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9 on behalf of himself, all others similarly
10 situated, and on behalf of the general public.

11 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
12 **IN AND FOR THE COUNTY OF SAN DIEGO**

13 GERARDO DIAZ, on behalf of himself, all
14 others similarly situated, and on behalf of
15 the general public,

16 Plaintiff,

17 v.

18 CMC AMERICA, LLC; and DOES 1
19 through 100,

20 Defendants.

Case No. 37-2022-00019716-CU-OE-CTL

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

21 Date: May 23, 2024
22 Time: 9:00 a.m.
23 Dept.: C-73

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1 **I. INTRODUCTION**

2 This motion seeks final approval of a non-reversionary \$151,538.93¹ proposed wage and
3 hour class action settlement by Plaintiff Gerardo Diaz (hereinafter “Plaintiff”) on behalf of himself
4 and all current and former non-exempt, hourly employees of Defendant CMC America, LLC
5 (hereinafter “Defendant”) (hereinafter, Plaintiff and Defendant are collectively referred to as the
6 “Parties”) at any time between May 24, 2018 through January 17, 2023 (“Class Period”). To date,
7 there is a 100% participation rate amongst Class Members—that is, there were no objections, no
8 disputes, and no requests for exclusion. **The proposed settlement is projected to pay an average**
9 **estimated payment of \$3,213.30 per Class Member, with a high payment of \$10,653.41.**²

10 This case required 125 hours of attorney time from Class Counsel and sought relief for 25
11 individuals. This litigation involved investigations with Class Members throughout California,
12 extensive discovery, the production of hundreds of documents by Defendant, and protracted arm’s-
13 length settlement negotiations.

14 Plaintiff moves for final approval of attorneys’ fees in the amount of \$50,512.98, which
15 represents 33 1/3% of the GSA. As will be demonstrated herein, Plaintiff’s attorney fee request is
16 supported using the percentage fee method and the lodestar method. Second, Plaintiff moves for
17 final approval of litigation costs in the amount of \$2,193.51 incurred in litigating this matter. Third,
18 Plaintiff moves for final approval of the Class Representative Enhancement Payment in the amount
19 of \$10,000 to compensate the Class Representative for a general release of his claims against
20 Defendant, and for the time he spent on and the risks absorbed in undertaking this case. Plaintiff

21 _____
22 ¹ The actual number of workweeks worked by Class Members during the Class Period of May 24,
23 2018 through January 17, 2023 was determined to be 1,674, triggering the escalator provision in
24 the Joint Stipulation and Settlement Agreement. Declaration of David Mara, Esq. (“Mara Dec.”),
25 **Ex. 1** Joint Stipulation and Settlement Agreement III (52)(A). The provision provided if the actual
26 number of workweeks exceeded 1,657 (greater than a 20% increase from the originally
27 contemplated 1,387 workweeks), Defendant could either increase the Gross Settlement Amount
28 (“GSA”) on a pro rata basis according to the number of additional workweeks over the 20% cap,
or close the Class Period just before the date the workweeks exceeded this 20% cap. *Id.* Defendant
chose to increase the GSA; this increase of 17 workweeks meant the Gross Settlement Amount
would increase by \$1,538.93 from \$150,000 to \$151,538.93. (((\$150,000 / 1,657 workweeks) x 17
additional workweeks = \$1,538.93).

² Declaration of Madely Nava (“Nava Dec.”) ¶ 16.

1 played a vital role in representing the other individuals in this case and spearheading the lawsuit
2 to seek monetary relief for them. Fourth, Plaintiff moves for final approval of payment of \$3,500
3 to the Settlement Administrator, Apex Class Action, LLC (“APEX”) for the costs and fees of
4 administering settlement. Fifth, Plaintiff moves for final approval of payment to the Labor and
5 Workforce Development Agency (“LWDA”) under the Private Attorneys’ General Act (“PAGA”) in
6 the amount of \$3,750 (75% of \$5,000 allocated to PAGA penalties).

