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10
11 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
12 **FOR THE COUNTY OF SANTA CRUZ**

13 XAVIER HUNTER, on behalf of himself
14 and others similarly situated,

15 Plaintiff,

16 vs.

17 72 HOUR, LLC, a California limited
18 liability company, BOB WONDRIES
19 MOTORS, a California corporation; and
20 DOES 1 to 100, Inclusive,
21

22 Defendants.

Case No.: 22CV00661

Assigned for all Purposes to:
Hon. Timothy Volkman
Dept. 5

**MEMORANDUM OF POINTS AND
AUTHORITIES MOTION FOR FINAL
APPROVAL OF CLASS ACTION
SETTLEMENT AND REQUEST FOR
ATTORNEY'S FEES**

[Filed concurrently with Notice of Motion and
Motion; Declarations of Zachary M. Crosner and
Kevin Lee; [Proposed] Order]

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1 **I. INTRODUCTION**

2 Plaintiff and Class Representative Xavier Hunter seeks final approval of a non-
3 reversionary class action settlement resolving wage and hour claims on behalf of 194
4 individuals employed by Defendant 72 Hour, LLC doing business as Watsonville Ford, Chevrolet
5 of Watsonville, National Truck Sales and Service, Watsonville Buying Center, Monterey Bay
6 Chrysler Dodge Jeep Ram, National Auto Fleet Group, and Mid Bay Ford Lincoln (collectively “72
7 Hour”), as hourly-paid, non-exempt employees during the period of March 30, 2018, through June
8 30, 2022.¹ The proposed \$388,000 total settlement provides about \$211,666.67 in cash
9 payments to the Class, with an average award of about \$1,091, plus additional amounts payable
10 under PAGA. The remaining balance will cover a modest service award to Plaintiff, settlement
11 administration costs, civil penalties to the state, and reasonable attorney’s fees and costs. The
12 parties and their counsel finalized the settlement after extensive and difficult arms-length
13 negotiations overseen by an experienced and highly-regarded mediator. The Court
14 conditionally certified the Class and preliminarily approved the settlement on December 15,
15 2022. Since then, the Court-approved notice form was mailed to the Class Members on
16 February 1, 2023, and they reacted very favorably to the settlement. No class members opted
17 out of the settlement, and there are no objections.

18 Further, Class Counsel secured an excellent settlement with 72 Hour after some two
19 years of investigation, litigation, and settlement negotiation and administration, all
20 without any compensation for services rendered or costs expended. The class notice duly
21 informed the class members that Class Counsel would request attorney’s fees not to exceed
22 1/3 of the Total Maximum Settlement Amount, or \$129,333.33, along with reimbursement
23 of no more than \$10,000 for actual costs incurred litigating this matter. As of the filing of
24 this motion, *not one Class Member objected* to the proposed fee award. Consistent with
25 the Settlement and notice, Plaintiff now respectfully requests the Court award Class
26 Counsel's fees in the amount of \$129,333.33 and costs in the amount of \$10,000.00, as
27 described in the Declaration of Zachary M. Crosner (“Crosner Decl.”) filed herewith. The

28 ¹ The Class Period was shortened from September 19, 2022 to June 30, 2022 per the settlement’s escalator clause.

1 requested attorney's fees are well within the range of reasonableness, especially
2 considering the complex and risky nature of this litigation, the contingent risk assumed,
3 and the two-plus year delay in payment and, when subjected to a lodestar crosscheck, result
4 in a base lodestar that is slightly higher than the actual fee request.

5 Accordingly, on behalf of himself and the Settlement Class, Plaintiff respectfully
6 requests the Court grant this motion, give full and final approval to the settlement, grant Class
7 Counsel's request for attorney's fees and costs, and enter judgment accordingly.

8 **II. BACKGROUND**

9 The details of the procedural and factual background of this matter were outlined in the
10 Plaintiffs' Motion for Preliminary Approval of Class Action Settlement (filed on or about
11 November 14, 2022). To re-familiarize the Court with this litigation, Defendant 72 Hour owns
12 and operates a number of auto dealerships and service centers in Santa Cruz and Los Angeles
13 Counties. Plaintiff Xavier Hunter worked for 72 Hour as a non-exempt employee from approximately
14 February 2020 to October 2021. His job title was "Service Advisor," and he worked at the company's
15 heavy duty truck center in Watsonville. Plaintiff contends 72 Hour rounded off employee time
16 punches such that employees did not receive fully 30 minute meal periods, and in fact lost
17 compensable time due to the rounding. Information obtained from Plaintiff and review of time and
18 payroll records from 72 Hour also suggests numerous de facto violations where the class members'
19 meal breaks were late or lasted less than 30 minutes, and Plaintiff contends further that meal and
20 rest periods regularly were interrupted by work, as he had to respond to customer phone calls and
21 meet with customers during his breaks. Additionally, review of the records produced by Defendant
22 suggest employees rarely if ever received second lunches when they worked shifts longer than 10
23 hours. Similarly, Plaintiff alleges regular de facto rest break violations for similar reasons. Thus,
24 per Plaintiff, even if 72 Hour can establish it has legally compliant written meal and rest break
25 policy, its own records indicate potential de facto liability. [Crosner Decl., ¶ 2.]

26 Based on these allegations, Plaintiff's FAC asserts class claims for: (i) failure to pay all
27 wages due (including minimum, straight time and overtime wages); (ii) failure to provide legally-
28 compliant meal breaks; (iii) failure to provide legally-compliant rest breaks; (iv) failure to pay all

1 wages due at the time of termination; (v) failure to provide accurate itemized wage statements; (vi)
2 failure to reimburse for business expenses; (vii) violation of the Unfair Competition Law (Bus. &
3 Prof. Code §§ 17200, *et seq.*); and (viii) for penalties under the Private Attorneys General Act.
4 [Crosner Decl., ¶ 3.]

5 72 Hour has at all times denied Plaintiff's allegations and maintained its meal and rest break
6 and payroll policies and procedures comply with California law, and that it provided the class
7 members with required meal and rest breaks. 72 Hour contends that, if an employee missed a break,
8 it was in violation of company policy and would have been for purely personal reasons, to the extent
9 it happened at all. The company further argued it paid the class members for all hours worked at
10 the correct legal rate. It also strongly contends the case cannot be maintained as any kind of class
11 or representative action, arguing that to the extent class members missed meal and/or rest breaks,
12 that such breaks were non-compliant, or that any off the clock work occurred, it was intermittent
13 and infrequent and evidence of such missed breaks would be purely anecdotal. Thus, per Defendant,
14 class certification would be inappropriate as individual issues would predominate. [Crosner Decl.,
15 ¶ 4.]

