request is modest for the work performed, risks undertaken for payment of
25 fees and costs if this case had not been successfully concluded, stigma on future employment
26 opportunities, and the benefits all members of the class as well as all current and future class
27 members will enjoy as a result of Plaintiffs' efforts. Thus, the Court should approve the request.
28

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

2 The Parties agreed to hire Phoenix as the Administrator, and the Court approved this
3 choice. The Administrator was responsible for formatting, printing and mailing the Notice. It was
4 also responsible for updating addresses and re-mailing Notices returned as undeliverable,
5 responding to Class Member inquiries, answering questions from Counsel for the Parties, and
6 providing a declaration to document its duties and responsibilities under the settlement. Plaintiffs
7 now request that the Court finally approve the \$7,250.00 (estimated not to exceed \$15,000) fee to
8 Phoenix for services rendered and to be rendered. Salinas Dec. ¶ 14.

9 Following the grant of final approval, the Administrator's duties will continue in order to
10 calculate and mail the Individual Settlement Payment checks to Class Members, perform tax
11 reporting obligations, disburse other payments as ordered by the Court, and perform such other
12 duties as set forth in the Settlement Agreement. Phoenix's fee of \$7,250.00 for services rendered
13 and to be rendered is fair and reasonable and should be granted.

14 **VIII. CONCLUSION**

15 Based on the foregoing, Class Counsel respectfully requests the Court grant final approval
16 of the Class Action Settlement, award Class Counsel's attorneys' fees in the sum of \$508,322.10
17 and litigation costs of \$17,727.06, award the Class Representative Enhancement Awards to
18 Plaintiffs Eddie Escamilla and Gustavo Escamilla in the sum of \$10,000 each and Plaintiff Arturo
19 Escamilla in the sum of \$5,000, award to Phoenix \$7,250.00 for settlement administration services,
20 and approve of a payment to the LWDA in the amount of \$56,250.

21 Respectfully submitted,

22 Dated: August 15, 2022

MARA LAW FIRM, PC

23 

24 David Mara, Esq.
25 Matthew Crawford, Esq.
26 Attorneys for Plaintiffs
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