7 The requested amounts of attorneys’ fees, litigation costs, class representative
8 enhancement payment, settlement administration costs, and PAGA payment were fully disclosed
9 to the Class Members when the Class Notice was mailed to them on March 13, 2024.³ **Most**
10 **importantly, the Settlement and all its terms received universal support from Class Members**
11 **as there no were objections, no disputes, and no requests for exclusion.**⁴ The Court is therefore
12 respectfully requested to honor the Class Members’ endorsement of the settlement and grant final
13 approval of the settlement, attorneys’ fees, litigation costs, class representative enhancement
14 payment, costs of settlement administration, and payment to the LWDA pursuant to PAGA in the
15 amounts as preliminarily approved by this Court, as fully disclosed to the Class Members, and as
16 requested herein.

17 II. BACKGROUND, INVESTIGATION, DISCOVERY

18 Defendant provides machinery installs, maintenance, and repair services to its customers
19 in the State of California. In order to carry out its business, Defendant employs hourly employees,
20 like Plaintiff and Class Members. Mara Dec. ¶ 9.

21 On May 24, 2022, Plaintiff sent notice to the LWDA of his intent to pursue various wage
22 and hour claims against Defendant on behalf of similarly situated aggrieved employees. Shortly
23 thereafter, Plaintiff filed a putative class action complaint against Defendant in the San Diego
24 County Superior Court, alleging causes of action for: 1) Failure to Pay All Straight Time Wages;
25 2) Failure to Pay Overtime; 3) Failure to Provide Meal Periods; 4) Failure to Authorize and Permit
26 Rest Periods; 5) Failure to Provide Accurate Itemized Wage Statements; 6) Failure to Pay all

28 ³ Nava Dec. ¶ 7, Ex. A.

⁴ Nava Dec. ¶¶ 11-13.

1 Wages Due at the Time of Termination; 7) Failure to Reimburse Business Expenses; and 8)
2 Violation of Unfair Competition Law. The complaint was later amended to add an additional cause
3 of action for Violations of the Private Attorneys General Act of 2004 (“PAGA”) on or around
4 November 22, 2022. Mara Dec ¶ 10.

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

12 **a. Discovery and Investigation**

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

17 This discovery, in conjunction with the Parties’ meet and confer efforts, resulted in the
18 production of hundreds of documents and hundreds of lines of data, including Defendant’s
19 employee handbooks, policies, and practices, and a sampling of wage and time records for Plaintiff
20 and Class Members. Using the time and wage records for the Class provided and the data
21 surrounding the number of current and former employees, Plaintiff was able to establish a potential
22 exposure model to utilize for the purposes of settlement negotiations. Mara Dec. ¶ 13.

23 **b. The Parties’ Staunchly Conflicting Positions**

24 The gravamen of Plaintiff’s claims is that Defendant failed to provide lawful meal periods
25 and rest breaks to Class Members in violation of *Labor Code* sections 512 and 226.7, the IWC
26 Wage Orders, *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, and *Augustus*
27 *v. ABM Security Services, Inc.* (2016) 2 Cal.5th 257, and failed to pay Class Members for all hours
28 worked as defined in the Wage Orders. This proposed Settlement was only possible following

1 significant discovery and evaluation of Defendant’s relevant policies, procedures, and records,
2 which permitted Plaintiff’s Counsel to engage in a comprehensive analysis of liability and potential
3 damages to engage in settlement negotiations and prepare for class certification. Mara Dec. ¶ 14.

4 Defendant vigorously denies Plaintiff’s contentions, claiming that all meal and rest breaks
5 were provided in compliance with California law and that Class Members were paid for all time
6 worked. Specifically, Defendant contends that Plaintiff’s and Class Members Claims for meal and
7 rest periods are meritless due to the fact that Defendant maintained facially lawful meal and rest
8 period policies throughout the Class Period. Second, Defendant argues that the purported
9 “practices” Plaintiff relies upon in claiming that Class Members did not receive compliant meal
10 and rest periods simply do not exist. Therefore, without a common written policy to support these
11 allegations, particularly in light of Defendant’s compliant written policies, Defendant contends
12 Plaintiff faces a difficult burden of proof at certification to show his claims are common to all
13 putative Class Members. Further, Defendant contends that beyond the limited accusations of
14 Plaintiff, there is no evidence that Defendant had a policy or practice that resulted in any purported
15 failure to be paid for all hours worked, as the security checks complained of by Plaintiff last mere
16 seconds and are only conducted when Class Members exit the facility and are carrying a non-clear
17 bag. As such, Defendant contends that the Court would have to ask every Class Member what their
18 experience was regarding security checks, devolving into individualized issues that would be
19 unsuitable for class certification. Mara Dec. ¶ 15.