16 After Plaintiff filed his complaint, the Parties engaged in meet and confer discussions
17 regarding discovery, potential law and motion, and the merits of the case, and ultimately agreed to
18 attempt early mediation. They then engaged in significant informal discovery to facilitate an
19 exchange of information necessary to engage in a meaningful mediation. The Parties then engaged
20 Lisa Klerman, Esq., a respected mediator with extensive wage and hour class action experience and,
21 in June 2022, participated in a full day mediation with Ms. Klerman that resulted in the proposed
22 settlement. [Crosner Decl., ¶¶ 5-6.] This Court preliminarily approved the settlement on
23 December 15, 2022.

24 Class notices were mailed to class members on February 1, 2023, with a 45-day window
25 (to March 18, 2023) for class members to opt out of or object to the proposed settlement.
26 [Declaration of Kevin Lee ("Lee Decl."), ¶¶ 5, 9-11.]

27 ////

28 ////

1 **III. THE PROPOSED SETTLEMENT TERMS**

2 Under the settlement, 72 Hour will pay \$388,000.00 into a common fund, the Total
3 Maximum Settlement Amount. Attorney's fees of up to \$129,333.33 (1/3 of the TMSA), litigation
4 costs of up to \$10,000, an enhancement award to Plaintiff of up to \$10,000, settlement
5 administration costs of no more than \$7,000, and \$20,000 for PAGA penalties, all will be paid from
6 the TMSA. The remainder of approximately \$211,666.67 (the "Net Settlement Amount") will be
7 allocated among the Participating Class Members based on their total weeks worked during the
8 Class Period. The \$5,000 PAGA Payment allocated to the PAGA Group Members likewise will be
9 distributed based on their total weeks worked during the PAGA Period. No monies will revert to 72
10 Hour. [Crosner Decl., ¶ 7.]

11 **A. Certification of the Settlement Class**

12 The Court conditionally certified a settlement class defined to include all individuals who
13 worked for 72 Hour as a non-exempt employee in California during the Class Period, which runs
14 from March 30, 2018, through June 30, 2022.² The Settlement Administrator ultimately mailed
15 class notices to 194 individuals identified as members of the Class. [Lee Decl., ¶ 5.] Nothing
16 has changed to require reconsideration of the Court's certification of the Settlement Class.

17 **B. The Benefit Conferred on the Settlement Class**

18 As noted, the settlement obligates 72 Hour to pay \$388,000 to resolve the Settlement Class
19 claims, inclusive of attorney's fees and costs. At least \$211,666.67 from the Total Maximum
20 Settlement Amount will be distributed to the Participating Class Members. This is a cash settlement
21 that does not require Participating Class Members to submit a claim form to receive their settlement
22 share. Participating Class Members will receive their settlement checks automatically via First
23 Class U.S. Mail. Twenty percent (20%) of each settlement share will be allocated to wages and the
24 remaining eighty percent (80%) will be allocated to penalties and interest, which allocation is
25 consistent with 72 Hour's potential liability as discussed below. 72 Hour will pay any and all
26 applicable employer-side payroll taxes separately and in addition to the Total Maximum Settlement
27

28 ² The escalator clause was triggered since the total work weeks exceeded the cap stated in the Settlement Agreement, and 72 Hour elected to shorten the Class Period rather than increase the settlement amount. [Lee Decl., ¶ 13.]

1 Amount. Subject to the Court's approval, any amounts not claimed (because a class member does
2 not cash his or her settlement check) will be forwarded to the California State Controller's
3 Unclaimed Property Fund. [Crosner Decl., ¶ 8.]

4 Each Participating Class Member will receive a share of the Net Settlement Amount based
5 on his or her total weeks worked for 72 Hour during the Class Period while employed in a non-
6 exempt position. Thus, each Class Member's Individual Settlement Payment will be calculated
7 using criteria typically used in determining appropriate amounts of unpaid wages, unpaid premium
8 wages for missed meal and rest breaks, and potential statutory penalties. These methods are intended
9 to ensure each Class Member receives a portion of the available settlement funds corresponding to
10 the relative value of his or her potential claims. [Crosner Decl., ¶ 9.]

11 The average class settlement award currently is estimated to be about \$1,091, with a
12 maximum award of over \$2,600, while the average payment to the PAGA Group will be about \$37.
13 [Lee Decl., ¶¶ 15-16.]

14 **C. Settlement Administration**

15 Phoenix Settlement Administrators, as the Court-approved Settlement Administrator,
16 mailed the Notice Packet to the Class members after making all reasonable effort to ascertain
17 the best mailing address, including running each address through the National Change of
18 Address database and "skip-tracing" any Notice Packets returned as undeliverable. [Lee
19 Decl., ¶¶ 3-6.] The Class Notice, previously approved by the Court, duly informed Class
20 Members of the settlement terms, including the estimated relief each Class Member will
21 receive, the amounts to be requested for attorney's fees and the class representative
22 enhancement awards, and the right to opt out of or object to the settlement. [Lee Decl., Exh.
23 A.] Phoenix mailed 194 Notice Packets on February 1, 2023. [Lee Decl., ¶ 5.] Ultimately,
24 zero Notice Packets were deemed undeliverable, representing a 100% success rate. [Lee
25 Decl., ¶ 8.] The 45-day response window for responding to the settlement expired on March
26 18, 2023. [Lee Decl., ¶¶ 9-11.] As of the filing of this motion, Phoenix has received zero
27 requests for exclusion (for a 100% participation rate), and zero objections to the settlement.
28

1 No disputes have been submitted regarding the information used to calculate class member
2 settlement shares. [Lee Decl., ¶¶ 9-11.]

3 **D. Release of Claims**

4 All Participating Class Members will release 72 Hour from all claims alleged in the operative
5 complaint, or that could have been brought based on the factual allegations in the FAC, including
6 PAGA claims, during the Class Period. The release is limited to the claims that were actually pleaded
7 or could have been pleaded based on the alleged facts in the FAC. [Crosner Decl., ¶ 10.]

