

Larry W. Lee (State Bar No. 228175)

lwlee@diversitylaw.com

Nicholas Rosenthal (State Bar No. 268297)

nrosenthal@diversitylaw.com

DIVERSITY LAW GROUP, A Professional Corporation

515 S. Figueroa St., Suite 1250

Los Angeles, CA 90071

(213) 488-6555

(213) 488-6554 facsimile

WILLIAM L. MARDER, ESQ. (CBN 170131)

Polaris Law Group LLP

501 San Benito Street, Suite 200

Hollister, CA 95023

Tel: (831) 531-4214

Fax: (831) 634-0333

Email: bill@polarislawgroup.com

Dennis S. Hyun (State Bar No. 224240)

dhyun@hyunlegal.com

HYUN LEGAL, APC

515 S. Figueroa St., Suite 1250

Los Angeles, CA 90071

(213) 488-6555

(213) 488-6554 facsimile

Attorneys for Plaintiff and the Class

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

ERIC CHAVEZ, as an individual and on
behalf of all others similarly situated,

Plaintiffs,

vs.

CONVERSE, INC., a Delaware
corporation; and DOES 1 through 50,
inclusive,
Defendants.

Case No. 15-cv-03746-NC

**PLAINTIFF'S NOTICE OF MOTION AND
MOTION FOR FINAL APPROVAL OF
CLASS ACTION SETTLEMENT;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT**

Date: November 20, 2020

Time: 1:00 p.m.

Courtroom: 5, 4th Floor

Judge: Hon. Nathanael Cousins

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on November 20, 2020, at 1:00 p.m., or as soon thereafter as counsel may be heard, in Courtroom 5 of the Hon. Nathanael Cousins, United States District Court for the Northern District of California, located at 280 South 1st Street, San Jose, CA 95113, Plaintiff Eric Chavez (“Plaintiff”) will and hereby does move the Court for an Order (1) granting final approval of the proposed class action settlement; (2) approving Class Counsel’s application for attorneys’ fees in the amount of \$625,000.00 (one-third of the Class Settlement Amount) and reimbursement of costs in the amount of \$166,554.46; and (3) approving Plaintiff’s request for an enhancement award of \$10,000.00.

Given that this is a Motion for Final Approval of a settlement reached with Defendant Converse, Inc. (“Defendant”), Plaintiff has been informed that Defendant will not oppose this Motion.

This Motion is based upon this Notice, the attached Memorandum of Points and Authorities, the accompanying Declarations of Larry W. Lee, Dennis S. Hyun, Nick Rosenthal, Kristen Agnew, Max Gavron, William L. Marder, Plaintiff, and Elizabeth Kruckenberg, any oral argument of counsel, the complete files and records in the above-captioned matter, and such additional matters as the Court may consider.

DATED: October 16, 2020

DIVERSITY LAW GROUP, P.C.

By: /s/ Larry W. Lee
Larry W. Lee
Attorney for Plaintiff and the Class

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

As this Court may recall, this settlement was reached after years of significant litigation, and nearly on the eve of trial. Indeed, this case was completely dismissed by Defendant's prior summary judgment, only to be resurrected through Plaintiff's appeal. By this motion, Plaintiff Eric Chavez ("Plaintiff") seeks final approval of a substantial class-wide settlement reached between Plaintiff and Defendant Converse, Inc. ("Defendant") (Plaintiff and Defendant collectively, the "Parties"). Plaintiff also seeks an order approving Class Counsel's application for attorneys' fees in the amount of \$625,000.00 (one third of the class settlement amount of \$1,875,000.00 ("Class Settlement Amount")), reimbursement of litigation costs in the amount of \$166,554.46, and Plaintiff's application for an enhancement award of \$10,000.00. This request was set forth in the Notice of Class Action Settlement ("Notice Packet") mailed to all Class Members. Moreover, the settlement documents, including the Agreement, were uploaded and made available to putative class members on the Administrator's website. As set forth in the Class Action Settlement Agreement ("Settlement Agreement") between the Parties, Defendant has agreed to not object to the requests sought herein.

On July 8, 2020, the Court entered an Order Granting Plaintiff's Motion for Preliminary Approval of Class Settlement (Dkt. No. 215) ("Preliminary Approval Order"). The Parties now seek this Court's final approval of the settlement.

The settlement requires Defendant to pay a total of One Million Eight Hundred Seventy-Five Thousand Dollars (\$1,875,000.00), a sum which represents a substantial recovery for the members of the Class. **Again, this settlement is non-reversionary, such that no monies will revert back to Defendant. (Settlement Agreement § 5.5).** As such, there was no claims process involved. Class Members were given an opportunity to object or opt-out of the settlement. To date, there have been zero (0) opt outs and zero (0) objections to the settlement. (Declaration of Elizabeth Kruckenberg ("Kruckenberg Decl.") ¶¶ 8-9.) Accordingly, this shows that the overwhelming majority of Class Members have reacted favorably to the settlement as there is a **100% participation rate and not a single objection from the 2,677 member class.**

Moreover, all of the Court's orders concerning dissemination of the Notice Packet have been followed.

Based thereon, Plaintiff respectfully requests that final approval be granted in its entirety.

II. SUMMARY OF ARGUMENT

As previously detailed in Plaintiff's Motion for Preliminary Approval (Dkt. No. 210), this case was hard fought over several years, including numerous dispositive motions, class certification and decertification, roughly 20 class member depositions, expert reports, several rounds of written discovery, and an appeal to the Ninth Circuit which overturned the dismissal of this case.

The detailed terms of the settlement are set forth in the Stipulation of Class Action Settlement and Release of Claims ("Settlement Agreement") entered into by the Parties and previously provided to this Court. (Dkt. No. 210-9.) Pursuant to the settlement terms, Defendant will pay the entirety (100%) of the settlement sum of \$1,875,000.00 without any reversion to Defendant.

The proposed settlement meets the criteria for final approval, which are set forth in the Manual for Complex Litigation, Fourth, and is well within the range of what would be fair, reasonable, and adequate in this case. Thus, Plaintiff requests that the Court take the final step in the approval process – granting the requested final approval of the settlement which is sought herein.

III. THE SETTLEMENT PROCESS HAS BEEN DUTIFULLY ADHERED TO AND SUCCESSFULLY CARRIED OUT

A. Dissemination of Notice

As noted above, preliminary approval was granted on July 8, 2020. At that time, Phoenix Settlement Administrators ("Settlement Administrator") was appointed by the Court as the Settlement Administrator. The Parties, through the work of the Settlement Administrator, have complied with this Court's orders concerning dissemination of the class notice. (Kruckenberg Decl. ¶¶ 2-10.)

