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Attorneys for Plaintiff LUIS HERNANDEZ

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

FLORENTINO LOPEZ, individually, and on behalf of all others similarly situated,

Plaintiff,

vs.

UTILITY TREE SERVICE, LLC, a Pennsylvania Limited Liability Company; and DOES 1 through 10, inclusive,

Defendant.

LUIS HERNANDEZ, individually, and on behalf of all others similarly

Case No.: 3:22-cv-01404-JES-DDL

PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR AN AWARD OF ATTORNEYS' FEES AND COSTS, AND ENHANCEMENT AWARDS TO PLAINTIFFS; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Date: May 22, 2024
Time: 9:00 a.m.
Action Filed: September 15, 2022

Hon. James E. Simmons, Jr.
Courtroom 4(B), 4th Floor
United States Courthouse
221 West Broadway

situated,

Plaintiff,

vs.

UTILITY TREE SERVICE, LLC, a Pennsylvania Limited Liability Company; and DOES 1 through 10, inclusive,

Defendant.

San Diego, California 92101

TO THE COURT, TO ALL PARTIES AND TO THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on May 22, 2024, at 9:00 a.m., in Courtroom 4(B) of the United States District Court for the Southern District of California, located at 221 West Broadway, San Diego, California 92101, Plaintiffs Florentino Lopez and Luis Hernandez ("Plaintiffs") will and hereby do move the Court for an order awarding attorneys' fees to Class Counsel, costs to Class Counsel, and Class Representative Enhancement Payments to Plaintiffs. Specifically, Plaintiff moves for an order:

1. Awarding fees in the amount of $288,333.33 to Class Counsel;
2. Awarding costs in the amount of $17,387.50 to Class Counsel ($12,342.69 to Moon Law Group, PC and $5,044.81 to Wilshire Law Firm, PLC); and,
3. Awarding Class Representative Enhancements Payments of $5,000.00 to each Plaintiff (for a total award of $10,000.00).

Plaintiffs' Motion is based on this Notice, the following Memorandum of Points and Authorities, the declaration of counsel submitted herewith, the declarations of Plaintiffs, all other pleadings and papers on file in this action, and any oral argument or other matter that may be considered by the Court.

As this Motion, and the relief sough, is consistent with the provisions of the JOINT STIPULATION OF CLASS ACTION AND PAGA SETTLEMENT AND RELEASE, it is not opposed.

Respectfully submitted,

Dated: April 19, 2024

MOON LAW GROUP, PC

By: /s/ Allen Feghali
Kane Moon
Allen Feghali
Christopher Garcia

Attorneys for Plaintiff Florentino Lopez

Dated: April 19, 2024

WILSHIRE LAW FIRM, PLC

By: /s/ Justin F. Marquez
Justin F. Marquez
Benjamin H. Haber
Daniel J. Kramer

Attorneys for Plaintiff Luis Hernandez

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL DECISIONAL AUTHORITY

CALIFORNIA DECISIONAL AUTHORITY

TREATISES

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This is a putative wage and hour class and representative action on behalf of non-exempt employees employed by Defendant Utility Tree Service, LLC ("Defendant") at any time from July February 15, 2020 through January 22, 2024. The core issues in the case were based on allegations by named Plaintiffs Fernando Lopez and Luiz Hernandez ("Plaintiffs") that Defendant did not pay all wages owed, did not provide legally compliant meal periods and rest breaks, did not reimburse employees for business expenses, did not compensate employees for all time worked, and, as a result, wage statements provided to employees were rendered inaccurate, final wages were not timely paid, and the conduct violated the California Private Attorneys General Act of 2004 ("PAGA") and the Unfair Competition Law ("UCL"). Defendant disputes these claims.

The case was thoroughly investigated by all Parties. Following the production of policy documents, time records, and pay data, and vigorous negotiation at mediation, Plaintiffs and Defendant (Plaintiffs and Defendant collectively referred to herein as the "Parties") reached a proposed class action settlement valued at $850,000.00 for the 996 members of the putative class. The Court granted preliminary approval. *See*, Dkt. No. 48.

Through this Motion, and in conjunction with the Motion for Final Approval of Class Action Settlement concurrently filed herewith, Plaintiffs request an order awarding attorneys' fees to Class Counsel, costs to Class Counsel, and Class Representative Enhancement Payments to Plaintiffs. The fee award sought by this Motion is within the range of reasonableness. The costs requested are only those costs that were reasonable and necessary to successfully resolve this matter. The results obtained and the work performed by Plaintiffs justify the requested Service Payments.

II. SUMMARY OF SETTLEMENT TERMS

The full terms of the settlement are set forth in the Joint Stipulation of Class Action and PAGA Settlement and Release ("Settlement"). A true and correct copy of the

Settlement is attached to the Declaration of Kane Moon[1] ("Moon Decl."), as Exhibit 1. The primary material terms of the Settlement are as follows:

(a) Action: The "Action" means *Florentino Lopez v. Utility Tree Service, LLC*, United States District Court Southern District of California Case No. 22-cv-1404-RSH-DDL (originally filed on August 1, 2022 in the Superior Court of California, County of San Diego Case No. 37-2022-00030456 and removed to federal court on September 15, 2022). *See*, Settlement, ¶ 1.