8 **E. PAGA and Notice to the LWDA**

9 As noted, the Parties allocated \$20,000 from the TMSA to resolution of Plaintiff's claims
10 under PAGA, and respectfully request that the Court approve that amount as fair, reasonable and
11 adequate. Consistent with PAGA, \$15,000 of this amount will be paid to the LWDA as the
12 state's share of the civil penalties, and the remainder of \$5,000 will be distributed to the 133
13 individuals eligible to receive a PAGA payment. [Lee Decl., ¶ 16.] As required by Labor Code
14 section 2699(l)(2), Plaintiff notified the LWDA of the settlement and the final approval hearing via
15 its online portal. [Crosner Decl., ¶ 11; Exh. 1.]

16 **IV. ARGUMENT**

17 **A. Standards for Final Approval**

18 The law favors settlement, particularly in class actions where substantial resources can
19 be conserved by avoiding the time, cost, and rigors of formal litigation. H. Newberg & A.
20 Conte, 4 Newberg on Class Actions (4th ed. 2002), § 11.41; Class Plaintiffs v. City of Seattle
21 (9th Cir. 1992) 955 F.2d 1268, 1276, cert. denied, 506 U.S. 953; Van Bronkhorst v. Safeco
22 Corp. (9th Cir. 1976) 529 F.2d 943,950; Potter v. Pacific Coast Lumber Co. (1951) 37 Cal.2d
23 592, 602. Nevertheless, to make certain the rights of absent parties are not unjustly
24 compromised, the settlement of a class action requires court approval. Cal. Rule of Court 3.769;
25 Dunk v. Ford Motor Co. (1996) 48 Cal.App.4th 1794, 1801; Wershba v. Apple Computer (2001)
26 91 Cal.App.4th 224, 245. The purpose of that judicial review is to protect against fraud or
27 collusion, and to ensure fairness to absent class members. Dunk, 48 Cal.App.4th at 1800-01;
28 Newberg, at §§ 11.22, *et seq.* Review is accomplished through a two-step process intended to

1 determine whether, under the totality of circumstances, the settlement is fair, reasonable and
2 adequate. Dunk, 48 Cal.App.4th at 1801; Wershba, 91 Cal.App.4th at 245.

3 On a motion for final approval, the trial court is charged with determining whether, in
4 light of the total circumstances of the action and the response of the class members to the
5 proposed settlement, the settlement is fair, reasonable, and adequate. Dunk, 48 Cal.App.4th at
6 1801-02; Wershba, 91 Cal.App.4th at 244-45. The court has broad discretion in making that
7 determination and may consider a number of relevant factors, including: the strength of
8 plaintiff's case; the likelihood of potential recovery; the risk, expense and likely duration of
9 further litigation; the amount offered in settlement; the extent of discovery and stage of the
10 proceedings; the experience and opinion of counsel; and the reaction of class members to the
11 settlement. Id. In light of the strong judicial policy favoring the settlement of class actions,
12 courts generally apply a presumption of fairness to a proposed class action settlement when:
13 (1) the settlement is reached through arm's-length bargaining; (2) investigation and discovery
14 are sufficient to allow counsel and the court to act intelligently; (3) counsel is experienced in
15 similar litigation; and (4) the percentage of objectors is small. Dunk, 48 Cal.App.4th at 1802;
16 Wershba, 91 Cal.App.4th at 245.

17 **B. The Proposed Settlement Merits Final Approval**

18 The proposed settlement of this action warrants final approval under the standards
19 summarized above. The settlement is fair, reasonable and adequate, and represents a favorable
20 resolution of highly disputed claims. Further, the settlement was overwhelmingly approved by
21 the class members, as there were no objections and no class members requested exclusion, for
22 a 100% participation rate.

23 **1. The Settlement Is the Product of Arm's-Length, Informed Negotiations**

24 The settlement is not the result of fraud or collusion. Rather, the proposed settlement
25 was reached following arm's-length negotiations presided over by Lisa Klerman, Esq., a highly
26 respected and well-known mediator with extensive experience mediating wage and hour class
27 actions. [Crosner Decl., ¶ 6.] Moreover, Plaintiff and his counsel were well-informed about the
28 facts and the law, and counsel Zachary M. Crosner and Chad Saunders have years of litigation

1 experience, including litigating wage and hour class actions. Plaintiff's counsel are well-qualified
2 to evaluate the risks and benefits of pursuing further litigation or settling the matter. [Crosner Decl.,
3 ¶¶ 26-36.] 72 Hour likewise was represented by highly-qualified and experienced defense
4 counsel. Both sides advocated vigorously for their clients and nothing was "left on the table."

5 **2. The Class Reacted Favorably to the Settlement**

6 The settlement was well-received by the class. As of the filing of this motion, no
7 objections have been filed, and not one Class Member requested exclusion out of 194 settlement
8 class members. [Lee Decl., ¶¶ 9-10.] As many courts recognize, class member reaction to the
9 settlement is one of the most important factors to consider in determining if final approval should
10 be granted. Mandujano v. Basic Vegetable Prods., Inc., 541 F.2d 832, 837 (9th Cir. 1976); see also
11 In re: American Bank Note Holographics, 127 F.Supp.2d 418, 425 (S.D.N.Y. 2001) ("It is well-
12 settled that the reaction of the class to the settlement is perhaps the most significant factor to be
13 weighed in considering its adequacy") (internal quotation marks omitted).

14 **3. The Settlement Is Fair and Reasonable Considering the Benefits** 15 **Conferred, the Case Value, and Significant Litigation Risks**

16 The proposed settlement involves a substantial sum of money that, when distributed,
17 will confer meaningful monetary benefits on the Class members. As described above, each
18 individual award will be based on an allocation consistent with the nature of the claims asserted
19 and will fairly and equitably allocate the available funds in relation to the degree of damage
20 each Class member incurred. While class members who worked for only a short period of time
21 will receive relatively small sums, those with longer tenures and who worked more hours and
22 shifts throughout the class period will receive appropriately larger awards.