The notice was mailed to the class of 2,677 individuals utilizing the data provided by

Defendant. (Kruckenberg Decl. ¶¶ 3-5.) Of those, 177 notices were returned with an invalid address. (Kruckenberg Decl. ¶ 6.) Out of these, 168 were mailed to updated addresses after performing a skip-trace. (*Id.*) As of the date of the filing of this Motion, eleven (11) Notice Packets are considered undeliverable. (*Id.* ¶ 7). Specifically, nine (9) Notice Packets were undeliverable since an updated address could not be obtained and two (2) Notice Packets were returned a second time. (*Id.*)

B. CAFA Notice

On or about September 16, 2020, pursuant to the Class Action Fairness Act of 2005 (the “CAFA”), Defendant provided notice of the proposed settlement to the appropriate federal and state agencies. Pursuant to 28 U.S.C. § 1715(d), the Parties jointly request that the Court wait until December 15, 2020, to issue its Order granting final approval.¹

IV. OVERVIEW OF ISSUES AND ARGUMENT

As discussed in detail in the previously filed Motion for Preliminary Approval (Dkt. No. 210), this case primarily arose out of Defendant’s alleged security inspection practices. Specifically, Plaintiff alleged that whenever employees left the retail store, they had to undergo a security inspection. Defendant denies that it engaged in any alleged unlawful conduct and maintains that it has complied with California law. Further, Defendant contends that it would have prevailed on the merits at trial.

V. LITIGATION HISTORY

On or about July 10, 2015 Plaintiff commenced this action in the Santa Clara Superior Court, alleging the following causes of action: (1) violation of California Labor Code sections 1194, 1197, and 1197.1 for failure to pay minimum wages; (2) violation of California Labor Code sections 510 and 1194 for failure to pay overtime wages; (3) violation of California Labor Code sections 226.7 and 512 for failure to provide proper meal breaks; (4) violation of California Labor Code section 226.7 for failure to provide proper rest breaks; (5) violation of California

¹ Section 1715(d) states that “[a]n order giving final approval of a proposed settlement may not be issued earlier than 90 days after the later of the dates on which the appropriate Federal official and the appropriate State official are served with the notice required under subsection (b).”

1 Labor Code section 226(a) for failure to provide accurate wage statements; (6) violation of the
 2 Private Attorneys General Act (“PAGA”), Labor Code § 2698, *et seq.*, based on the above-stated
 3 Labor Code violations; and (7) violation of the California Business and Professions Code section
 4 17200, *et seq.* for unfair business practices. On August 17, 2015, Defendant filed a Notice of
 5 Removal of Civil Action to the United States District Court for the Northern District of
 6 California pursuant to the Class Action Fairness Act of 2005. (Dkt. No. 1.) Plaintiff
 7 subsequently filed a First Amended Complaint on November 23, 2015, adding claims for waiting
 8 time penalties under Labor Code section 203. (Dkt. No. 28.)

9 On August 18, 2016, the Court granted Defendant’s Motion for Partial Summary
 10 Judgment as to Plaintiff’s second cause of action for violation of Labor Code sections 510 and
 11 1194 (failure to pay overtime wages) and Plaintiff’s fifth, sixth and seventh causes of action to
 12 the extent these claims were premised upon Defendant’s failure to pay overtime wages as a result
 13 of the miscalculation of Plaintiff’s regular rate of pay. (Dkt. No. 80.)

14 The Parties thereafter fully briefed class certification. On September 22, 2016, the Court
 15 granted Plaintiff’s Motion for Class Certification, finding that common questions of law and fact
 16 predominated:

17 Because the time clock is always at the back of a Converse store, while the point of exit
 18 is at the front, all class members are necessarily off-the-clock when they have their bags
 19 checked. ... [T]he Court finds that Chavez has demonstrated that most, if not all,
 Converse stores are set up such that an employee would necessarily be off-the-clock
 when a bag check occurs.

20 (Dkt. No. 89 at 3). The Court certified the following class: “[a]ll current and former non-exempt
 21 retail store employees of Converse who worked in California during the period from July 10,
 22 2011, to the present.” (Dkt. No. 89 at 6). The Court certified all remaining claims, with the
 23 exception of Plaintiff’s third cause of action for violation of Labor Code sections 226.7 and 512
 24 (failure to provide meal breaks). (Dkt. No. 89.)

25 Subsequently, the Parties filed cross-Motions for Summary Judgment. Defendant’s
 26 Motion for Summary Judgment sought dismissal of all of Plaintiff’s claims based on the federal
 27 *de minimis* doctrine. (Dkt. No. 118.) Plaintiffs’ Partial Motion for Summary Judgment sought a
 28 determination as to whether classmembers were under the “control” of Defendant while

1 undergoing security checks (Dkt. No. 124.) On October 11, 2017, the Court granted Defendant's
 2 Motion for Summary Judgment based on the de minimis doctrine and denied Plaintiff's Motion
 3 for Partial Summary Judgment as moot. (Dkt. No. 144.) Plaintiff appealed the ruling on
 4 Defendant's Motion for Summary Judgment to the Ninth Circuit. On June 28, 2019, the Ninth
 5 Circuit issued its opinions in *Rodriguez v. Nike Retail Servs., Inc.*, 928 F.3d 810, 818 (9th Cir.
 6 2019), and *Chavez v. Converse, Inc.*, 772 F. App'x 571, 572 (9th Cir. 2019), reversing the lower
 7 court's (including this Court's) granting of the defendants' motions for summary judgment based
 8 on the de minimis doctrine.

9 Following remand from the Ninth Circuit, the Parties thus continued to extensively
 10 litigate the certified class claims. The Parties filed motions for summary adjudication on liability
 11 over the security check policy. On January 15, 2020, the Court granted Plaintiff's Motion for
 12 Partial Summary Judgment, finding that employees were subject to Defendant's control as a
 13 result of being forced to undergo the security inspections: "[u]nder the exit search policy as
 14 written, Converse exercises control over its employees during exit searches. Employees are
 15 required to make sure a manager inspects their belongings." *Chavez v. Converse, Inc.*, 2020 WL
 16 247942, at *3 (N.D. Cal. Jan. 15, 2020). On March 13, 2020, the Court granted in part
 17 Defendant's Motion for Partial Summary Judgment as to Plaintiff's Labor Code sections 203 and
 18 226 penalties, resulting in the adjudication of these claims against Plaintiff. (Dkt. No. 202.) The
 19 Court, however, denied Defendant's Motion for Partial Summary Judgment based on the *de*
 20 *minimis* doctrine, and as to Plaintiff's meal and rest break claims. (Dkt. No. 202.)

21 On March 20, 2020, Defendant filed a Motion to Decertify the Class and Strike Plaintiff's
 22 PAGA Claim as Unmanageable, which was pending at the time the Parties mediated and reached
 23 the agreement resulting in this settlement. (Dkt. No. 203.)

24 With respect to investigation and discovery, Plaintiff conducted extensive investigation
 25 of the facts surrounding the claims in this action before filing suit, as well as conducted extensive
 26 discovery during the course of litigating and prosecuting this case. (Declaration of Larry W. Lee
 27 ("Lee Decl.") at ¶¶ 3-6.) The Parties propounded and responded to multiple rounds of written
 28 discovery, including interrogatories and requests for production of documents. (*Id.* at ¶ 3.) In

1 connection with written discovery, Plaintiff also obtained and reviewed Defendant's document
 2 production, including policy documents, class contact information, and class time and payroll
 3 data. (*Id.* at ¶ 3, 5.)