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

22 **c. The Parties Agreed to Engage in Settlement Discussions**

23 The Parties agreed to engage in settlement discussions. Based on these discussions and the
24 informal discovery conducted, the Parties were ultimately able to reach an agreement on the key
25 terms of the settlement on or around September 11, 2023. The Parties then met and conferred
26 regarding all the terms of the settlement and finalized their agreement in the Joint Stipulation and
27 Settlement Agreement that the Parties now seek to finally approve. Mara Dec. ¶ 16; **Exhibit 5**.

III. THE PROPOSED SETTLEMENT AND THE CLASS MEMBERS' RESPONSE

a. Terms of the Proposed Settlement

The Parties agreed (subject to and contingent upon the Court's approval) that this action be settled and compromised for the non-reversionary total sum of \$151,538.93 ("Gross Settlement Amount" or "GSA") which includes, subject to Court approval: (a) attorneys' fees of up to \$50,512.98 (33 1/3% of the GSA) to compensate Class Counsel for work already performed and all work remaining to be performed in documenting the settlement, administrating the settlement and securing Court approval; (b) litigation costs of \$2,193.51 (originally estimated not to exceed \$5,000); (c) Class Representative Enhancement Payment to the named class representative, Gerardo Diaz, in a sum not to exceed \$10,000 each in consideration for the general release of his claims against Defendant and for initiating and prosecuting this Class Action, serving as Class Representative, work performed, and risks undertaken for the payment of Defendant's attorneys' fees and costs in the event he had been unsuccessful in this matter; (d) claims administration fees and expenses to Apex, in the amount of \$3,500; and (e) the \$5,000 allocated to Plaintiff's claims under the PAGA. Mara Dec. ¶ 17.

After all Court-approved deductions from the GSA, it is estimated that \$80,332.44, ("Net Settlement Amount" or "NSA"), less all applicable employee taxes, will be distributed to Class Members – **with an average estimated payment of \$3,213.30 per Class Member, and a high payment of \$10,653.41.** One hundred percent (100%) of the NSA will be paid to the Class Members, less taxes. Subject to the terms and conditions of the settlement, the NSA will be allocated among Settlement Class Members according to each Settlement Class Member's workweeks during the Class Period as a *pro rata* portion of the total combined workweeks of all the Settlement Class Members during the Class Period as derived from Defendant's records.

Furthermore, the Settlement allocates \$5,000 in consideration for the settlement of Plaintiff's PAGA claims, which is to be distributed separately from the NSA. Settlement Class Members who performed work for Defendant from May 24, 2021, one year prior to the submission of the written notice of Labor Code violations to the LWDA pursuant to Labor Code § 2699.3(a)(1), through January 17, 2023 ("PAGA Period") are also deemed "Aggrieved Employees" and able to recover their share of the civil penalties under the settlement. 75% of this \$5,000, or \$3,750, will

1 be paid to the LWDA, while the remaining 25%, or \$1,250, will be distributed to the Aggrieved
2 Employees – with an average estimated payment of \$50.00 per Aggrieved Employee, and a high
3 payment of \$109.96. These payments will also be made according to each Aggrieved Employee’s
4 workweeks during the PAGA Period as a *pro rata* portion of the total combined workweeks of all
5 the Aggrieved Employees during the PAGA Period. One day worked in a given week will be
6 credited as a workweek for purposes of this calculation.

7 **Under no circumstances will any portion of the \$151,538.93 settlement revert to**
8 **Defendant.**

9 **b. Released Claims**

10 Under the terms of the Settlement, the Plaintiff and the Settlement Class Members will release
11 and discharge the Released Parties from any and all claims, debts, liabilities, demands, obligations,
12 penalties, guarantees, costs, expenses, attorney’s fees, damages, action or causes of action of whatever
13 kind or nature, whether known or unknown, contingent or accrued, that are alleged or could have been
14 alleged based upon a reasonable interpretation of the facts alleged in the First Amended Complaint
15 against Defendant, for the duration of the Class Period. A full recital of the released claims can be
16 found in **Exhibit 5** attached to the Declaration of David Mara, Esq., which is the Settlement, in
17 Section I, Paragraphs 37 and 38.