23 Prior to settlement, the parties engaged in informal discovery to facilitate settlement
24 discussions. Thus, Plaintiff reviewed documents and information regarding 72 Hour's payroll
25 practices, a random sampling of pay stubs and time records from class members, applicable
26 compensation plans, meal and rest break policies, etc., and information from 72 Hour regarding
27 class size and breakdown, work weeks/pay periods, rates of pay, and other information used to
28 formulate a damages model. Plaintiff then had that information analyzed by a consulting expert to

1 assist in determining potential violation rates and other data used to formulate a damages model.
2 Plaintiff's counsel are confident they obtained sufficient information to understand the law and facts
3 of this case and make an informed decision regarding the proposed settlement and whether it is fair
4 and reasonable. [Crosner Decl., ¶ 5.]

5 Through the information exchanged and analysis undertaken, Plaintiff weighed the risks of
6 continued litigation against the benefits of the proposed settlement and determined settlement to be
7 the most reasonable option. Using that data and with the assistance of a consulting expert, Plaintiff
8 ran various calculations and estimated 72 Hour's likely maximum exposure on the class claims at
9 approximately \$4,212,000 including about \$157,300 on the underpaid wage/off the clock issue,
10 \$1,270,300 in unpaid meal period premiums, \$2,174,800 in unpaid rest period premiums, \$218,500
11 in statutory penalties for wage statement violations, and about \$390,900 in waiting time penalties.³
12 [Crosner Decl., ¶ 12.] Plaintiff's counsel substantially discounted the value of these claims,
13 however, in light of the multiple and considerable risks posed by proceeding with the litigation, as
14 Defendant raised numerous defenses and vigorously defended against these claims.

15 First, on the unpaid wage and rounding claims, Plaintiff alleged Defendants' rounding policy
16 favored the employer overall, caused employees to lose hours worked and corresponding pay over
17 time, and noted numerous instances in the pay records showing a loss of several minutes per shift
18 due to rounding. On the other hand, Stone argued its time keeping and rounding policy is entirely
19 neutral in effect and did not deprive class members of compensable hours worked over time and,
20 accordingly, does not violate California law. See's Candy Shops, Inc. v. Super. Ct. (2012) 210 Cal.
21 App. 4th 889, 901. While Plaintiff believes this is one of his stronger claims, he also notes the
22 employees typically lose only a minute or two per shift and thus the aggregate damages aren't all
23 that great even the class prevails. [Crosner Decl., ¶ 14.]

24 For the meal and rest break claims, Defendant offered multiple defenses. First, it emphasized
25 its written meal and rest break policy was compliant, and it authorized and permitted all necessary
26 breaks. Given that the time records Plaintiff reviewed suggested nearly all eligible shifts at least

27 ³ Plaintiff's complaint includes claims for unpaid overtime and reimbursement of business expenses, but after
28 investigation it was determined there was little evidence of systemic violations in this regard, and Plaintiff accorded
no value to these claims. [Crosner Decl., ¶ 13.]

1 had a recorded meal break, there was some validity to this position. Plaintiff's review of the time
2 records, however, suggested a substantial violation rate for late and short meal breaks, as well as a
3 failure to provide second meal breaks on shifts of 10+ hours. Defendant countered that even if this
4 occurred, it was in violation of company policy and would require significant individual inquiries
5 to determine the reasons underlying any such alleged violations and whether it was by employee
6 choice or some other reason, and whether class members waived a second meal period. Thus, per
7 72 Hour, certification on this issue would be impossible. [Crosner Decl., ¶ 15.]

8 As with meal breaks, Defendant argues its rest break policies complied with California law
9 and authorized and permitted employees to take all required breaks. Defendant further contended
10 that, in light of the fact that it is not required to maintain a record of rest periods, any evidence of
11 failure to authorize rest periods and/or discouragement from taking rest periods would be purely
12 anecdotal and individual issues would predominate on liability. Defendant also may contend that it
13 is only liable if Plaintiff can prove, on a shift-by-shift basis, the aggrieved employees actually did
14 not receive a fully compliant rest break. This arguably would make a trial unmanageable since the
15 number of instances an employee missed a rest break would have to be tested on a case by case basis
16 to determine if there was compliance. [Crosner Decl., ¶ 16.]

17 Plaintiff also alleged derivative violations of Labor Code § 226 (wage statement
18 violations) and §§ 201-203 (waiting time penalties). These claims were based on the "off the clock"
19 unpaid wage claims and will rise or fall along with that primary claim, in addition to being subject
20 to "good faith" and other defenses available to Defendant. E.g., Amaral v. Cintas Corp. No. 2 (2008)
21 163 Cal.App.4th 1157, 1203-04 (holding employer did not willfully fail to pay wages under Labor
22 Code § 203 even though the class prevailed on the merits on the underlying claim for failing to pay
23 living wages). Accordingly, Plaintiff had to discount the value of these derivative claims
24 significantly in light of these multiple potential defenses. [Crosner Decl., ¶ 17.]

25 As far as potential PAGA liability, the PAGA Group was theoretically entitled to penalties
26 totaling at least \$1.1 million should Plaintiff prevail on all claims and establish violations of the
27 multiple Labor Code sections at issue. As with the class claims, Plaintiff discounted the potential
28 PAGA penalties based on Defendant's various defenses on the merits, and further took into account

1 the Court's wide discretion to reduce such penalties, or to decline to award penalties at all. Labor
2 Code section 2699(e)(2). Accordingly, the Parties allocated \$20,000 to PAGA penalties, and
3 Plaintiff submits this amount is reasonable under the circumstances and in line with comparable
4 settlements in other wage and hour class actions in California. Van Kempen v. Matheson Tri-Gas,
5 Inc. (N.D. Cal. Aug. 25, 2017) 2017 U.S. Dist. LEXIS 137182 (granting final approval of \$5,000
6 PAGA penalty from \$370,000 settlement, or 1.4 percent of total settlement); Slavkov v. First Water
7 Heater Partners I (N.D. Cal. July 25, 2017) 2017 U.S. Dist. LEXIS 116303 (finding a \$7,500 PAGA
8 payment reasonable when measured against the overall settlement of \$345,000 and the possible
9 weaknesses in Plaintiffs' case, or 2.2 percent of total settlement). Additionally, the LWDA has been
10 informed of the terms of the PAGA portion of the settlement, and will be able to weigh in as
11 necessary. Jennings v. Open Door Mktg. Inc. (N.D. Cal. Oct. 3, 2018) 2018 U.S. Dist. LEXIS
12 171356, at *27 (approving settlement with PAGA penalties of 0.6% where "[p]laintiffs [have]
13 submitted the settlement agreement to the LWDA, and the LWDA has not objected to the
14 settlement"). [Crosner Decl., ¶ 18.]