(b) Class or Class Members: All persons who worked for Defendant in California as an hourly-paid, non-exempt employees at any time from February 15, 2020 to January 22, 2024 (the "Class Period"). Excluded from the Settlement Class are all persons who properly and timely elect to opt out. *See,* Settlement, ¶ 5.

(c) Class Counsel: "Class Counsel" means Moon Law Group, PC and Wilshire Law Firm, PLC. *Id.* at ¶ 2.

(d) Gross Settlement Amount: The non-reversionary Gross Settlement Amount is $850,000.00 and excludes Defendant's employer's taxes. This amount includes the Net Settlement Amount, the Class Representative Enhancement Payments to Plaintiffs, the PAGA Settlement Amount, Settlement Administration Costs to the Settlement Administrator, and Class Counsel's Award. *Id.* at ¶ 13.

(e) Net Settlement Amount: The Net Settlement Amount is the portion of the Gross Settlement Amount remaining after deduction of the approved Class Representative Enhancement Payments, Settlement Administration Costs, the Labor and Workforce Development

[1] Declaration of Kane Moon in Support of Plaintiffs' Motions For (1) Final Approval of Class Action Settlement And (2) Award for Attorneys' Fees and Costs, And Service Awards to Plaintiffs.

Agency's ("LWDA") portion of the PAGA Settlement Amount, and Class Counsel Award. *Id.* at ¶ 15. The Net Settlement Amount is estimated to be $491,666.67, resulting in an average net payment per Class Member of $493.64, with the estimated highest settlement payment of $994.67. *See*, Moon Decl., ¶ 35.

(f) Settlement Administrator: "Settlement Administrator" means Simpluris, Inc. ("Simpluris"). *See*, Settlement, ¶ 28. Settlement Administration Costs are estimated not to exceed $15,000.00. *Id*. at ¶ 29.

(g) PAGA Settlement Amount: From the Gross Settlement Amount, $25,000.00 ("PAGA Settlement Amount") will be allocated toward penalties under PAGA. *Id*. at ¶ 18. Seventy-five percent (75%) of the PAGA Settlement Amount, or $18,750.00, will be paid to the LWDA, and twenty-five percent (25%), or $6,250.00, will be distributed to Class Members on a pro rata basis based on the number of workweeks each Class Member worked during the PAGA limitations period from February 15, 2020 to January 22, 2024. *Id*. at ¶ 38(a).

(h) Enhancement/Service Awards to Plaintiffs: Defendant will not oppose the application for Class Representative Enhancement Payments of up to $5,000.00 for each Plaintiff, for a total of $10,000.00, in recognition of their effort and work in prosecuting the Action on behalf of Class Members. *Id.* at ¶ 7.

(i) Class Counsel's Award: Defendant will not oppose Class Counsel's application for fees not to exceed 33 1/3% of the Gross Settlement Amount ($283,333.33), and actual costs, in an amount not to exceed $25,000.00 (together, "Class Counsel's Award" or "Attorneys' Fees and Costs"). *Id.* at ¶ 3. Currently, Class Counsel's costs total $17,387.50 Moon Law Group, PC's costs are $12,342.69 and Wilshire

Law Firm PLC's costs are $5,044.81. *See*, Moon Decl., ¶ 18, Ex. 4 and Declaration of Justin F. Marquez ("Marquez Decl."), ¶ 23.

III. BACKGROUND

A. Plaintiffs' Claims

Because of Defendant's alleged violations of various provisions of the Labor Code, Plaintiff Florentino Lopez filed a complaint on August 1, 2022, in the Superior Court of California, County of San Diego, Case No. 37-2022-00030456 and was removed to federal court on September 15, 2022 (the "Lopez Matter" or the "Action"), which, in its amended form and in addition to Mr. Lopez's individual FEHA-related claims, alleges that Defendant: (5) Failed to Pay Minimum Wages [Cal. Lab. Code §§ 204, 1194, 1194.2, and 1197]; (6) Failed to Pay Overtime Compensation [Cal. Lab. Code §§ 1194 and 1198]; (7) Failed to Provide Meal Periods [Cal. Lab. Code §§ 226.7 and 512]; (8) Failed to Authorize and Permit Rest Breaks [Cal. Lab. Code § 226.7]; (9) Failed to Indemnify Necessary Business Expenses [Cal. Lab. Code § 2802]; (10) Failed to Timely Pay Final Wages at Termination [Cal. Lab. Code §§ 201-203]; (11) Failed to Provide Accurate Itemized Wage Statements [Cal. Lab. Code § 226]; (12) Engaged in Unfair Business Practices [Cal. Bus. & Prof. Code §§ 17200, et seq.]; and (13) Owes Civil Penalties Under PAGA [Cal. Lab. Code §§ 2698, et seq.]. Moon Decl., ¶ 7.