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

20 On January 26, 2024, the Court granted preliminary approval, conditionally certified the
21 Class, appointed Apex to act as the Settlement Administrator, approved the notice to be sent to the
22 Class, and directed that the notice be mailed to the Class by First Class U.S. Mail. On February 9,
23 2024, Apex received the class data file from Counsel for Defendant, which contained the name,
24 social security number, last known mailing address, employment dates, and the total number of
25 applicable workweeks worked for each Settlement Class Member. Nava Dec. ¶ 5. Apex conducted
26 a National Change of Address (“NCOA”) search in an attempt to update the class list of addresses
27 as accurately as possible. *Id.* at ¶ 6. A The NCOA database contains records of requested address
28 changes submitted to the United States Postal Service (“USPS”). *Id.* On March 13, 2024, the
Notice was mailed, via U.S First Class Mail, to all 25 individuals contained in the Class List. *Id.*

1 at ¶ 7.

2 Only one (1) notice was returned to Apex by the Post Office. Nava Dec. ¶ 8. Apex
3 performed a computerized skip trace on the returned Notice, which did not have a forwarding
4 address, in an effort to obtain an updated address for purpose of re-mailing the Notice. *Id.* This
5 notice was successfully remailed as a result of the skip trace. *Id.* at ¶¶ 8-9. As a result, none of the
6 notices have been deemed undeliverable. *Id.* at ¶ 10.

7 In sum, the settlement was received with overwhelming support from the Class Members.
8 Specifically, there were no objections, disputes, and no requests for exclusion submitted by Class
9 Members. Nava Dec. ¶¶ 11-13. This means all 25 Class Members, or 100%, will receive a
10 settlement payment. *Id.* at ¶ 14.

11 **IV. ARGUMENT**

12 **a. The Settlement is Fair, Reasonable, and Adequate Based on the Strengths of** 13 **Plaintiff’s Case, the Risks and Costs of Further Litigation, and Satisfies the** 14 **Standard for Final Approval**

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

21 In deciding whether to approve a class settlement, a court evaluates whether the proposed
22 settlement is “fair, adequate, and reasonable.” *Dunk v. Ford Motor Co.* (1996) 48 Cal. App. 4th
23 1794, 1801 (citing *Officers for Justice v. Civil Serv. Comm’n of City & Cnty. of S.F.* (9th Cir. 1982)
24 688 F.2d 615, 625); *Cho v. Seagate Tech. Holdings, Inc.* (2009) 177 Cal. App. 4th 734, 742 43. A
25 court enjoys broad discretion to make its fairness determination. *Dunk*, 48 Cal. App. 4th at 1801.

26 However, “a presumption of fairness exists where: (1) the settlement is reached through
27 arm’s-length bargaining; (2) investigation and discovery are sufficient to allow counsel and the
28 court to act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of
objectors is small.” *Dunk*, 48 Cal. App. 4th at 1802; accord *Wershba*, 91 Cal. App. 4th at 245. In

1 addition, a court should consider additional relevant factors, including the strength of the plaintiff's
2 case compared to the settlement amount; the risk, expenses, complexity, and likely duration of
3 further litigation; and the fair treatment of class members in relation to each other. *Dunk*, 48 Cal.
4 App. 4th at 1802.

5 At the time of preliminary approval, the Court was provided with sufficient information to
6 satisfy three of the four *Dunk* factors, leaving the fourth factor, the number of objectors, unknown
7 until after the Class had an opportunity to respond to the Settlement as explained in the Class
8 Notice.⁵ Subject only to the Class' reaction to the Settlement, the Court preliminarily presumed
9 the Settlement was fair, adequate and reasonable. Following dissemination of the Class Notice,
10 and adequate time provided to the Class to return an objection to the Settlement, no class members
11 objected to the Settlement. Nava Dec. ¶ 12. Thus, the proposed settlement is entitled to the
12 presumption that it is fair and in all other respects proper and should be finally approved.