15 Thus, Defendant raised various and multi-layered defenses to each of Plaintiff's claims,
16 anyone of which, if successful, could have decimated Plaintiff's case. And Defendant vowed to raise
17 all these defenses in opposition to class certification and at trial. Accordingly, Plaintiff faced risky
18 issues going forward with this litigation, and given the need to certify the class, maintain
19 certification through trial, try the case on the merits, and deal with post-trial appeals, it would have
20 taken years to realize any recovery in this action. [Crosner Decl., ¶¶ 19-21.]

21 Plaintiff's counsel discounted the value of the class claims consistent with the risks discussed
22 above, and carefully weighed the likelihood of the class receiving substantially greater benefit if the
23 litigation continued Plaintiff's counsel concluded – in light of these very real and substantial risks –
24 settlement on the proposed terms and without prolonged and costly litigation was in the best interests
25 of the class. The overall \$388,000 recovery represents a significant percentage of Defendant's
26 potential exposure. Given these risks, a total recovery for the class of \$388,000 with an average
27 award of some \$1,100 per class member (plus additional amounts to the PAGA Group), is a fair
28

1 result within the range of reasonableness considering all potential outcomes and will provide direct
2 awards to all Class Members without further delay. [Crosner Decl., ¶ 21.]

3 Importantly, the mere fact that a settlement does not provide the same recovery as might be
4 achieved at trial is not a proper indicator of whether the settlement is fair, reasonable, and adequate.
5 Wershba, 91 Cal.App.4th at 246, 250 (“Compromise is inherent and necessary in the settlement
6 process...even if the relief afforded by the proposed settlement is substantially narrower than it
7 would be if the suits were to be successfully litigated, this is no bar to a class settlement because the
8 public interest may indeed be served by a voluntary settlement in which each side gives ground in
9 the interest of avoiding litigation”); 7-Eleven Owners for Fair Franchising v. Southland Corp. (2000)
10 85 Cal.App.4th 1135, 1150 (“The fact that a proposed settlement may amount to only a fraction of
11 the potential recovery does not, in and of itself, mean that the proposed settlement is grossly
12 inadequate and should be disapproved”); White v. Experian Information Solutions, Inc. (C.D. Cal.
13 2011) 803 F.Supp.2d 1086, 1098 (rejecting contention settlement was not fair and reasonable even
14 though it represented 99% discount off the maximum value of the claims); Lane v. Facebook, Inc.
15 (9th Cir. 2012) 696 F.3d 811, 819 (“[T]he question whether a settlement is fundamentally fair . . . is
16 different from the question whether the settlement is perfect in the estimation of the reviewing
17 court”). Importantly as well, the proposed settlement is non-reversionary and will provide benefits
18 to the Class Members without a claims process. White, 803 F.Supp.2d at 1098; c.f., Federal Judicial
19 Center, Managing Class Action Litigation: A Pocket Guide for Judges (3d ed. 2010) at 20, available
20 at [http:// www.fjc.gov/sites/default/files/2012/ClassGd3.pdf](http://www.fjc.gov/sites/default/files/2012/ClassGd3.pdf) (reversionary provisions and/or
21 cumbersome claims process may indicate lack of fairness). Plaintiff and his counsel submit the
22 settlement is within the “range of reasonableness,” and is fair and adequate for the Class.

23 **V. PLAINTIFF’S ENHANCEMENT AWARD**

24 Pursuant to the terms of the settlement, Plaintiff seeks a modest incentive award of
25 \$10,000 for his service in bringing these claims on behalf of the Class. The request is reasonable
26 given the risks he undertook on behalf of the Class Members. By contacting and retaining counsel
27 to pursue these claims, Plaintiff helped make this settlement possible for the absent Class
28 Members, while shouldering the risk of being liable for 72 Hour’s litigation costs. Plaintiff also

1 exposed himself to unwanted notoriety related to filing a public lawsuit (discoverable even
2 through a simple google search) for the benefit of other employees, placing himself at risk of
3 discrimination by future prospective employers. As set forth in more detail in his declaration
4 submitted herewith, among taking many other actions assisting in the successful litigation of this
5 case, Plaintiff provided substantial factual information and documents to counsel, attended
6 numerous meetings/phone conferences with counsel to discuss the case, and kept abreast of all
7 significant developments. [Crosner Decl., ¶ 22.] Finally, there are no class member objections
8 submitted with respect to the amounts Plaintiff proposes to receive. [Lee Decl., ¶ 10.]
9 Accordingly, the requested enhancement payment to Plaintiff is appropriate and justified as part of
10 the settlement.

11 **VI. SETTLEMENT ADMINISTRATION COSTS**

12 The settlement provides for a payment to Phoenix of no more than \$7,000 for its services
13 as the Settlement Administrator. As set forth in the Declaration of Kevin Lee, Phoenix has
14 performed and will continue to perform its required duties through final distribution of the
15 settlement funds, and incurred \$7,000.00 in fees and expenses. [Lee Decl., ¶ 18.] Accordingly,
16 Plaintiff respectfully requests the Court approve payment of \$7,000 to Phoenix from the GSA.
17 [Crosner Decl., ¶ 23.]

18 **VII. ATTORNEY'S FEES AND COSTS**

19 **A. The Attorney's Fees Requested Are Fair and Reasonable and Should Be**
20 **Approved**

21 This Court has discretion over the amount of attorneys' fees awarded and court
22 approval is required for Class Counsel's fees. Cal. Rule of Court 3.769; Levy v. Toyota
23 Motor Sales, U.S.A. (1992) 4 Cal.App.4th 807, 813; Lealao v. Beneficial Cal., Inc. (2000) 82
24 Cal.App.4th 19. In defining a reasonable fee, the Court should attempt to mimic the
25 marketplace for cases involving significant contingent risk, such as this one. Deposit
26 Guaranty Nat'l Bank, Jackson, Miss. v. Roper (1980) 445 U.S. 326, 338, rehg. den. 446 U.S.
27 947; Lealao, 82 Cal.App.4th at 49-50 (court should attempt "to award the fee that informed
28 private bargaining, if it were truly possible, might have reached" in determining a reasonable

1 fee, and a fee award should approximate a "range of fees freely negotiated in comparable
2 litigation"). Here, Class Counsel's request for attorney's fees and costs is reasonable and
3 justified by the work performed, the benefits obtained, and the contingent risk assumed.