4 Plaintiff's counsel also defended Plaintiff's deposition and took multiple depositions of
 5 Defendant's FRCP 30(b)(6) Corporate Representatives on various topics that impacted class
 6 certification and liability. (Lee Decl. at ¶ 4.) Additionally, over the course of litigation, Plaintiff
 7 took the depositions of over 25 current and former employees of Defendant located throughout
 8 the State of California. (*Id.*) In addition, Plaintiff retained an expert, Brian Kriegler, Ph.D. for
 9 purposes of liability and damages. (*Id.* at ¶ 5.) Similarly, Defendant also retained its own expert,
 10 Dr. Robert Crandall. (*Id.*) The Parties have conducted expert discovery, including deposing Dr.
 11 Kriegler and the observers to Defendant's time and motion study and submitting and reviewing
 12 expert and rebuttal expert reports. (*Id.* at ¶ 6.)

13 In sum, as evidenced from the docket, from the time of removal to the instant settlement,
 14 this case has been substantively and vigorously litigated by both Parties. The Parties have also
 15 conducted extensive investigation and discovery, including formal written discovery; taking and
 16 defending depositions of Plaintiff, Defendant's corporate representatives, class members, and
 17 Plaintiff's expert; exchanging class data and documents; and conducting expert discovery. (Lee
 18 Decl. at ¶¶ 3-6.)

19 **VI. THE SETTLEMENT**

20 The Settlement terms were summarized in detail in the Motion for Preliminary Approval,
 21 and Plaintiff respectfully incorporates those arguments herein so as to avoid unnecessary
 22 duplication. The specific terms of the settlement are set forth in the Settlement Agreement and
 23 the Order Granting Motion for Preliminary Approval of Class Settlement. (Dkt. Nos. 210-9 and
 24 215.) The principal terms are:

25 a. Settlement Class is "All individuals employed by Converse, Inc. as non-
 26 exempt/hourly employees in California who worked at any time during the Settlement Class
 27 Period (July 10, 2011, through and including November 19, 2019)."

28 b. The Settlement Class is releasing:

any and all present and past claims under the wage and hour laws and regulations of the state of California that were or could have been asserted based on the facts pleaded in the Lawsuit or any amendments thereto, including but not limited to, all statutes mentioned in the Lawsuit and corresponding provisions of the relevant California Wage Order, including but not limited to California Labor Code sections 201-203, 226, 226.7, 510, 512, 558, 1194, 1197, 1197.1, the Private Attorneys General Act (“PAGA”) (Labor Code Sections 2698-2699.5) and California Business and Professions Code sections 17200, et seq., as related to claims for: overtime; minimum wage; meal period premiums; rest break premiums; wage statements; waiting time penalties; restitution; civil and statutory penalties; interest; injunctive relief; and attorneys’ fees, costs and expenses. based on facts pleaded in the Lawsuit. The “Settlement Class Members’ Released Claims” are released from July 10 2011 through and including November 19, 2019.

c. Defendant will pay a total Settlement Amount of \$1,875,000.00. This sum includes payments made to the settlement class members, settlement administration costs, awards of attorneys’ fees and costs, the class representative enhancement award, and payment to the LWDA.

d. The sum available for use as payments to class members after the settlement administration costs, awards of attorneys’ fees and costs, the class representative enhancement award, and to the LWDA shall be referred to as the Net Settlement Proceeds. Defendant agrees that it shall pay the entirety (100%) of the Net Settlement Amount. **In other words, the settlement is non-reversionary, meaning that no funds will revert back to Defendant.**

e. No claim forms were necessary for any class member to participate in the settlement and receive their share of the settlement. Thus, any class member who does not opt-out in connection with this settlement will automatically receive his/her share of the settlement proceeds. On average, each class member will receive approximately a payment of \$363.63. (Kruckenberg Decl. ¶ 11). The highest individual settlement payment to be paid will be approximately \$5,187.14. (*Id.*)

f. Any remaining monies from uncashed checks will be paid to Legal Aid at Work.

g. All of this Court’s orders in connection with the settlement administration process have been followed. (*See Kruckenberg Decl. filed herewith.*)

The settlement represents a compromise between the positions and evaluations of the two sides to this controversy. Clearly, there were significant disagreements between the Parties as to

the facts and the law.

VII. THE SETTLEMENT EXCEEDS THE STANDARDS FOR FINAL APPROVAL

Federal Rule of Civil Procedure 23(e) provides that any compromise of a class action must receive Court approval. The court has broad discretion to grant such approval and should do so where the proposed settlement is “fair, adequate, reasonable, and not a product of collusion.” *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998); *Joel A. v. Giuliani*, 218 F.3d 132, 138 (2nd Cir. 2000). In determining whether a proposed settlement should be approved, the Ninth Circuit has a “strong judicial policy that favors settlement, particularly where complex class action litigation is concerned.” *Class Plaintiffs v. Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992).

The fairness, reasonableness, and adequacy of any class action settlement depends on “the relative strength of the plaintiffs’ case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery completed and the stage of the proceedings; the experience and views of counsel; ... and the reaction of class members to the proposed settlement.” *Hanlon* 150 F.3d at 1026. Here, as set forth in the Motion for Preliminary Approval and discussed below, the factors for final approval of this settlement have been established.

A. The Strength of Plaintiff’s Case Supports Settlement

This factor is generally satisfied when plaintiffs must overcome barriers to make their case. *Chun-Hoon v. McKee Foods Corp.*, 716 F. Supp. 2d 848, 851 (N.D. Cal. 2010). One issue which will continue to pose risks at trial is the *de minimis* doctrine. Significantly, in *Troester v. Starbucks Corp.*, 5 Cal. 5th 829 (2018), the California Supreme Court has issued its opinion on July 26, 2018 holding that *de minimis* doctrine does not apply to regularly occurring work under the California Labor Code. However, the Court left open the question and did not address whether there are other activities that are so irregular or brief that it is unreasonable to require compensation. *Id.* While this Court previously addressed *Troester* in its Order Denying Class Certification, the Court only found that whether time spent off-the-clock for security checks and

visual inspections did not defeat commonality. (Dkt. No. 122.) The Court has yet to rule on liability with respect to the certified security check claims. As this issue remains undecided, this Settlement provides concrete relief to the Class without having to proceed with trial on this issue.

Finally, even if a violation could be established, as to the PAGA claim, this Court has complete discretion to decrease any applicable penalties that could be assessed. Indeed, just recently, the California Court of Appeals upheld a decision wherein PAGA penalties were reduced by 90%. *Carrington v. Starbucks Corp.*, 30 Cal. App. 5th 504 (2018).

Therefore, this factor favors settlement. See *Dyer v. Wells Fargo Bank, N.A.*, 2014 WL 5369395, at *3 (N.D. Cal. Oct. 22, 2014) (factor favors final approval where “[p]laintiffs acknowledge that, if the settlement is not approved, they will encounter significant obstacles in establishing their claims”); see also *Moore v. Verizon Commc’ns Inc.*, 2013 WL 4610764, at *5 (N.D. Cal. Aug. 28, 2013) (finding that the relative strength of plaintiffs’ case favored settlement because plaintiffs admitted they would face hurdles in proving liability and damages).

B. Risks, Expense, and Duration of Continued Litigation Support Settlement

“Difficulties and risks in litigating weigh in favor of approving a class settlement.” *Dyer*, 2014 WL 5369395, at *3 (citation omitted). In addition to the obstacles set forth above, even if Plaintiff had prevailed at trial, there was a likelihood that Defendant would have appealed the verdict. Thus, the risks, expense, and duration of continued litigation favor final approval of the settlement. See *Dyer*, 2014 WL 5369395, at *3 (“This factor supports final approval of this settlement because, without a settlement, Plaintiffs would risk recovering nothing after a lengthy and costly litigation.”).