Separately, on December 22, 2022, Plaintiff Luis Hernandez filed a Class Action Complaint currently pending in the Central District of California, Case No. 2:22-cv-09283-JFW-KS ("Hernandez Matter"). *Id.* at ¶ 8. The Hernandez Matter stated class claims which overlapped with the claims set forth in the Lopez Matter. *Id.*

The Parties in the Hernandez Matter and Lopez Matter engaged in a global mediation, which resulted in a settlement. As part of the settlement, the Parties in both matters agreed to file an amended complaint in the Lopez Matter whereby Hernandez would be added as a plaintiff, and Hernandez's counsel would be added as putative class counsel for purposes of seeking approval in a single venue. *Id.* at ¶ 9. Pursuant to this Court's September 29, 2023 order, Plaintiffs' Third Amended Class Action Complaint was deemed filed in this Action for purposes of seeking approval in a single forum and under a single case number. *Id.*

B. <u>Pre-Mediation Data Production and Analysis</u>

The Parties have conducted significant investigation of the facts and law during the prosecution of this litigation. *See*, Moon Decl., ¶¶ 11, 12. Such investigation has included informal written discovery; the pre-mediation exchange of information and voluminous data; and, numerous communications between the Parties. *Id*. The Parties have further investigated the applicable law as applied to the alleged claims of Plaintiffs and potential defenses thereto, and the damages claimed by Plaintiffs. *Id*.

After reviewing documents regarding Defendant's wage and hour policies and practices and other information obtained during the informal exchange of discovery, Class Counsel were able to evaluate the probability of class certification, success on the merits, and the reasonably obtainable maximum monetary exposure for all claims. Class Counsel reviewed these records and prepared a damage analysis prior to mediation. Class Counsel also investigated the applicable law regarding the claims and defenses asserted in the litigation. *See*, Moon Decl., ¶ 11.

C. <u>Settlement Negotiations</u>

On April 26, 2023, the Parties participated in a full-day mediation presided over by professional, neutral mediator, Lisa Klerman, Esq. *See*, Moon Decl., ¶ 13. At the mediation, the Parties discussed at length the burdens and risks of continuing with the litigation as well as the merits of the claims and defenses. *Id*. The Parties met and conferred extensively over the detailed terms of the settlement agreement. *Id*. at ¶ 14. Several drafts and revisions were circulated, and on September 29, 2023, the Parties executed the long form settlement agreement. *Id*.

This Settlement was a product of non-collusive, arm's-length negotiations. Moreover, Plaintiffs and Class Counsel are aware of the burdens of proof necessary to establish liability for the claims asserted in the Action, both generally and in response to Defendant's defenses thereto. *See*, Moon Decl., ¶¶ 24-25. Plaintiffs and Class Counsel have also taken into account that the Settlement confers substantial relief upon the Class and is in the best interest of the Class considering the risks and uncertainties involved in litigation. *Id*. at ¶¶ 36-37. Based on the foregoing, Plaintiffs and Class Counsel have determined that the Settlement set forth in this Agreement is a fair, adequate, and reasonable Settlement and is in the best interests of the Class. *Id*. at ¶¶ 24-25.

IV. <u>DISCUSSION</u>

A. <u>The Legal Standard for Attorneys' Fee Awards</u>

In a class action settlement, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement. *See*, Fed. R. Civ. P. 23(h). Courts have the power to award reasonable attorney's fees and costs where, as here, a litigant proceeding in a representative capacity secures a "substantial benefit" for a class of persons. *See e.g., Hendricks v. Starkist Co*, No. 13-cv-00729-HSG, 2016 WL 5462423, *10 (N.D. Cal. Sept. 29, 2016); *Staton v. Boeing Co.*, 327 F.3d 938, 967 (9th Cir. 2003). The two methods for determining reasonable fees in the class action settlement context are the "percentage of recovery" method and the "lodestar method." *See, Parkinson v. Hyundai Motor Am.*, 796 F.Supp.2d 1160, 1170 (C.D. Cal. 2010); *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1029 (9th Cir. 1998).

When a district court exercises diversity jurisdiction over a case consisting of exclusively California claims, as here, California substantive law applies to the calculation of the attorney's fee award. *See, Mangold v. Cal. Pub. Utils. Comm'n*, 67 F.3d 1470, 1478-1479 (9th Cir. 1995) (finding state law to be applicable in "in determining not only the right to fees, but also the method of calculating the fees."); *see also, Rodriguez v. Disner*, 688 F.3d 645, 653 fn. 6 (9th Cir. 2012) ("If … we were exercising our diversity jurisdiction, state law would control whether an attorney is entitled to fees and the method of calculating such fees"); *Gonzalez v. Southern Wine & Spirits of Am., Inc.*, 555 Fed.Appx. 704, 704-705 (9th Cir. 2014) (finding district court abused its discretion in applying federal law instead of California substantive law to the calculation of attorneys' fees, holding that, because the court exercised diversity jurisdiction, California substantive law should have been applied).

California and the Ninth Circuit, and all federal courts, for that matter, use similar criteria to assess a fee request attendant to a motion for final approval, including: (i) the results achieved on behalf of the class; (ii) class counsel's experience, reputation and ability; (iii) the time and labor required by the litigation; (iv) whether class counsel was precluded from other work; (v) the complexity of the litigation; and (vii) the contingent nature of the litigation. *See Serrano v. Priest*, 20 Cal. 3d 25, 49 (1977); *accord Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1048-50 (9th Cir. 2002) (identifying similar criteria); *see also* Herr, MANUAL FOR COMPLEX LITIGATION, FOURTH, § 21.71 at 524-27 (2008) (survey of federal criteria similar to California criteria).