4 As addressed in detail above, at the time the parties reached the tentative settlement
5 success for Plaintiff and the putative class was far from certain. Plaintiff faced a real risk that
6 some or all the claims would not be certified for class treatment, as 72 Hour had strong
7 arguments that its compensation policies were legal and properly compensated the class
8 members. Even if Plaintiff certified some or all of the claims and ultimately prevailed on the
9 merits, it undoubtedly would have taken several years to realize any recovery while they
10 pursued class certification, trial, and an almost certain appeal.

11 Nonetheless, Plaintiff succeeded and expeditiously obtained the relief she set out to
12 obtain, and the settlement provides substantial cash payments to Class Members, with an
13 average award of about \$1,091, and with a maximum award of over \$2,600. Importantly as
14 well, the Class Members have been overwhelmingly supportive of the Settlement – as of the
15 filing of this motion, there are no objections to the settlement and zero individuals opted out.
16 [Lee Decl., ¶¶ 9-10.]

17 **B. The Requested Fee Award Is Reasonable and Appropriate**

18 The United States Supreme Court has ruled the parties to a class action properly may
19 negotiate not only the settlement of the action itself but also the payment of attorney's fees.
20 Evans v. Jeff D. (1986) 475 U.S. 717, 734-35, 738, fn. 30.) In Hensley v. Eckerhart (1983)
21 461 U.S. 424, 437, the Supreme Court explained that negotiated, agreed-upon attorney's fee
22 provisions are the ideal towards which the parties should strive: "A request for attorney's fees
23 should not result in a second major litigation. Ideally, of course, litigants will settle the
24 amount of a fee." The United States Supreme Court has reemphasized this policy and further
25 stressed trial courts have "a responsibility to encourage agreement" on fees. Blum v. Stenson
26 (1984) 465 U.S. 886, 902 n.19.

27 As part of the Settlement, 72 Hour agreed not to object to an award of no more than
28 1/3 of the GSA for attorney's fees, or \$129,333.33, and up to \$10,000 in reimbursement for

1 litigation costs and expenses. Such a fee is commensurate with what the market would
2 provide for similar services and the Court therefore can most certainly enforce the agreement.

3 As California's Court of Appeal has instructed:

4 Given the unique reliance of our legal system on private litigants to enforce substantive
5 provisions of law through class and derivative actions, attorneys providing the essential
6 enforcement services must be provided incentives roughly comparable to those negotiated
7 in the private bargaining that takes place in the legal marketplace, as it will otherwise be
8 economic for defendants to increase injurious behavior.

8 Lealao, 82 Cal.App.4th at 47.

9 Here, the parties did not negotiate the inclusion of attorney's fees until after extensive
10 arms-length bargaining regarding relief to the Class was completed. [Crosner Decl., ¶ 24.]
11 The requested fee and cost award was a product of these arms-length negotiations and fairly
12 reflects the marketplace value of the services rendered by Class Counsel in this case. As a
13 result, the fee agreed to by the parties should be approved.

14 C. **Class Counsel's Fees are Justified When Calculated as a Percentage of the**
15 **Common Fund**

16 In approving fee applications, courts typically apply either a percentage-of-recovery
17 method or the lodestar method. Laffitte v. Robert Half Int'l., Inc. (2016) 1 Cal.5th 480, 489;
18 Wershba v. Apple Computer, Inc. (2001) 91 Cal.App.4th 224, 254, disapproved on other
19 grounds, Hernandez v. Restoration Hardware, Inc. (2018) 4 Cal.5th 260. The California
20 Supreme Court recently recognized the advantages and equities of calculating attorney's fees
21 using the percentage-of-the-common-fund method in another wage-and-hour case:

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

26 Laffitte, 1 Cal.5th at 503 (citations omitted).

27 Indeed, both California and federal courts have long recognized an appropriate method
28 for determining the award of attorney's fees is based on a percentage of the total value of

1 benefits afforded to class members by the settlement. Serrano v. Priest (1977) 20 Cal.3d 25,
2 34; Boeing Co. v. Van Gernert (1980) 444 U.S. 472, 478; Vincent v. Hughes Air West, Inc.
3 (9th Cir. 1977) 557 F.2d 759, 769. Awarding a fee based on a percentage of the common fund
4 recovered operates to "spread litigation costs proportionately among all the beneficiaries so
5 that the active beneficiary does not bear the entire burden alone." Vincent, 557 F.2d at 769.

6 In determining a reasonable common fund fee award, courts should also consider the
7 fact that fees serve as an economic incentive for lawyers to bring class action litigation to
8 achieve increased access to the judicial system for meritorious claims and to enhance
9 deterrents to wrongdoing. Conte, Attorney Fee Awards (2d ed. 1993) § 104. Without
10 prosecution on a contingent basis and use of the class action mechanism, the courthouse door
11 would effectively be closed to most class members due to the relatively small size of their
12 individual claims in relation to the enormous time and cost associated with class action
13 litigation.

14 Here, Class Counsel seek a fee award for their successful prosecution and resolution of
15 this action of no more than 1/3 of the total amount recovered by the Class via the lawsuit, or
16 \$129,333.33. The percentage requested is justified for the reasons set forth further below,
17 and comports with fee awards calculated on a percentage-of-the-benefit basis. Indeed, review
18 of class action settlements shows that courts have historically awarded fees in the range of 20
19 to 50 percent, depending upon the circumstances of the case. In re Warner Communications
20 Sec. Litig. (S.D.N.Y. 1985) 618 F.Supp. 735, 749-50 (concluding that percentage fees in
21 common fund cases range from 20 to 50 percent); Newberg, Newberg on Class Actions (3d
22 ed.) § 14.03, pp. 13-14 ("Usually 50% of the fund is the upper limit on a reasonable fee award
23 from a common fund in order to assure that the fees do not consume a disproportionate part of
24 the recovery obtained for the class, although somewhat larger percentages are not
25 unprecedented.").