13 Furthermore, although Plaintiff is confident in the strengths of his claims and believes this
14 case is suitable for certification on the claimed basis that there are company-wide policies and
15 practices that Plaintiff contends violate California law and uniformly affect the Class Members,
16 Defendant's counterarguments raise uncertainties with respect to both class certification and
17 success on the merits. As the California Supreme Court ruled in *Sav-On v. Superior Court* (2004)
18 34 Cal.4th 319, class certification is always a matter of the trial court's sound discretion. Decisions
19 following *Sav-On* have reached different conclusions, with respect to certification of wage and
20 hour claims.⁶ In light of Defendant's defenses, supporting evidence, and position that the action is
21 not suitable for class treatment, the settlement amount of \$151,538.93 — **with an average**

22 ⁵ See Memorandum of Points and Authorities in Support of Preliminary Approval, filed on January
23 3, 2024. In addition to the *Dunk* factors, Class Counsel also detailed the other factors such as the
24 strengths of Plaintiff's case, risks and costs of further litigation, as well as the reasonableness of
the GSA amount in light of *Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116. *Id.*

25 ⁶ See, e.g., *Harris v. Superior Court* (2007) 154 Cal. App. 4th 164 (reversing decertification of
26 class claiming misclassification and ordering summary adjudication in favor of employees), *review*
27 *granted*, 171 P.3d 545 (2007) (not cited as precedent, but rather for illustrative purposes only);
28 *Walsh v. IKON Solutions, Inc.* (2007) 148 Cal. App. 4th 1440 (affirming decertification of class
claiming misclassification); *Aguilar v. Cintas Corp. No. 2* (2006) 144 Cal. App. 4th 121 (reversing
denial of certification); *Dunbar v. Albertson's Inc.* (2006) 141 Cal. App. 4th 1422 (affirming
denial of certification).

1 settlement share estimated at \$3,213.30, with a high payment of \$10,653.41 — Plaintiff and
2 his counsel believe this is a reasonable and fair settlement. Mara Dec. ¶ 18.

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

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

6 Class Counsel applies for an award of attorneys’ fees in the sum of \$50,512.98 (which is
7 one-third of the GSA), and litigation costs of \$2,193.51 (originally estimated not to exceed
8 \$5,000). Mara Dec. ¶ 19. California courts have recognized an appropriate method for determining
9 an award of attorneys’ fees is based on a percentage of the total value of benefits to Class Members
10 by the settlement, also known as the “common fund” method. *Serrano v. Priest* (1977) 20 Cal.3d
11 25, 34 (*Serrano III*) 34 (“when a number of persons are entitled in common to a specific fund, and
12 an action brought by a plaintiff or plaintiffs for the benefit of all results in the creation or
13 preservation of that fund, such plaintiff or plaintiffs may be awarded attorney’s fees out of the
14 fund.”); *Serrano v. Unruh*, 32 Cal.3d 621, 627 (1982) (in awarding a fee from the common fund
15 obtained for the benefit of all parties, the trial court acts within its equitable power to prevent the
16 other parties’ unjust enrichment.); *Rawlings v. Prudential-Bache Properties, Inc.*, 9 F.3d 513, 516
17 (6th Cir. 1993) (the percentage of the fund method for calculating attorney’s fees more accurately
18 reflects the results achieved for the putative class than the lodestar method and “establishes
19 reasonable expectations on the part of plaintiffs’ attorneys as to their expected recovery; and it
20 encourages early settlement, which avoids protracted litigation.”); *In re Rite Aid Corp. Securities
21 Litigation*, 396 F.3d 294, 300 (3d Cir. 2005) (“The percentage-of-recovery method is generally
22 favored in common fund cases because it allows courts to award fees from the fund ‘in a manner
23 that rewards counsel for success and penalizes it for failure.’”).

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

1 *San Francisco v. Sweet* (1995) 12 Cal.4th 105, 110, the California Supreme Court recognized that
2 the common fund doctrine has been applied “consistently in California when an action brought by
3 one party creates a fund in which other persons are entitled to share.” The reasons for applying the
4 common fund doctrine include: “...fairness to the successful litigant, who might otherwise receive
5 no benefit because his recovery might be consumed by the expenses; correlative prevention of an
6 unfair advantage to the others who are entitled to share in the fund and who should bear their share
7 of the burden of its recovery; encouragement of the attorney for the successful litigant, who will
8 be more willing to undertake and diligently prosecute proper litigation for the protection or
9 recovery of the fund if he is assured that he will be properly and directly compensated should his
10 efforts be successful.” *Id.*

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

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

17 *Id.* at 503 (internal citation omitted).⁷ Because there is a defined and traceable benefit to the Class,
18 the Court can base an award of attorneys’ fees using a ‘common fund’ approach.