C. The Extent of Discovery Favors Settlement

Here, settlement was reached following several years of litigation, motion, and appellate practice, including depositions of Plaintiff, several FRCP 30(b)(6) witnesses, numerous class members and Plaintiff’s expert, as well as interviews of class members, production of class data and time records, and extensive expert discovery. Courts have held that such discovery is sufficient for parties to make an informed decision regarding the adequacy of the settlement. See, e.g., *Dyer*, 2014 WL 5369395, at *3 (parties’ participation in written discovery, depositions,

witness interviews, and formal mediation favors an informed settlement); *Chun-Hoon*, 716 F. Supp. 2d at 848 (“true value of the class claims is well-known and class counsel possess a sufficient understanding of the issues involved and the strengths and weaknesses of the case”); *see also In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 459 (9th Cir. 2000) (formal discovery not necessary where the parties have sufficient information to make an informed decision about settlement).

D. The Recommendations of Counsel Favor Approval of the Settlement

The recommendations of experienced counsel should be given considerable weight. *Boyd v. Bechtel Corp.*, 485 F. Supp. 610, 622 (N.D. Cal. 1979); *Ellis v. Naval Air Rework Facility*, 87 F.R.D. 15, 18 (N.D. Cal. 1980), (“[T]he fact that experienced counsel involved in the case approved the settlement after hard-fought negotiations is entitled to considerable weight.”); *Kirkorian v. Borelli*, 695 F. Supp. 446, 451 (N.D. Cal. 1988); *Reed v. General Motors Corp.*, 703 F.2d 170, 175 (5th Cir. 1983); *Williams v. Vukovich*, 720 F.2d 909, 922-23 (6th Cir. 1983), *Armstrong v. Board of Sch. Dirs.*, 616 F.2d 305, 325 (7th Cir. 1980).

Lead counsel for Plaintiff has broad experience litigating employment class actions. (Lee Decl. ¶¶ 11-15; Declaration of Dennis S. Hyun (“Hyun Decl.”) ¶¶ 3-6; Declaration of William L. Marder (“Marder Decl.”) ¶¶ 8-15.) They support this settlement as a fair and reasonable settlement which is in the best interest of the settlement class. (Lee Decl. ¶¶ 7-8; Hyun Decl. ¶¶ 7-9; Marder Decl. ¶¶ 2-3.) Therefore, this factor favors approval of the settlement. *See Dyer*, 2014 WL 5369395, at *3 (recommendation of plaintiffs’ counsel supports approval of settlement); *Chun-Hoon*, 716 F. Supp. 2d at 848 (same).

E. The Class Has Responded Favorably to the Proposed Settlement

“[T]he absence of a large number of objections to a proposed class action settlement raises a strong presumption that” the settlement is favorable to class members. *In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1043 (N.D. Cal. 2008), *see Pallas v. Pacific Bell*, 1999 WL 1209495, at *6 (N.D. Cal. July 13, 1999) (“The greater the number of objectors, the heavier the burden on the proponents of settlement to prove fairness.”).

Here, **not a single class member out of 2,677 individuals has objected or opted out of**

1 this settlement. (Kruckenberg Decl. ¶¶ 8-9.) In other words, this settlement has a 100%
 2 participation rate. (*Id.*) Thus, the absence of any objections or opt-outs strongly support the
 3 fairness of the settlement. *See Churchill Vill. LLC v. Gen. Elec.*, 361 F.3d 566, 577 (9th Cir
 4 .2004) (approving settlement with 45 objections and 500 opt-outs from a 90,000-person class,
 5 representing .05% and .56% of the class, respectively); *Dyer*, 2014 WL 5369395, at *4 (strong
 6 support from class in favor of approving settlement where only three of 8,695 class members
 7 opted out); *Chun-Hoon*, 716 F. Supp. 2d at 852 (where 16 of 329 class members opted out, court
 8 found that positive class reaction “strongly supports settlement”).

9 **F. The Procedure Through Which the Settlement Was Achieved Supports Final**
 10 **Approval**

11 The Ninth Circuit has recognized that the factors to be examined at final approval may
 12 differ depending on the circumstance of each case. *Officers for Justice*, 688 F.2d at 625.
 13 Therefore, although not one of the *Officers for Justice* listed factors, the procedures by which the
 14 settlement was achieved also strongly support the fairness of the settlement. *See Chun-Hoon*,
 15 716 F. Supp. 2d at 851 (“To these factors, the court adds as a ninth factor to consider the
 16 procedure by which the settlement was arrived at”), citing *Manual for Complex Litigation*
 17 (Fourth) § 21.6 (2004). As noted above, the parties participated in arm’s length negotiations,
 18 including one full day of a mediation before Michael Loeb, Esq., who was able to facilitate this
 19 settlement. This weighs in favor of approval of the settlement. *See Chun-Hoon*, 716 F. Supp.
 20 2d at 851 (finding that use of formal arm’s-length mediation supported approval of settlement
 21 agreement).

22 Further, the Ninth Circuit has shown longstanding support of settlements reached through
 23 arm’s length negotiation by capable opponents. In *Rodriguez v. West Publishing Corp.*, 563 F.3d
 24 948 (9th Cir. 2009), the Ninth circuit expressly opined that courts should defer to the “private
 25 consensual decision of the [settling] parties.” *Id.* at 965, citing *Hanlon*, 150 F.3d at 1027. The
 26 primary reason for deferring to such settlements is the experience of counsel and the
 27 participation of a neutral, both of which factors are present here.

28 The Court in *Rodriguez* found that the settling parties “put a good deal of stock in the

product of an arms' length, non-collusive, negotiated resolution, and have never prescribed a particular formula by which that outcome must be tested." *Rodriguez*, 563 F.3d at 965 (citations omitted). As the Court explained, "[i]n reality, parties, counsel, mediators, and district judges naturally arrive at a reasonable range for settlements by considering the likelihood of a plaintiffs' or defense verdict, the potential recovery, and the chances of obtaining it, discounted to present value." *Id.* at 965 (citations omitted). *See also Williams v. Vukovich*, 720 F.2d 909, 922-923 (6th Cir.1983) ("The court should defer to the judgment of experienced counsel who has competently evaluated the strength of his proofs"); *4 Newberg on Class Actions* § 11.24 (4th Ed. & Supp. 2002); *Manual For Complex Litigation* (Fourth) § 30.42).

The proposed settlement has no deficiencies. There is no standard or benchmark for determining whether any given settlement is fair. "Ultimately the district court's determination is nothing more than 'an amalgam of delicate balancing, gross approximations and rough justice.'" *Officers for Justice v. Civil Service Comm'n of City and County of San Francisco*, 688 F.2d 615, 625 (9th Cir. 1982) (citation omitted). In making its determination, the Court should weigh the benefits that the settlement will realize for the class against the uncertainty of litigation and the possibility that the class members would obtain no relief in the absence of a settlement. *See Linney v. Cellular Alaska P'ship*, 151 F.3d 1234, 1242 (9th Cir. 1998) ("it is the very uncertainty of outcome in litigation and avoidance of wasteful and expensive litigation that induce consensual settlements").