26 **D. A Lodestar Cross-Check Also Supports Class Counsel's Fee Request**

27 To ensure the fairness of an attorney's fee award, courts frequently conduct a lodestar
28 cross check of counsel's fees. "A lodestar cross-check thus provides a mechanism for bringing

1 an objective measure of the work performed into the calculation of a reasonable attorney fee."
2 Laffitte, 1 Cal.5th at 504. Here, Class Counsel spent 216.4 hours of time on this matter,
3 resulting in a modest and very reasonable lodestar of \$160,835.

4 As is fully detailed in the Crosner Declaration, Class Counsel's efforts included: (1)
5 extensive pre-lawsuit investigation of the claims of Plaintiff and the putative class, including legal
6 research, research into similar claims and claims against other employers in the same industry, and
7 attempts to locate and contact other 72 Hour employees; (2) drafting a PAGA notice letter; (3)
8 drafting the initial complaints and related documents; (4) case management, including
9 communications with defense counsel, meeting and conferring/preparing case management
10 statements, etc.; (5) propounding initial written discovery, (6) lengthy discussions with defense
11 counsel regarding settlement/mediation and informal discovery needed for meaningful settlement
12 discussions; (7) engaging in substantial informal discovery, including propounding informal
13 discovery "requests" and reviewing documents and other information produced; (8) drafting a
14 mediation brief and accompanying damages model after review and analysis of 72 Hour's
15 informal discovery production; (9) attending an all-day mediation; (10) negotiating and drafting
16 the settlement agreement and related documents; (11) drafting an amended complaint to effectuate
17 the settlement and dismissing the PAGA action; (12) drafting the motion for preliminary approval,
18 and attending the hearing; (13) administration of the settlement, including communications with
19 the Settlement Administrator and settlement class members; (14) drafting the motion for final
20 approval and motion for attorney's fees, and attending the final approval hearing; and (15)
21 extensive communications with the Plaintiff regarding case status, case investigation and
22 document review, mediation, and settlement terms. Additionally, Class Counsel will incur
23 additional time following final approval to, inter alia, respond to class member inquiries, work
24 with the Settlement Administrator on the distribution of settlement funds, and on the compliance
25 hearing and amended judgment. [Crosner Decl., ¶ 25, Exh. 2.]

26 In pursuing this matter, Class Counsel incurred total attorney's fees of \$160,835, based
27 on 216.4 attorney hours. The lodestar is based on an eminently reasonable number of hours
28 worked to litigate this matter to a successful conclusion attorney hours, and the requested attorney

1 hourly rates are reasonable and comport with hourly rates charged by other attorneys with similar
2 experience in this practice area in California. [Crosner Decl., ¶¶ 26-41.] On a lodestar basis, the
3 fee request of \$129,333.33 results in a base lodestar that is higher than the fees requested on
4 percentage of the recovery basis. Accordingly, Class Counsel submits the lodestar crosscheck
5 operates to show that the percentage fee request is reasonable considering the fees requested
6 are lower than the actual value of the services rendered when valued via traditional hourly
7 billing.

8 **E. The Award is Supported By 1) the Results Achieved; 2) the Risk, 3) the Skill**
9 **Required, 4) the Contingent Nature of the Fee and 5) Awards in Similar**
10 **Cases.**

11 What has now emerged in most fee award decisions is the recognition that fee
12 determinations in both common fund and statutory fee situations are incapable of
13 mathematical precision because of the intangible factors that must be resolved in the court's
14 discretion based on the circumstances of each particular case. Conte, § 207, p. 44. In
15 determining an appropriate fee in a common fund case, a Court must decide, based on the
16 unique posture of each case, what percentage of the common fund would most reasonably
17 compensate Class Counsel given the nature of the litigation and the performance of counsel.
18 Paul, Johnson, Alston & Hunt v. Graulity (9th Cir. 1989 886 F.2d 268, 272) (the benchmark
19 percentage fee may be adjusted to account for the circumstances involved in a case).

20 Courts apply a five-part test in calculating a reasonable percentage fee in common
21 fund cases: (1) the results achieved; (2) the risk of litigation; (3) the skill required and the
22 quality of work; (4) the contingent nature of the fee and the financial burden carried by the
23 plaintiffs; and (5) awards made in similar cases. Laffitte, 1 Cal.5th at 489.

24 **1. The Results Achieved.**

25 Class Counsel obtained an excellent result in this case for the Class Members. The
26 Settlement provides real monetary benefits to the Class Members, and the Settlement is
27 particularly advantageous to the Class Member because the proceeds will be distributed
28 shortly as opposed to waiting additional years for a similar, or possibly, less favorable result.

1 Considering many individual claims would be very modest and would not be cost-effective to
2 pursue successfully, the Settlement provided them with fair compensation for their claims.
3 Moreover, the absence of any objection to either the Settlement or the attorney's fee request
4 bolsters the excellent results. Indeed, the approval of the Class is overwhelming as indicated
5 by the fact that not only one class member opted out. Additionally, the settlement amounts to
6 a substantial percentage of the maximum value of the amount the Class might have obtained if
7 it had tried the case and recovered on all theories seeking recovery of wages and penalties.
8 "It is well-settled law that a cash settlement amounting to only a fraction of the potential
9 recovery does not per se render the settlement inadequate or unfair." In re Omnivision Techs.,
10 Inc., 559 (N.D. Cal. 2008) F.Supp.2d 1036, 1042.

11 **2. Class Counsel Bore Considerable Risk.**

12 At the time of filing the complaint, Class Counsel recognized that they would have to
13 expend a substantial amount of time and advance significant costs to prosecute a statewide
14 class action suit with no guarantee of compensation or reimbursement, in the hope of
15 prevailing against a sophisticated company represented by first-rate attorneys. Despite
16 their belief in the validity of Plaintiff's claims, they also knew they faced substantial risks
17 of class certification and the ability to prove class-wide and individual damages. In light of
18 the highly uncertain nature of this suit, Class Counsel also bore the risk that 72 Hour would
19 dig in and attempt to bury their small firms in work. Given the small size of Class Counsel's
20 firm, not receiving any compensation for several years while simultaneously advancing
21 litigation costs posed considerable risk and difficulty. [Crosner Decl., ¶¶ 42-43.]