B. <u>The Fee Award Is Reasonable and Should Receive Final Approval</u>

1. A Reasonable Result Was Achieved on Behalf of the Class

The benefit achieved on behalf of class members defines a primary yardstick against which any fee motion is measured. *See Serrano*, 20 Cal. 3d at 49; *accord Vizcaino*, 290 F.3d at 1048. One of the most straightforward measures of a settlement's success from the Plaintiff's perspective is the average amount available to each class member from the settlement fund. For the 996 members of the Class, the average individual settlement payment is approximately $493.64 and the estimated highest settlement payment is $994.67. *See*, Moon Decl., ¶ 35. Given the risks identified at Preliminary Approval, this result is commendable.

How class members respond to a class action settlement is typically addressed in concert with courts' assessments of a settlement's overall benefit to class members. *See generally*, *Vizcaino*, *supra*. State and federal courts alike take the measure of a settlement's "fairness" with reference to the class members' reaction, and specifically the extent to which class members object, and through their objections imply a settlement's unfairness. *See, e.g.*, *7-Eleven Owners for Fair Franchising v. Southland Corp.*, 85 Cal.

App. 4th 1135, 1152-53 (2000) (only nine objectors from a class of 5454 was an "overwhelmingly positive" fact that supported approval of the settlement); *Reynolds v. National Football League*, 584 F.2d 280 (8th Cir. 1978) (16 objectors out of 5400 strongest evidence of no dissatisfaction with settlement among class members); *American Eagle Ins. Co. v. King Resources Co.*, 556 F.2d 471, 478 (10th Cir. 1977) (only one objector "of striking significance and import"). The Motion for Final Approval will address Class Member satisfaction with the Settlement.

2. The Experience, Reputation, and Ability of Class Counsel

California law also recognizes the "skill and experience of attorneys" as appropriate criteria for evaluating a fee motion. *Flannery v. California Highway Patrol*, 61 Cal. App. 4th 629, 647 (1995); *accord In re Rent-Way Sec. Litig.*, 305 F. Supp. 2d 491 (W.D. Pa. 2003) ("skill and efficiency of counsel" among fee motion criteria); *In re Heritage Bond Litig.*, 2005 U.S Dist. LEXIS 13555 at *64 (C.D. Cal. June 10, 2005) (Considering "the quality of Class Counsel's effort, experience and skill"). Class Counsel has had substantial experience with the causes of action here and has regularly litigated wage and hour class actions. *See*, Moon Decl., at ¶¶ 40-47.

3. The Effort Required by the Litigation Justifies the Fee

California and federal law also look to the time and labor required in connection with the litigation and settlement of a class action for which final approval is sought. *See Serrano*, 20 Cal. 3d at 49, *accord Vizcaino*, 290 F.3d at 1048-50. Compared to the reasonable value of the claims, Class Counsel expended substantial effort to achieve the settlement result. *See*, Moon Decl. ¶¶ 11-12, 60. The "time and labor" criterion weighs in favor of an award of the requested fees.

4. Class Counsel Was Precluded from Other Employment

Another of the criteria for the evaluation of a preliminarily approved fee request is whether the settled litigation resulted in Class Counsel's foregoing other employment. *Serrano*, 20 Cal. 3d at 49; *accord In re Public Serv. Co.*, 1992 U.S. Dist. LEXIS 16326 at *9 (S. D. Cal. July 28, 1992) (the opportunity cost of being precluded from representing other clients in other cases "weighs in favor of an award of one-third of the common fund"). Here, Class Counsel was precluded from other employment, a factor supporting the fee. *See*, Moon Decl., ¶ 61.

5. The Complexity of the Legal and Factual Issues

California law recognizes that the litigation's general complexity and "difficulty of the questions involved, and the skill in presenting them" are properly considered. *Serrano*, 30 Cal. 3d at 49, *accord Wershba v. Apple Computer*, 91 Cal. App. 4th 224, 245 (2001). Complexity of legal issues was moderate here, though the fee is reasonable, rendering this factor irrelevant.

6. Class Counsel Assumed Substantial Risk

The novelty and challenges presented by a class action, as well as the corresponding risk that the class members and class counsel will be paid no recovery or fee, is properly evaluated in connection with a fee motion. *See Serrano*, 20 Cal. 3d at 49; *accord Vizcaino*, 290 F.3d at 1050-51 (multiplier applied to lodestar cross-check reflects risk of non-recovery).