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

21 Several studies of class action fee awards have found that the median common fund fee
22 award is approximately one-third of the total settlement fund.⁸ The requested fee falls in the mid-

23 ⁷ *Laffitte* also held trial courts have discretion to assess reasonableness of fee awards with tools
24 such as the lodestar cross-check, although they need not do so. *Laffitte*, 1 Cal.5th at 506 (“We hold
25 further that trial courts have discretion to conduct a lodestar cross-check on a percentage fee . . .
they also retain the discretion to forgo a lodestar cross-check and use other means to evaluate the
reasonableness of a requested percentage fee”).

26 ⁸See, e.g., *Chavez v. Netflix, Inc.* (2008) 162 Cal. App. 4th 43, 66, n.11 (numerous studies have
27 shown that “fee awards in class actions average around one-third of the recovery.”); Reagan W.
28 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*

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.⁹
7 In short, Plaintiffs’ counsels’ fee request of \$50,512.98 (33 1/3% of the GSA) is in line with awards
8 in similar cases in California and nationwide and demonstrates that Plaintiff’s counsels’ fee request
9 is consistent with market rates and is reasonable.

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

11 Class Counsel’s fee request is reasonable when calculated using the lodestar method.
12 Under the lodestar method, a base fee amount is calculated from a compilation of time reasonably
13 spent on the case and the reasonable hourly compensation of the attorney. *Serrano v. Priest* (1977)
14 20 Cal. 3d 25, 48. The court then enhances this lodestar figure by a “multiplier” to account for a
15 range of factors, such as the novelty and difficulty of the case, its contingent nature, and the degree
16 of success achieved. *Id.*, at 49; see also *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1132-36; *PLCM*
17 *Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1096; *Thayer v. Wells Fargo Bank* (2001) 92
18 Cal.App.4th 819, 834, (“[t] there is no ... rule limiting the factors that may justify an exercise of
19 judicial discretion to [adjust the] lodestar”).e

20 As of the date of filing this Motion for Final Approval, Plaintiff’s counsel has worked a
21 total of 125 hours on this case and calculated the base lodestar at \$86,200 at rates reflecting those
22 currently earned in the marketplace. Mara Dec. ¶¶ 20, 22-23, 25-26; **Exhibit 1**. All of the work
23 and tasks performed by Plaintiff’s counsel were reasonable and necessary to the prosecution of
24 this case. Mara Dec. ¶¶ 20, 22-23, 25-26. As Class Counsel’s lodestar fee is in excess of their fee

25 *on Civil Rules*, 90 (1996) (finding that attorneys’ fees in class litigation “were generally in the
26 traditional range of approximately one-third of the total settlement”).

27 ⁹ *Smith v. CRST Van Expedited, Inc.* (S.D. Cal. Jan. 14, 2013) 10-CV-1116- IEG WMC, 2013 WL
28 163293, *5 (“These percentages compare favorably with both California (33%) and federal (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.”).

request, a multiplier on their lodestar fee is not sought herein. Mara Dec. ¶ 21. In fact, the requested fee results in a so-called “negative multiplier” which suggests the percentage of the fund amount is reasonable and fair. *See Chun-Hoon v. McKee Foods Corp.* (N.D. Cal. 2010) 716 F.Supp.2d 848, 854; *In re Portal Software, Inc. Securities Litigation* (N.D. Cal. 2007) 2007 U.S. Dist. LEXIS 88886, 2007 WL 4171201, at *16.

d. Class Counsel’s Hourly Rates Are Reasonable

Plaintiff’s counsels’ hourly rates are between \$600 and \$800 and are in line with rates typically approved in wage and hour class action litigation and which rates have been approved by Courts in California in the Los Angeles, Sacramento, San Francisco, Alameda, Orange and San Diego County Superior Courts.¹⁰ A reasonable hourly rate is the prevailing rate charged by attorneys of similar skill and experience in the relevant community. *PLCM Group, Inc v. Drexler* (2000) 22 Cal. 4th 1084, 1095. When determining a reasonable hourly rate, courts may consider factors such as skill and experience, the nature of the work performed, the relevant area of expertise and the attorney’s customary billing rates. *Flannery v. California Highway Patrol* (1998) 61 Cal. App. 4th 629, 632.