The settlement has been reached after considerable investigation, litigation, negotiation, and involving the mediation efforts of a highly experienced mediator. Each side evaluated the strengths and weaknesses of their case and independently came to the conclusion that this settlement represents a responsible means of addressing the claims of Plaintiff and the Class, as well as Defendant's contention that it would prevail on the merits.

VIII. THE REQUESTED ATTORNEYS' FEES AND COSTS SHOULD BE APPROVED

Governing Ninth Circuit law, following the clear instruction of the United States Supreme Court in *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980), establishes that percentage awards are to measure against the entire common fund created in the settlement. In

1 *Glass v. UBS Financial Services, Inc.*, 2007 WL 474936, at *16 (N.D. Cal. Jan 26, 2007), citing
 2 to the Ninth Circuit authority, the Court noted:

3 The Ninth Circuit has held, however, that the district court must
 4 award fees as a percentage of the entire fund, or pursuant to the
 5 lodestar method, not on the basis of the amount of the fund
 actually claimed by the class.

6 *See also Williams v. MGM-Pathe Communications Co.*, 129 F.3d 1026, 1027 (9th Cir.1997).

7 Moreover, the U.S. Supreme Court consistently has recognized that “a litigant or a lawyer
 8 who recovers a common fund for the benefit of persons other than himself or his client is entitled
 9 to a reasonable attorney’s fee from the fund as a whole.” *Boeing Co. v. Van Gemert*, 444 U.S.
 10 472, 478 (1980); *Mills v. Elec. Auto-Lite Co.*, 396 U.S. 375 (1970). The purpose of this doctrine
 11 is largely to avoid unjust enrichment, by spreading the litigation costs proportionally among all
 12 the beneficiaries so that the active beneficiary does not bear the entire burden alone. It provides
 13 that when a litigant’s efforts create or preserve a fund from which others derive benefits, the
 14 litigant may require the passive beneficiaries to compensate those who created the fund.

15 Every United States Supreme Court case that has considered the award of attorney’s fees
 16 under the common fund doctrine has determined those fees as a percentage of the recovery. *See*,
 17 *e.g., Camden I Condo. Ass’n, Inc. v. Dunkle*, 946 F.2d 768, 773 (11th Cir. 1991) (citing *Blum v.*
 18 *Stenson*, 465 U.S. 886, 900 n.16 (1984)) (noting that the percentage of recovery method is the
 19 appropriate method to award attorney’s fees in common fund cases); *Sprague v. Ticonic Nat’l*
 20 *Bank*, 307 U.S. 161, 165 n.2 (1939); *Cent. R.R. & Banking Co. v. Pettus*, 113 U.S. 116, 128
 21 (1885); *Internal Improvement Fund Trs. v. Greenough*, 105 U.S. 527, 532 (1881).

22 The Ninth Circuit has also recognized a “ground swell of support for mandating a
 23 percentage-of-the-fund approach in common fund cases.” *Florida v. Dunne*, 915 F.2d 542, 545
 24 (9th Cir. 1990); *see also In re Pac. Enters. Sec. Litig.*, 47 F.3d 373, 378-79 (9th Cir. 1995)
 25 (affirming attorney’s fee of 33% of the recovery). Although the Ninth Circuit has typically
 26 found that 25% of the common fund is “benchmark,” numerous courts in the Ninth Circuit have
 27 awarded higher amounts. *See Stetson v. West Publishing Corp.*, Case No. 13-57061, at *11 (9th
 28 Cir. May 11, 2016). The twenty-five percent benchmark may be adjusted upward or downward

1 depending on the circumstances presented by the particular case. Indeed, the Ninth Circuit and
 2 district courts therein have routinely permitted recovery in the amount of 33.33%, 40% and even
 3 up to 50% of the common fund. *See, e.g., In re Activision Sec. Litig.*, 723 F. Supp. 1373, 1378
 4 (N.D. Cal. 1989) (listing Ninth Circuit cases).

5 Seeking a fee based on a percentage of the gross recovery, which is what Class Counsel
 6 is seeking here, is appropriate and even desirable in cases like this. *See* Newberg on Class
 7 Actions, Fourth Edition, vol. 4, p. 556, §14.6 (noting that percentage of the fund awards are
 8 preferable because they align the interests of the attorney with the client, as the attorney is not
 9 incentivized to bill unnecessary hours to generate a greater fee); *Boeing*, 444 U.S. at 478. Unlike
 10 the lodestar method which can encourage class counsel to devote unnecessary hours to generate a
 11 substantial fee, under the POR [percentage of recovery] method, the more the attorney succeeds
 12 in recovering money for the client, and the fewer legal hours expended to reach that result, the
 13 higher dollar amount of fees the lawyer earns. Thus, one of the primary advantages of the POR
 14 method is that it is thought to equate the interests of class counsel with those of the class
 15 members and encourage class counsel to prosecute the case in an efficient manner.

16 As reiterated by the Ninth Circuit, courts are obligated to apply California law in diversity
 17 jurisdiction cases in awarding attorneys' fees. *Farmers Ins. Exch. v. Law Offices of Conrado Joe*
 18 *Sayas, Jr.*, 250 F.3d 1234, 1236 (9th Cir. 2001) ("Because this case is based on diversity
 19 jurisdiction, we are obligated to apply California state law regarding attorneys' fees."); *Vizcaino*
 20 *v. Microsoft Corp.*, 290 F.3d 1043, 1047 (9th Cir. 2002); *Mangold v. Cal. Public Utils. Comm'n*,
 21 67 F.3d 1470, 1478 (9th Cir. 1995); *Chambers v. Whirlpool Corp.*, No. CV111733FMOJCGX,
 22 2016 WL 5922456, at *10 (C.D. Cal. Oct. 11, 2016) ("[i]n diversity actions..., the Ninth Circuit
 23 **applies state law to determine the right to fees and the method for calculating fees**")
 24 (emphasis added).

25 As this case was removed to this Court pursuant to diversity jurisdiction, Plaintiff
 26 respectfully submits that California law should govern this Court's analysis. The California
 27 Supreme Court clarified its stance on common fund cases, ruling –
 28

1 “We join the overwhelming majority of federal and state courts in holding that when
 2 class action litigation established a monetary fund for the benefit of the class members,
 3 and the trial court in its equitable powers awards class counsel a fee out of that fund,
 4 the court may determine the amount of a reasonable fee by choosing an appropriate
 5 percentage of the fund created.”

6 *Laffitte v. Robert Half Int’l*, 1 Cal. 5th 480, 503 (2016). Explaining its ruling, the Court further
 7 held that “[t]he recognized advantages of the percentage method – including relative ease of
 8 calculation, alignment of incentives between counsel and the class, a better approximation of
 9 market conditions in a contingency case, and the encouragement it provides counsel to seek an
 10 early settlement and avoid unnecessarily prolonging litigation – convince us the percentage
 11 method is a valuable tool that should not be denied by our trial courts.” *Id.* (internal citations
 12 omitted); *see also Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047.