Ninth Circuit and California state courts regard circumstances in which class counsel's work is wholly contingent as a factor weighing in favor of approving a negotiated fee award that approximates market rates. *Ketchum v. Moses*, 24 Cal. 4th 1122, 1132-33 (2001). Here, Class Counsel's outlay of time and money in this case has been significant. In total, Moon Law Group, PC has spent approximately 221.1 hours and Wilshire Law Firm, PLC has spent approximately 138 hours investigating, analyzing, researching, litigating, and negotiating a favorable resolution of this case, and Moon Law Group, PC has incurred $12,342.69 and Wilshire Law Firm has incurred $5,044.81 in necessary litigation expenses. *See*, Moon Decl., ¶¶ 48, 57 and Marquez Decl. ¶ 23. The possibility of no recovery is only one of the uncertainties involved in taking on such a case. Other uncertainties are the amount that will be recovered, uncertainty as to the cost, both in effort and expenses, and uncertainty about how much time will pass before the recovery is obtained. *See e.g., Ketchum*, 24 Ca1.4th at 1132-1133, 1138.

Unsettled legal issues also presented risks to the claims in this case. Additional risks associated with this matter include:

- the risk that Plaintiff would be unable to establish liability for allegedly unpaid straight time or overtime wages, *see, e.g., Duran v. US Bank Nat'l Ass'n*, 59 Cal. 4th 1, 39 & fn. 33 (2014) ("*Duran*"), *citing Dilts v. Penske Logistics, LLC* 2014 WL 205039 (S.D. Cal. 2014) (dismissing certified off-the-clock claims based on proof at trial);
- the risk that Defendant's challenged employment policies might not ultimately support class certification or a class-wide liability finding, *see*, *Duran*, 59 Cal. 4th at 14 & fn. 28 *(*citing Court of Appeal decisions favorable on class certification issue without expressing opinion as to ultimate viability of proposition);
- the risk that uncertainties pertaining to the ultimate legality of Defendant's policies and practices could preclude class-wide awards of statutory penalties under Labor Code §§ 203 and 226(e);
- the risk that individual differences between Settlement Class Members could be construed as pertaining to liability, and not solely to damages, *see*, *Duran*, 59 Cal. 4th at 19;
- the risk that class treatment could be deemed improper as to one or more claims except for settlement purposes;
- the risk that lengthy appellate litigation could ensue; and,
- the substantial risk that differences in the work experiences of employees assigned to different locations would make both certification and proof of liability prohibitively unlikely.

These risks are non-exhaustive. (Moon Decl., ¶ 26.)

Class Counsel bore the substantial risk of an uncertain outcome in agreeing to prosecute this class action case on a contingency fee basis, as well as the difficulties and delay inherent in such litigation. There was the prospect of the enormous cost inherent in class action litigation, as well as extensive negotiations with a corporate defendant who vigorously opposed Plaintiffs' claims and resisted settlement from the outset. Class Counsel risked significant time and expense to ensure the successful settlement. As detailed above, the risks presented in this case were significant, and Defendant's defenses posed serious risks to the success of this matter on the merits. *See*, Moon Decl., ¶ 65. Class Counsel nevertheless faced that risk and a reasonable result was obtained.

7. The Fee is Reasonable Under the Common Fund Doctrine

Courts in the Ninth Circuit and California generally use the "percentage method" rather than the lodestar approach when awarding fees in a common fund settlement. *See* 7 Witkin, B.E., CALIFORNIA PROCEDURE (2007 Supp.) §§ 255-261 at 236-241 (describing prevalence of percentage method under California law); *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980) ("[A] litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole"); *In re Activision Sec. Litig.*, 723 F. Supp. 1373, 1377-78 (N.D. Cal. 1989) (Patel, J.) (endorsing percentage method). *See generally*, *Serrano*, 20 Cal. 3d at 25; *accord Hanlon v. Chrysler Corp.*, 150 F.3d 1011 (9th Cir. 1998).

In endorsing the use of the percentage method of awarding attorney's fees where a class action suit results in a common fund, the California Supreme Court noted the method's relative ease of calculation, alignment of incentives between counsel and the class, a better approximation of market conditions in a contingency case, and the encouragement it provides counsel to seek an early settlement and avoid unnecessarily prolonging the litigation. *See*, *Laffitte v. Robert Half International, Inc.*, 1 Cal.5th 480, 503 (2016) (approving attorney's fee award in wage and hour case in the amount of one-third of gross settlement).

Courts within the Ninth Circuit also generally prefer the percentage approach to other methods for awarding attorney's fees, such as a lodestar calculation. *See*, Thomas E. Willing, Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules 4, 71 (1996) (noting that the Northern District of

California has determined fees by percentage of recovery 6:1 over the lodestar approach); *see also, e.g.*, *Vizcaino*, 290 F.3d at 1047 (approving the percentage method for determining fees in a common-fund case); *Vasquez v. Coast Valley Roofing, Inc.*, 266 F.R.D. 482, 491 (E.D. Cal. 2010) ("a percentage of the common fund [to assess fees] is particularly appropriate when each member of a certified class has an undisputed and mathematically ascertainable claim"). The percentage-of-the-fund method is appropriate where the amount of the settlement is fixed without any reversionary payment to the defendant – as it is here. *See*, *Thieriot v. Celtic Ins. Co.*, No. C 10-04462 LB, 2011 U.S. Dist. LEXIS 44852, at *15 (N.D. Cal. Apr. 21, 2011) (citing *Chu v. Wells Fargo Investments, LLC*, Nos. C 05-4526 MHP, C 06-7924 MHP, 2011 U.S. Dist. LEXIS 15821, 2011 WL 672645, at *4 (N.D. Cal. Feb. 16, 2011)).

a) The standard fee award in class actions has, over time, resolved itself as one-third of the recovery in common fund cases.