22 **3. The Skill Required and the Quality of Work.**

23 Practice in the narrow area of wage and hour litigation requires skill, knowledge and
24 experience. The issues presented in this case required more than just a general appreciation of
25 wage and hour law and class action procedure. This Settlement was possible only because
26 counsel persuaded 72 Hour that Plaintiff and the putative class had a realistic chance of
27 prevailing on their claims despite 72 Hour's contrary arguments, and that the case would
28 be pursued through class certification and trial if necessary. In successfully navigating

1 these hurdles, Class Counsel displayed appropriate skill while pursuing a risky and
2 difficult case.

3 4. **The Contingent Nature of the Fee and Risk Assumed**

4 There is a substantial difference between the risk assumed by attorneys being paid
5 by the hour and attorneys working on a contingent fee basis. The attorney being paid by
6 the hour can go to the bank with his fee. Powers v. Eichen (9th Cir. 2000) 229 F.3d 1249,
7 1256. The attorney working on a contingent basis can only log hours while working
8 without pay towards a result that will hopefully entitle him to a market fee considering
9 the risk and other factors of the undertaking. Id. at 1257. Otherwise, the contingent fee
10 attorney receives nothing. Id. In this case, Class Counsel subjected themselves to this
11 risk in this all or nothing contingent fee case wherein the necessity and financial burden
12 of private enforcement makes the requested award appropriate.

13 Counsel retained on a contingency fee basis, whether in private matters or in class
14 action litigation, is entitled to a premium beyond their standard, hourly, non-contingent
15 fee schedule to compensate for both the contingent risk assumed and the delay in
16 payment. The simple fact is that despite the most vigorous and competent of efforts,
17 success is never guaranteed. McKittrick v. Gardner (4th Cir. 1967) 378 F.2d 872, 875.
18 Indeed, if counsel is not adequately compensated for the risks inherent in difficult class
19 actions, competent attorneys will be discouraged from prosecuting similar cases.
20 Ketchum v. Moses (2001) 24 Cal.4th 1122, 1132-33; Cazares v. Saenz (1989) 208
21 Cal.App.3d 279, 287.

22 Here, the contingent fee practices of Plaintiff's counsel simply do not accommodate
23 the investment of unnecessary time in a case, and the adverse resolution of any one of several
24 difficult issues present in this matter could have doomed the entire effort. As discussed, the
25 attorney's fees in this case were not only contingent but fairly risky, and there was always a
26 palpable chance Plaintiff's counsel would receive nothing for any number of reasons.
27 [Crosner Decl., ¶¶ 42-43.] Accordingly, the contingent nature of the fee and the financial
28 burdens on Class Counsel and Plaintiff also support the fee requested.

1 **5. Awards in Other Cases**

2 As discussed, the attorney's fees requested by Class Counsel are within the range of
3 fees awarded in comparable cases, as California courts regularly approve class action fee
4 awards amounting to 1/3 or more of a common fund. Additionally, review of class action
5 settlements over the past 10 years shows that the courts have historically awarded fees in the
6 range of 20 to 50 percent, depending upon the circumstances of the case. In re Warner
7 Communications Sec. Litig. (S.D.N.Y. 1985) 618 F.Supp. 735, 749-50 (concluding that
8 percentage fees in common fund cases range from 20 to 50 percent); Newberg, Newberg on
9 Class Actions (3d ed.) § 14.03, pp. 13-14 ("Usually 50% of the fund is the upper limit on a
10 reasonable fee award from a common fund in order to assure that the fees do not consume a
11 disproportionate part of the recovery obtained for the class, although somewhat larger
12 percentages are not unprecedented."). Class Counsel's requested fees equal thirty percent of
13 the gross amount recovered on behalf of the class and are well within the range of
14 reasonableness under either the percentage of the recovery or the lodestar method in light of
15 the contingent risk assumed, the delay in payment, the result achieved, and the overall quality
16 of the representation.

17 **F. Class Counsel's Costs and Expenses are Reasonable**

18 Plaintiff's counsel also request reimbursement of actual out-of-pocket expenses incurred to
19 prosecute this action. These expenses were incidental and necessary to the effective representation
20 of the employees, and Plaintiffs' counsel is permitted to recover litigation costs and expenses
21 under the common fund doctrine and the Settlement Agreement. Serrano, 20 Cal.3d at 35
22 (common fund doctrine permits recovery of fees and costs from the fund); Rider v. County of San
23 Diego (1992) 11 Cal.App.4th 1410, 1424 n.6 (costs are recoverable from the common fund "[o]f
24 necessity, and for precisely the same reasons discussed above with respect to the recovery of
25 attorneys' fees by ... [Plaintiffs'] attorneys"). Plaintiffs' counsel also is entitled to recover "those
26 out-of-pocket expenses that would normally be charged to a fee-paying client." Harris v.
27 Marhoefer (9th Cir. 1994) 24 F.3d 16, 19.

1 As explained in the Crosner Declaration, Class Counsel incurred a total of
2 \$10,958.53 in expenses incurred in connection with this litigation. Since the actual costs
3 exceed the \$10,000 cap allowed for in the Settlement Agreement, Plaintiff requests only
4 \$10,000 in reimbursement. These expenses include the amounts paid for court filing fees,
5 service of process, expert fees, postage, and mediation fees, all of which are costs
6 normally billed to and paid by the client. These costs were reasonably incurred in the
7 prosecution of this matter and it is respectfully requested that the Court authorize
8 reimbursement in the full amount provided for in the Settlement Agreement. [Crosner
9 Decl., ¶¶ 44-45.]

10 **VII. CONCLUSION**

11 For all the foregoing reasons, Plaintiff Xavier Hunter respectfully requests that the Court
12 grant this motion and grant final approval of the proposed class action settlement and approve the
13 payment of PAGA penalties to the State. Plaintiff further requests the Court approve payment of
14 the Settlement Administrator's fees and expenses, approve the requested class representative
15 enhancement payment, approve the award of attorney's fees and costs as requested, and enter
16 judgment in this action. Finally, Plaintiff requests the Court set a final compliance hearing for
17 May 10, 2024, or a later date convenient for the Court.

18 Dated: April 12, 2023

CROSNER LEGAL, P.C.

20 By: 
21 Michael Crosner
22 Zach Crosner
23 Attorneys for Plaintiff XAVIER HUNTER
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