13 Based on this rationale, the California Supreme Court in *Laffitte* affirmed a fee award
 14 representing one-third of the fund and rejected the objections of putative class members to this
 15 award. *Laffitte*, 1 Cal.5th at 506. Further, this was based on a lodestar amount that required a
 16 multiplier of 2.13. *Id.* at 487. As the Court held, only when the multiplier is “extraordinarily
 17 high or low [should] the trial court [] consider whether the percentage method should be
 18 adjusted so as to bring the imputed multiplier within a justifiable range.” *Id.* at 505. Moreover,
 19 in the *Laffitte* intermediate court decision, the court observed that “33 1/3 percent of the
 20 common fund is consistent with, and in the range of, awards in other class action lawsuits.”
Laffitte v. Robert Half Int’l, Inc. (2014) 231 Cal.App.4th 860, 871.

21 Numerous district courts have followed *Laffitte* in awarding 1/3 of the common fund.
 22 Indeed, District Judge Edward Davila in *Ramirez v. Walgreen*, N.D. Cal. Case No. 18-cv-03921-
 23 EJD (Dkt. No. 34) and *Lao v. H&M Hennes & Mauritz*, N.D. Cal. Case No. 16-cv-00333-EJD
 24 (Dkt. No. 166), followed *Laffitte* in awarding Plaintiff’s counsel (the same counsel as in the
 25 instant case) 1/3 of the common fund of \$1.15 million based on a multiplier of 1.32 and \$3.8
 26 million based on a negative multiplier, respectively. Magistrate Judge Laurel Beeler in *Reilly v.*
 27 *Recreational Equipment, Inc.*, N.D. Cal. 3:18-cv-07385-LB, also awarded Plaintiff’s counsel 1/3
 28 of the common fund of \$5 million based on a multiplier of 2.7.

1 Additionally, the Northern District Court in *Villalpando v. Exel Direct Inc.*, No. 3:12-CV-
 2 04137-JCS, 2016 WL 7740854, at *2 (N.D. Cal. Dec. 12, 2016), cited *Laffitte* when awarding
 3 33% of the common fund:

4 Plaintiffs' fee request of \$ 4,500,000 represents one-third of the
 5 Settlement Fund, which is reasonable under both applicable law,
 6 and in light of the contingent risk, Counsel's documented lodestar,
 the complex and protracted nature of the case, and strong result for
 the Class.

7 *Id.*

8 Further, the Eastern District Court in *Zepeda v. Ulta Salon, Cosmetics & Fragrance, Inc.*,
 9 E.D. Cal. Case No. 1:17-cv-00853-DAD-EPG (Dkt. No. 55), followed *Laffitte*, in awarding 1/3 of
 10 the common fund of \$3.4 million, or \$1,133,333.33 in attorneys' fees applying a multiplier of
 11 1.328. (Dkt. No. 55 at 12-14). In so holding, the Court reiterated that "[i]n a diversity action such
 12 as this, federal courts apply state law both to determining the right to fees and the method of
 13 calculating them." *Id.*; see also *Emmons v. Quest Diagnostics Clinical Labs., Inc.*, No.
 14 113CV00474DADBAM, 2017 WL 749018, at *7 (E.D. Cal. Feb. 27, 2017) (following *Laffitte* in
 15 awarding 33% of the common fund; "[t]he California Supreme Court recently held that the
 16 percentage-of-fund method of calculating attorneys' fees survives in California courts").

17 **A. The Percentage Awarded Should Mimic the Market**

18 *Newberg on Class Actions*, Fourth Edition, vol. 4, p. 560, § 14.6 contains an interesting
 19 discussion of the concept of a marketplace analysis and why it is so valuable in determining a
 20 percentage award:

21 [Goodrich and Silver]...suggest that fee awards should be
 22 consistent with contingent fee arrangements negotiated in non-
 23 class litigation:
 24 The percentage method is consistent with and is intended to mirror
 practice in the private marketplace where contingent fee attorneys
 typically negotiate percentage fee arrangements with their clients.
 25 As Judge Posner emphasized in *In re Continental Illinois*
Securities Litigations, "[t]he object in awarding a reasonable
 26 attorney's fee...is to simulate the market...The class counsel are
 entitled to the fee they would have received had they handled a
 27 similar suit on a contingent fee basis, with a similar outcome, for a
 paying client." In non-class litigations, one-third contingency fees
 28 are typical. In their concurring opinion in *Blum*, Justices Brennan
 and Marshall observed that "[i]n tort suits, an attorney might
 receive one-third of whatever the plaintiff recovers. In those cases,

therefore, the fee is directly proportional to the recovery.”
 If named plaintiffs have agreed to pay a one-third contingent fee, that is powerful evidence of a reasonable fee. One of the best ways to demonstrate the value of counsel’s work to the class is to review the consideration agreed to be paid by the named plaintiffs in their contracts. If the named plaintiffs have employed their counsel by contingent fee agreements that obligated them to pay one-third of the recovery, it would indeed be inequitable for the members of the class, who will enjoy the benefits of this settlement without incurring the risks of bringing the claim, to pay less than the named plaintiffs.

The complex and heavily litigated nature of this litigation, and its successful result lead to the clear conclusion that the fee request herein is reasonable. In *Camden I Condominium Association, Inc., v. Dunkel*, 946 F. 2d 768 (11th Cir. 1991), the court identified various factors to be considered in arriving at a common fund fee determination. Each of the factors is now briefly addressed.

1. The time and labor required – this is overwhelmingly established in this motion, based upon the work involved, and the supporting attorney declarations and time charts submitted;

2. The novelty and difficulty of the questions involved – this case involved novel and difficult questions of evolving law, including *Troester* and *Frlekin*, which the Parties briefed and litigated, including to the Ninth Circuit;

3. The skill requisite to perform the legal services properly – this goes hand in hand with the first and second factors. Plaintiff’s counsel was able to litigate this case effectively and ultimately achieved a very good result for the class because of Plaintiff’s counsel’s experience in litigating wage and hour cases;

4. The preclusion of other employment by the attorney due to the acceptance of the case – the case required and demanded attorney time on both sides. The result of this scheduling was that Class Counsel could have spent such time on numerous other matters while this litigation was ongoing. Indeed, Plaintiff’s counsel took numerous class member depositions, briefed and argued numerous motions, and zealously represented Plaintiff and the Class;

5. The customary fee – as discussed above, numerous courts have approved an award of 33.33% of the gross settlement fund, which is the standard percentage pursuant to

1 California law;

2 6. Whether the fee is fixed or contingent – this matter was clearly contingent without
3 any sort of fixed or guaranteed fees for Class Counsel. Indeed, Plaintiff's counsel's sole
4 payment was based on contingency fee and no fixed guaranteed costs would have received
5 unless Plaintiff's counsel were successful in this litigation;

6 7. Time limitation imposed by the client or the circumstances – although the client
7 did not impose any time limitations, Class Counsel invested a significant amount of time in this
8 case;

9 8. The amount involved and results obtained – this is discussed above;

10 9. The experience, reputation and ability of the attorney – as evidenced by the
11 supporting declarations, Class Counsel has been designated and certified as class counsel in
12 numerous other matters, including in the Northern District;

13 10. The nature and length of the relationship with the client – this does not apply; and

14 11. Awards in similar cases – similar cases were identified in the section above.

15 As the Court is well aware, Plaintiff's counsel has diligently and zealously litigated this
16 case over several years, including successfully appealing dismissal of this case, fighting against
17 numerous attempts by Defendant to rebut the claims and defeat class certification. Significant
18 risks were assumed by Plaintiff's counsel in litigating this case. Plaintiff's counsel's lodestar
19 cross check also supports the award of the 33.33% percentage fee given that their lodestar cross
20 check results in a negative multiplier!