According to a leading treatise on class actions, "No general rule can be articulated on what is a reasonable percentage of a common fund. Usually 50% of the fund is the upper limit on a reasonable fee award from a common fund in order to assure that the fees do not consume a disproportionate part of the recovery obtained for the class, although somewhat larger percentages are not unprecedented." *See* Conte & Newberg, Newberg on Class Actions (3rd Ed.) § 14.03. Attorneys' fees that are fifty percent of the fund are typically considered the upper limit, with ***thirty to forty percent commonly awarded in cases where the settlement is relatively small***. *See id.*; *see also, Van Vranken v. Atlantic Richfield Company*, 901 F. Supp. 294 (N.D. Cal. 1995) (stating that most cases where 30-50 percent was awarded involved "smaller" settlement funds of under $10 million).

The proposed one-third fee award is consistent with the average fee award in class actions. The Ninth Circuit has directed that, to determine what constitutes a fair and reasonable percentage of the settlement for purposes of calculating common fund attorneys' fees, the courts should use a "benchmark" percentage of 25% of the total fund. *Paul, Johnson, Alston & Hunt v. Graulty*, 886 F.2d 268, 272 (9th Cir. 1989); *Vizcaino*, 290

F.3d at 1047; *Six Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir. 1990). The percentage can be adjusted upwards where the benefits obtained, risks undertaken by counsel, and the work necessary to achieve those results support such an adjustment of the benchmark. *See*, *Bergman v. Thelen LLP*, No. 3:08-cv-05322-LB, 2016 U.S.Dist.LEXIS 170861, at *21 (N.D. Cal. Dec. 9, 2016) (citing *Morales v. Stevco, Inc.*, 2013 U.S. Dist. LEXIS 41799, 2013 WL 1222058, *2 (E.D. Cal. Mar. 25, 2013).

In fact, while the Ninth Circuit identified twenty-five percent as a fee percentage that is presumptively reasonable, the custom and practice in class actions is to award approximately one-third of a fund as a fee award. *See Chavez v. Netflix, Inc.*, 162 Cal. App. 4th 43, 66, n.11 (2008) ("Empirical studies show that, regardless whether the percentage method or the lodestar method is used, fee awards in class actions average around ***one-third*** of the recovery.") (emphasis added); *Morris v. Lifescan, Inc.*, 54 F.App'x 663, 664 (9th Cir. 2003) (affirming 33% fee award); *In re Pacific Enterprises Sec. Litig.*, 47 F.3d 373, 379 (9th Cir. 1995) (same); *See, e.g.*, *Romero v. Producers Dairy Foods, Inc.*, No. 1:05cv0484 DLB, 2007 WL 3492841, *4 (E.D. Cal. 2007) (in wage and hour action, court stating: "fee awards in class actions average around one-third of the recovery" and awarding fees in that amount); *See, e.g., Zamora v. Lyft, Inc.*, No. 3:16-cv-02558-VC, 2018 WL 4657308, at * 3 (N.D. Cal. Sept. 26, 2018) (one-third award is "consistent with the Ninth Circuit authority and the practice in this District.").

b) Plaintiffs seek one-third of the Settlement Fund in fees.

The compensation sought for Class Counsel is also fair and reasonable. Here, the Gross Settlement Amount obtained through the efforts of Class Counsel is $850,000.00. *See*, Moon Decl., ¶ 17. Class Counsel has agreed to request no more than **$283,333.33**[2] in fees from the Gross Settlement Amount, or one-third of the Gross Settlement Amount. Compared to a lodestar based on contemporaneously recorded and reasonably expended

[2]Moon Law Group, PC and Wilshire Law Firm, PLC have agreed to split the attorney's fees with 75% ($212,500.00) to Moon Law Group, PC and 25% to Wilshire Law Firm, PLC ($70,833.33). Moon Decl., ¶ 39 n.4. Plaintiffs have approved this fee splitting agreement. *Id.*

hours amounting to approximately **$175,887.50** for Moon Law Group, PC and **$122,432.00** for Wilshire Law Firm, PLC, the total compensation to Class Counsel is consistent with their recorded lodestar. Moon Decl., ¶ 48 and Marquez Decl., ¶ 15. The multiplier necessary to reach the total requested compensation for Moon Law Group, PC is approximately 1.2, and a negative multiplier is required for Wilshire Law Firm, PLC. *See*, Moon Decl., ¶ 55 and Marquez Decl., ¶ 15.

But perhaps most importantly, the proposed attorneys' fees were disclosed to the Class Members in the Notice issued to Class Members. *See*, Moon Decl., Exhibit 1-A.