Plaintiff’s counsels’ skill and experience support their hourly rates. Their practice is limited exclusively to litigation, focusing on the representation of employees in wage and hour and consumer class action matters. Mara Decl. ¶¶ 2-8, 24. As prominent attorneys in the field of wage and hour class action litigation, Plaintiff’s counsel continually monitors the prevailing market rates charged by both defense and plaintiff law firms and set the billing rates of their attorneys and paralegals to be consistent with the prevailing market rates in the private sector for attorneys and staff of comparable skill, qualifications and experience. Other wage and hour attorneys working as class counsel before California courts charge comparable if not higher rates.¹¹ Therefore, as

¹⁰ Mara Dec. ¶¶ 23, 26; **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.

¹¹ Mara Dec. ¶¶ 23, 26, **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).

they are in line with those of the relevant community, Class Counsel's hourly rates are reasonable.

e. Class Counsel's 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, Plaintiff's Counsel has expended a total of 125 hours litigating this case. The work performed to achieve a settlement that will provide valuable consideration to the Class, **averaging an estimated payment of \$3,213.30**,¹² is summarized by Class Counsel in the declarations submitted herewith. Mara Dec. ¶¶ 22-23, 25-26; **Ex. 1**. Counsel's many tasks, in summary form, included the following: pre-filing investigation and legal research; communicating with the class representative; 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; drafting and filing notice to the LWDA; numerous conferences with Defendant's counsel regarding a variety of issues throughout the litigation, settlement negotiations, and settlement process; numerous interoffice discussions about litigation strategy and theories of liability; draft and propound discovery; appearing at hearings and case management conferences; drafting of stipulations throughout litigation; review and analyze documents produced by Defendants, create exhibits for use in the case; review case file for settlement negotiations; draft liability and exposure analysis for settlement negotiations; draft settlement correspondence documents to Defendant and review Defendant's settlement correspondence documents; draft, revise, and negotiate long form settlement agreement; draft motion for preliminary approval and supporting documents; obtain bids from settlement administrators; communicate with the settlement administrator throughout the administration process; and draft motion for final approval and supporting documents. All tasks and work performed were reasonable and necessary to the prosecution of this case. The work

¹² See Nava Dec. ¶ 16.

performed was justified in light of the result achieved. Mara Dec. ¶¶ 22-23, 25-26.

f. Costs of Litigation

Class Counsel seeks reimbursement of the litigation costs and expenses of \$2,193.51 (originally estimated not to exceed \$5,000). These costs were all reasonable and necessary to the prosecution of this case and the results achieved and are fair, and reasonable. Mara Dec. ¶ 27, Ex.

1.

VI. THE CLASS REPRESENTATIVE ENHANCEMENT PAYMENT IS REASONABLE

In addition, Plaintiff agreed to a general release of his claims against Defendant in exchange for the \$10,000 Class Representative Enhancement Payment. Courts routinely approve service payments, or incentive awards, to compensate a named plaintiff for the services he or she provides and the risks he or she incurs during class litigation. *See In re Cellphone Fee Termination Cases* (2010) 186 Cal.App.4th 1380, 1393; *see also Bell v. Farmers Ins. Exch.* (2004) 11 Cal.App.4th 715, 725-26 (upholding services payments to class representatives); *Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles* (2010) 186 Cal.App.4th 399, 412 (upholding incentive awards to plaintiffs that, when added to their individual recoveries, amounted to more than twice as much as the average payment to class members). Courts have regularly and routinely granted approval of settlements containing such enhancements. *See, e.g., Staton v. Boeing*, 327 F.3d 938, 977 (9th Cir. 2003).¹³ In Class Counsel's experience, the typical enhancement award in wage and hour class action settlements ranges from \$5,000 to \$75,000. Very commonly there is more than one class representative who receives an award in the above range. Mara Dec. ¶ 28.