21 Moreover, as this Court knows, Plaintiff's attorneys heavily and aggressively litigate
22 numerous wage and hour class actions on behalf of workers throughout the State of California –
23 all cases of which are on a contingency fee basis. *See, e.g., Rodriguez v. Nike Retail Servs., Inc.*,
24 928 F.3d 810, 818 (9th Cir. 2019); *Magadia v. Wal-Mart Assocs., Inc.*, 384 F. Supp. 3d 1058
25 (N.D. Cal. 2019). For example, in *Magadia*, Plaintiff's counsel litigated that case for several
26 years, including trying the case to a successful \$102 million judgment on behalf of the class.
27 Walmart appealed and Plaintiff's counsel have not been reimbursed for any attorneys' fees or
28 costs. As such, employment class actions present significant risks. Nevertheless, Plaintiff's

counsel zealously represent workers notwithstanding the potential for losing cases, or not being reimbursed attorneys' fees and costs for years of tireless litigation.

The fee sought relates to all efforts expended by Class Counsel for the complete handling of the class/representative action, including any additional work remaining to be performed by Class Counsel in securing final Court approval of the Settlement, and later following through to ensure that the Settlement is fairly administered and fully implemented.

A significant amount of work on the part of Class Counsel went into achieving this resolution. Based upon the factors relating to approval of percentage of the fund fee awards, class counsel submit that the effort and result justify the requested percentage fee requested. As a secondary "cross-check" to the percentage of the common fund award, class counsel are also providing this Court with a time and task chart, which breaks down the tasks and time spent by each firm, so that the Court can conduct a lodestar analysis.

Plaintiff's attorneys' time and task charts show in this case that Plaintiff's counsel lodestar is \$1,325,475, which results in a significant negative multiplier of the requested amount.

B. The Lodestar Calculation "Cross-Check"

It has been noted that it is sometimes helpful to courts to "cross-check" a percentage award by employing a lodestar with a multiplier analysis. While the lodestar method is generally considered inappropriate in a common fund case where real cash benefits (as opposed to coupons or non-monetary benefits) are made available to class members, its use can provide further validation of the appropriateness of the percentage award approach. *See In re Prudential Ins. Co. of America Sales Practice Litigation*, 106 F. Supp. 2d 721 (D.N.J. 2000). Such is the case here.

The declarations of Class Counsel evidence the fact that they devoted approximately 1,788.5 hours of time to this litigation to date. (Lee Decl. ¶¶ 16-17, Exh. A; Agnew Decl. ¶ 8, Exh. A; Rosenthal Decl. ¶ 8, Exh. A; Gavron Decl. ¶ 9, Exh. A; Hyun Decl. ¶¶ 10-12, Exh. A; Marder Decl. ¶¶ 4-6, Exh. A.) These hours are summarized in the time and task charts that are attached to Plaintiff's counsel's declarations. And, to the extent that any argument is made that the time spent was duplicative, the way in which Plaintiff's counsel work is for each attorney to

1 handle a task and for the other attorneys to review and revise the work, which is identical to the
 2 way defense firms staff and handle cases. More importantly, as recently noted by the Ninth
 3 Circuit in *Stetson v. West Publishing Corp.*, Case No. 13-57061, at *13 (9th Cir. May 11, 2016),
 4 “some amount of duplicative work is ‘inherent in the process of litigating over time.’” (Citing
 5 *Moreno v. City of Sacramento*, 534 F.3d 1106, 1112 (9th Cir. 2008)).

6 In addition, as explained above, Class Counsel expect to expend an additional 40 hours
 7 through the final approval hearing, including on matters such as preparing the Motion for Final
 8 Approval, attending the final approval hearing, and further conferring with class members
 9 regarding the case status. (Lee Decl. ¶ 17; Hyun Decl. ¶ 11; Marder Decl. ¶ 5.) Thus, Class
 10 Counsel will have expended 1,828.5 hours through final approval.

11 Applying the various hourly rates of the law firms and lawyers who dedicated their
 12 efforts to this matter, a lodestar of \$1,325,475.00 is established for the amount of work spent
 13 through final approval. (Lee Decl. ¶¶ 16-18, Exh. A; Agnew Decl. ¶¶ 8-10, Exh. A; Rosenthal
 14 Decl. ¶ 9; Hyun Decl. ¶¶ 10-12, Exh. A; Marder Decl. ¶¶ 4-6, Exh. A.) The percentage award
 15 sought by Class Counsel, if converted to the lodestar method, would entail a negative multiplier
 16 of approximately .47. In the Ninth Circuit, **positive** multipliers “ranging from one to four are
 17 frequently awarded...when the lodestar method is applied.” *Vizcaino v. Microsoft Corp.*, 290
 18 F.3d 1043, 1051 n. 6 (9th Cir.). Again, in *Spann*, the Court granted a 3.07 multiplier. Thus, as
 19 set forth in the Introduction to this motion, the fee application is supported whether by the cross-
 20 check lodestar/multiplier method discussed herein, or by the percentage of the common fund
 21 discussed in the preceding sections.

22 **1. Plaintiff’s Counsel’s Lodestar is Reasonable**

23 The hourly rates employed by Class Counsel, as declared to in the attorney declarations,
 24 are reasonable. Plaintiff’s attorneys are entitled to the hourly rates charged by attorneys of
 25 comparable experience, reputation, and ability for similar litigation. The background and
 26 experience of Plaintiff’s counsel are fully set forth in the declarations filed in support of this
 27 motion. The basic hourly rates listed for each firm are fair, and representative of the
 28 combination of years of experience and the clear successes they have had in the past in

1 connection with class action litigation. The time and task charts summarize the total hours
 2 devoted to the matter by the various law firms, along with the hourly rates as set forth in the
 3 supporting declarations, and the total billed. (Lee Decl. ¶¶ 16-18, Exh. A; Agnew Decl. ¶¶ 8-10;
 4 Rosenthal Decl. ¶ 8-9, Exh. A; Hyun Decl. ¶¶ 10-12, Exh. A; Marder Decl. ¶¶ 4-6, Exh. A.)

5 As discussed in their supporting declarations, Class Counsel are a group of well-
 6 experienced litigators, including class action litigation. (Lee Decl. ¶¶ 13-15; Agnew Decl. ¶¶ 2-
 7 7; Rosenthal Decl. ¶ 2-3; Hyun Decl. ¶¶ 3-6; Marder Decl. ¶¶ 8-15.) Under California law,
 8 counsel are entitled to compensation for all hours reasonably spent on the matter. *Ketchum vs.*
 9 *Moses*, 24 Cal. 4th 1122, 1133 (2001). Reasonableness of hours is assessed by “the entire course
 10 of the litigation, including pretrial matters, settlement negotiations, discovery, litigation tactics,
 11 and the trial itself....” *Vo v. Las Virgenes Municipal Water Dist.*, 79 Cal. App. 4th 440, 447
 12 (2000). In addition, the attached time and task charts clearly reflect the many hours which were
 13 necessarily spent on the case.