8. A Lodestar Analysis Supports the Requested Fee

Despite the widely recognized limitations of the so-called "lodestar" method, California and federal courts recognize the utility of a lodestar "cross-check." *Lealao v. Beneficial California, Inc.*, 82 Cal. App. 4th 19, 46 (2000). A lodestar "cross-check" analysis typically happens in three steps. *Cundiff v. Verizon California*, 167 Cal. App. 4th 718 (2008), *accord Vizcaino*, 290 F.3d at 1047. First, a trial court must determine a baseline guide or "lodestar" figure based on the time spent and reasonable hourly compensation for each attorney involved in the case. *Serrano*, at 48. Second, the court sets a reasonable hourly fee to apply to the time expended, with reference to the prevailing rates in the geographical area in which the action is pending. *Bihun v. AT&T Information System*, 13 Cal. App. 4th 976, 997 (1993) (16 years ago, affirming a $450 per hour rate for a Southern California litigation attorney). Finally, a "multiplier" of the base lodestar is set with reference to the factors described in detail in this brief. Across all jurisdictions, multipliers of up to four are frequently awarded. NEWBERG, §14.03 at 14. Often, multipliers of greater than four are warranted.

Here, the lodestar for Moon Law Group, PC is **$175,887.50** and for Wilshire Law Firm, PLC is **$122,435.00**, as supported by the declaration of counsel. *See*, Moon Decl., ¶ 48 and Marquez Decl., ¶ 15. These lodestar figures require a multiplier of approximately 1.2 and a negative multiplier, respectively, to align them with the requested fee. Accordingly, the lodestar cross-check affirms that the fee award that has been preliminarily approved does in fact fall within the range of reasonableness.

While the lodestar of Class Counsel justifies the fee requested, Courts have nevertheless expressed frustration with the lodestar approach for deciding fee awards, which usually involves wading through voluminous and often indecipherable time records. Commenting on the lodestar approach, Judge Marilyn Hall Patel wrote in *In re Activision Securities Litigation*, 723 F. Supp. 1373, 1375 (N.D. Cal 1989):

> This court is compelled to ask, "Is this process necessary?" Under a cost-benefit analysis, the answer would be a resounding, "No!" Not only do the Lindy Kerr-Johnson analyses consume an undue amount of court time with little resulting advantage to anyone, but in fact, it may be to the detriment of the class members. They are forced to wait until the court has done a thorough, conscientious analysis of the attorneys' fee petition. Or, class members may suffer a further diminution of their fund when a special master is retained and paid from the fund. Most important, however, is the effect the process has on the litigation and the timing of settlement. Where attorneys must depend on a lodestar approach, there is little incentive to arrive at an early settlement.

The Ninth Circuit has similarly recognized that the lodestar method "creates incentives for counsel to spend more hours than may be necessary on litigating a case so as to recover a reasonable fee, since the lodestar method does not reward early settlement." *Vizcaino*, 290 F.3d at 1050, n.5. As a corollary, a defendant willing to recognize a potential error and settle at an early stage would face the increased risk that an early settlement overture would be rejected. That did not happen here, in part because a percentage of the fund award encourages efficient litigation. The Ninth Circuit has cautioned that, while a lodestar can be used as a cross check on the reasonableness of fees based on a percentage of recovery method if a district court in its discretion chooses to do so, a lodestar calculation is not required and it did "not mean to imply that class counsel should necessarily receive a lesser fee for settling a case quickly." *Id*.

The percentage of recovery method "rests on the presumption that persons who obtain benefits of a lawsuit without contributing to its cost are unjustly enriched at the successful litigant's expense." *Staton*, 327 F.3d 938, 967 (9th Cir. 2003). This rule, known as the "common fund doctrine," is designed to prevent unjust enrichment by distributing the costs of litigation among those who benefit from the efforts of others. *Paul, Johnson, Alston & Hunt v. Graulty*, 886 F.2d 268, 271 (9th Cir. 1989).

It is only fair that every class member who benefits from the opportunity to obtain a share of the settlement pay his or her pro rata share of attorney's fees, and Plaintiffs' request for fees here means that Class Counsel seek an amount of fees less than the amount Class Counsel would likely receive if they represented each class member individually. Typical contingent fee contracts of plaintiffs' counsel provide for attorney's fees of 40% or more of any recovery obtained for a client. It would be unfair to compensate Class Counsel here at a substantially lower rate because they obtained relief for close to 1,000 Class Members. To the contrary, equitable considerations dictate that Class Counsel be rewarded for achieving a settlement that confers benefits among so many people, especially without protracted litigation. The result achieved by Class Counsel merits an award of attorney's fees equal to one third of the total recovered in this case.

9. Important Public Policies Are Advanced by Awarding Reasonable Fees to Skilled Class Counsel

Wage and hours laws "concern not only the health and welfare of the workers themselves, but also the public health and general welfare." *California Grape Etc. League v. Industrial Welfare Com.*, 268 Cal. App. 2d 692, 703 (1969). California's overtime laws "are to be construed so as to promote employee protection." *Sav-On Drug Stores, Inc. v. Superior Court*, 34 Cal. 4th 319, 340 (2004) (*citing Ramirez v. Yosemite Water, Inc.*, 20 Cal. 4th 785, 794 (1999)). Courts have also long acknowledged the importance of class actions as a means to prevent a failure of justice in our judicial system. *Linder v. Thrifty Oil Co.*, 23 Cal. 4th 429, 434-435 (2000) (citing *Daar v. Yellow Cab Co.*, 67 Cal. 2d 695, 703-704 (1967)). As a practical matter, therefore, privately initiated class actions are the primary mechanism for enforcement of California's labor code protections.