The requested payment is appropriate and reasonable and unopposed by Defendant. This payment is made, in part, in exchange for Plaintiff providing Defendant with a general release of his claims. This general release is far greater than the release signed by class members. In addition,

¹³ *See, e.g., Cook v. Niedert*, 142 F.3d 1004, 1015 (7th Cir. 1998); *Roberts v. Texaco*, 979 F. Supp. 185 (S.D.N.Y. 1997) ("present or past employee whose present position or employment credentials 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 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 in support of the enhancement request, Plaintiff submitted a declaration detailing the efforts he
2 expended on behalf of the class in order to advance this case to its successful conclusion. *See*
3 *generally* Declaration of Gerardo Diaz. There is no question that this case would not have reached
4 the same result but for Plaintiff's involvement and input at all stages of the litigation.

5 Furthermore, this general release operates to extinguish a significant amount of Plaintiff's
6 own individual damages. In the preliminary approval motion, it was highlighted that the entirety
7 of the damages under the meal period claim are actually limited to the Plaintiff himself. While
8 Plaintiff and Class Members were undoubtedly all subject to Defendant's uniformly policies and
9 practices Plaintiff is challenging as unlawful, review of the records provided by Defendant
10 indicates Class Members are paid a meal period premium each shift. Through an apparent clerical
11 error, Plaintiff did **not** receive these premiums along with the other Class Members. Agreeing to
12 release this claim as a part of this settlement, and the substantial exposure it represents,
13 unquestionably demonstrates Plaintiff's unwavering commitment to putting the interests of the
14 Class ahead of his own and serves as further justification for Plaintiff's enhancement payment.

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

22 Unfortunately, there have been several judgments entered against class representatives, e.g.
23 *Koehl v. Verio, Inc.* 142 Cal.App.4th 1313, 1328 (2006) (a wage and hour class action where
24 Defendant prevailed at trial, the named Plaintiffs were held liable, jointly and severally for the
25 Defendant's attorneys' fees); *Whiteway v. Fedex Kinkos Office & Print Services, Inc.*, 2007 U.S.
26 Dist. LEXIS 95398 (N.D. Cal. 2007) (a wage and hour misclassification case lost on summary
27 judgment, after the case was certified, the named Plaintiff was assessed costs in the sum of
28 \$56,788.). The risk of payment of Defendant's costs, in itself alone, is a sufficient basis for an

1 award of the requested enhancement sum. Few individuals are willing to take this risk, and it is
2 clear that the appointed Class Representative here championed a cause on behalf of others with
3 potentially huge monetary risks.

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

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

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

21 The Parties agreed to hire Apex as the Administrator, and the Court approved this choice.
22 The Administrator was responsible for formatting, printing and mailing the Notice. It was also
23 responsible for updating addresses and re-mailing Notices returned as undeliverable, responding
24 to Class Member inquiries, answering questions from Counsel for the Parties, and providing a
25 declaration to document its duties and responsibilities under the settlement. Plaintiff now requests
26 that the Court finally approve the \$3,500 fee to Apex for services rendered and to be rendered.
27 Nava Dec. ¶ 19.

28 Following the grant of final approval, the Administrator’s duties will continue in order to

1 calculate and mail the Individual Settlement Payment checks to Class Members, perform tax
2 reporting obligations, disburse other payments as ordered by the Court, and perform such other
3 duties as set forth in the Settlement Agreement. Apex's fee of \$3,500 for services rendered and to
4 be rendered is fair and reasonable and should be granted.

5 **VIII. CONCLUSION**

6 Based on the foregoing, Class Counsel respectfully requests the Court grant final approval
7 of the Class Action Settlement, award Class Counsel's attorneys' fees in the sum of \$50,512.98
8 and litigation costs of \$2,193.51, award to the named Plaintiff the Class Representative
9 Enhancement Payment in the sum of \$10,000, award Apex \$3,500 for settlement administration
10 services, and approve of a payment to the LWDA in the amount of \$3,750.

11
12
13 Dated: May 1, 2024

Respectfully submitted,

MARA LAW FIRM, PC

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15 

16 David Mara, Esq.
17 Matthew Crawford, Esq.
18 Attorneys for Plaintiff GERARDO DIAZ, on
19 behalf of himself, all others similarly situated,
20 and on behalf of the general public
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