14 In the Litigation History section above, the nature and extent of the proceedings held
 15 throughout this litigation were set forth in detail. Without repeating the same, it is incorporated
 16 herein. The total hours and billings thus generated are all supported herein. In sum, it is
 17 submitted that the reasonableness of Plaintiff’s lodestar is manifest. In the present case, Class
 18 Counsel’s lodestar exceeds the requested amount and thus, heavily favors granting of 33.33%
 19 fees in this case.

20 Whether analyzed under the percentage of the fund approach, which is the dominant
 21 view, or via the cross-check approach under the loadstar/multiplier approach, the fees are fully
 22 supported. This entire case has been litigated from the onset, demanded an extraordinary effort
 23 on the part of Class Counsel, and further required substantial costs advanced.

24 Finally, and as instructed by our Supreme Court and Ninth Circuit law, fees should be
 25 awarded off of the total fund created. It is the creation of the fund, and the opportunity to simply
 26 receive one’s share, which creates the right to the fee. *Boeing Co. v. Van Gemert*, 444 U.S. 472,
 27 478 (1980).

28 //

C. The Court Should Approve the Request for Reimbursement of Costs

The request for reimbursement of costs, in the amount of \$166,554.46 is fair and reasonable. As stated above, the costs are all litigation related costs, which have been detailed in the supporting declaration of Class Counsel. (Lee Decl. ¶ 19, Exh. B; Marder Decl. ¶ 7. Exh. B; Hyun Decl. ¶ 13, Exh. B.) The authority for the Court to award costs is the parties' Settlement Agreement and Labor Code Sections 218.5, 226(e), and 2699(g)(1). Further, pursuant to the Settlement Agreement, Defendant has agreed not to oppose any request for reimbursement of costs up to \$250,000.00, but the actual costs that are being sought are much less than the amount allotted in the Settlement Agreement. Pursuant to all of the authority cited above, including this Court's opinion in *Vandervort*, 8 F. Supp. 3d at 1209-10, Plaintiff's counsel should be awarded their costs.

IX. PLAINTIFF'S ENHANCEMENT SHOULD BE APPROVED

Finally, Plaintiff's enhancement is also justified given the duration of the litigation and his availability throughout the litigation to cooperate in producing documents, reviewing documents, and traveling from Fresno to prepare and sit for his deposition and the settlement conference in-person.

Plaintiff respectfully requests that the full amount of the service payment be awarded to him for the efforts that he undertook on behalf of the Class Members. It is commonly held that it is appropriate to recognize the role of the representative plaintiff without whose actions and courage the benefits of the settlement, which are conferred on the class as a whole, would never have been achieved. The criteria courts may consider in relation to incentive payments include: 1) the risk to the class representative in commencing the suit, both financial and otherwise; 2) the notoriety and personal difficulties encountered by the class representative; 3) the amount of time and effort spent by the class representative; 4) the duration of the litigation; and 5) the personal benefit (or lack thereof) enjoyed by the class representative as a result of the litigation. *See Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles*, 186 Cal. App. 4th 399, 412 (2010) (citing *Stanton v. Boeing Co.*, 327 F.3d 938, 975 (9th Cir. 2003)). Each of these factors favors the service awards requested in the present case.

1 Plaintiff is the only representative in this case. Plaintiff met with his attorneys to provide
 2 information regarding the facts involved. (Declaration of Eric Chavez (“Chavez Decl.”) ¶ 4.)
 3 Plaintiff also met with his attorneys to discuss the case and facts related to this matter. (*Id.*)
 4 Plaintiff has made himself available to answer questions and to sign declarations in support of
 5 the various motions that have been brought in this case. (*Id.*) Plaintiff further prepared for and
 6 provided his deposition. (*Id.*) Finally, Plaintiff traveled to and attended the settlement
 7 conference. (*Id.*)

8 Plaintiff took these risks upon himself from which the whole Class benefitted. Class
 9 members did not have to file individual lawsuits, nor did they have to bear the risks of payment
 10 of fees and costs should they not prevail. Class members also do not have to face the risk of
 11 potential retaliation or risk of future employment, due to Plaintiff’s efforts. In short, Plaintiff
 12 sacrificed a significant amount of time, effort, and his own rights in bringing about the benefits
 13 to the class.

14 The payment of enhancement awards to successful class representatives is appropriate
 15 and the amount of \$10,000 to Plaintiff is within the typically accepted range. *See e.g. Van*
 16 *Vranken v. Atlantic Richfield Co.*, 901 F. Supp. 294, 299-300 (N.D. Cal. 1995) (incentive award
 17 of \$50,000); *In re Dun & Bradstreet Credit Servs. Customer Litig.*, 130 F.R.D. 366, 374 (S.D.
 18 Ohio 1990) (two incentive awards of \$55,000, and three incentive awards of \$ 35,000);
 19 *Brotherton v. Cleveland*, 141 F. Supp. 2d 907, 913-14 (S.D. Ohio 2001) (granting a \$50,000
 20 Incentive award); *Enter. Energy Corp. v. Columbia Gas Transmission Corp.*, 137 F.R.D. 240,
 21 251-252 (S.D. Ohio 1991) (\$50,000 awarded to each class representative); *Glass v. UBS Fin.*
 22 *Servs.*, No. C-06-4068, 2007 U.S. Dist. LEXIS 8476, at *51-52 (N.D. Cal. Jan. 27, 2007)
 23 (awarding \$25,000 Incentive award in FLSA overtime wages class action); *Cook v. Niedert*, 142
 24 F.3d 1004, 1016 (7th Cir. 1998) (affirming \$25,000 Incentive award to class representative in
 25 ERISA case). Moreover, a \$10,000 service payment represents a mere **0.54%** of the gross
 26 settlement amount. For such reasons, Plaintiff respectfully requests that this Court find the
 27 enhancement payment amount of \$10,000 to Plaintiff as fair, reasonable, and adequate and that
 28 the enhancement payment be awarded to Plaintiff.

X. THE ADMINISTRATOR'S COSTS SHOULD BE APPROVED

Here, Phoenix Settlement Administrators dutifully administered the settlement. (*See generally* Kruckenberg Decl.) The Agreement provides up to \$25,000 for Phoenix's cost. (Settlement Agreement § 2.29). Plaintiff respectfully requests that the Court award Phoenix its costs.

XI. CONCLUSION

Based on the foregoing, Plaintiff and Class Counsel respectfully request that this Motion be granted in its entirety and grant Plaintiff's counsel's fee request of \$625,000.00, costs requested in the amount of \$166,554.46, class representative enhancement of \$10,000.00, and settlement administration costs of \$25,000.00. The Parties have reached this settlement following extensive litigation, ongoing case discussions and arms-length negotiations. Plaintiff respectfully requests that the Court:

1. Grant final approval of the proposed settlement;
2. Order payment from the settlement proceeds to the Settlement Administrator in compliance with the Settlement Agreement;
3. Order payment from the settlement proceeds to Class Counsel and Plaintiff in compliance with the Settlement Agreement;
4. Order payment from the settlement proceeds to the LWDA in compliance with the Settlement Agreement;
5. Enter the proposed Final Approval Order and Judgment submitted herewith; and
6. Retain continuing jurisdiction over the implementation, interpretation, , and consummation of the settlement.

DATED: October 16, 2020

DIVERSITY LAW GROUP, P.C.

By: /s/ Larry W. Lee
 Larry W. Lee
 Attorney for Plaintiff and the Class