C. The Cost Reimbursement Requested Is Reasonable and Should Receive Final Approval

Class action counsel are entitled to a cost reimbursement. *Serrano*, 20 Cal. 3d at 25; *Lealao*, 82 Cal. App 4th at 48. Here, Class Counsel has agreed not seek an amount greater than $25,000.00 for litigation costs. The total amount requested **$17,387.50**, $,12,342.60 for Moon Law Group, PC and $5,044.81 for Wilshire Law Firm, PLC, is well below that cap. *See*, Moon Decl., ¶ 19, Exhibit 4 and Marquez Decl., ¶ 23.

D. The Requested Service Awards Are Reasonable and Should Receive Final Approval

Enhancement awards serve to reward the named plaintiff for the time and effort expended on behalf of the class, and for exposing herself to the significant risks of litigation. "Courts routinely approve incentive awards to compensate named plaintiffs for the services they provided and the risks they incurred during the course of the class action litigation." *Ingram v. The Coca-Cola Co*., 200 F.R.D. 685, 694 (N.D. Ga. 2001); *In re Southern Ohio Correctional Facility*, 175 F.R.D. 270, 272 (S.D. Ohio 1997). In *Coca-Cola*, for example, the court approved incentive awards of $300,000 to each named plaintiff in recognition of the services they provided to the class by responding to discovery, participating in the mediation process and taking the risk of stepping forward on behalf of the class. *Coca-Cola*, 200 F.R.D. at 694; *see also Van Vranken v. Atl. Richfield Co*., 901 F. Supp. 294, 300 (N.D. Cal. 1995) (approving $50,000 award).

Here, Plaintiffs' counsel requests that the Court grant Plaintiffs service awards of $5,000.00 each. The amount of the enhancement awards is reasonable given the risks undertaken by Plaintiffs. Taking the risk of filing a lawsuit against an employer deserves reward. Additionally, Plaintiffs were actively involved in the litigation and settlement negotiations of this Action, including assisting Counsel to prepare for the mediation in this matter. Plaintiffs worked diligently with counsel to prepare the action and conferred with counsel regarding settlement negotiations. *See*, Moon Decl., ¶¶ 65-68.

The amounts of these service awards are fair when compared to the payments approved in similar cases by this Court and others in California. *See, Van Vranken v. Atlantic Richfield*, 901 F. Supp. 294, 300 (N.D. Cal. 1995) (holding that incentive awards of $50,000 to each named plaintiff was fair and reasonable); *Smith v. CRST Van Expedited, Inc.*, No. 10-CV-1116- IEG WMC, 2013 WL 163293, at *6 (S.D. Cal. Jan. 14, 2013) (holding that incentive awards of $15,000 for each of the three named representatives was "well within the range awarded in similar cases"); *Eddings v. Health Net, Inc.*, No. CV 10-1744-JST RZX, 2013 WL 3013867, at *7 (C.D. Cal. June 13, 2013) (approving the $6,000 service award to Plaintiff).

The requested service awards are also reasonable in light of the significant reputational risks Plaintiffs took by publicly affiliating themselves with litigation against their employer. Notwithstanding these risks, Plaintiffs have remained an active part of the litigation and saw it through to its outcome, while also agreeing to a broader release of all claims than the Class. This substantial sacrifice supports the service awards sought here. *See, Schaffer v. Litton Loan Servicing, LP*, No. CV 05-07673 MMM (JCx), 2012 WL 10274679, at *18 (C.D. Cal. Nov. 13, 2012); *Millan v. Cascade Water Services, Inc.*, No. 1:12-cv-01821-AWI-EPG, 2016 WL 3077710, at *12 (E.D. Cal. June 2, 2016) (reasoning that service awards "are particularly appropriate in wage-and-hour actions where plaintiffs undertake a significant 'reputational risk' by bringing suit against their present or former employers.").

Moreover, the Class Notice advised Class Members of the service awards. Therefore, the proposed service awards should be finally approved.

V. <u>CONCLUSION</u>

This settlement is fair and reasonable, especially given the claims and the potential defenses to them and to class certification. Thus, the $850,000.00 settlement is worthy of final approval. Further, because Plaintiffs' counsel were required to expend resources and take risks to obtain that result, fair compensation is also reasonable. For the reasons set forth herein, Plaintiffs requests that the Court award Plaintiffs' counsel $283,333.33 in fees, which is one-third of the Gross Settlement Amount and roughly 1.2 times the lodestar for Moon Law Group, PC and represents a negative multiplier for the lodestar for Wilshire Law Firm, PLC. Finally, Plaintiffs request an award of reasonable costs in the amount of $17,387.50. Finally, Plaintiffs request awards of $5,000.00 each as Class Representative Enhancement Payments for their efforts to bring this action and deliver a substantial settlement to the Class.

Respectfully submitted,

Dated: April 19, 2024 **MOON LAW GROUP, PC**

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