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6
7 **SUPERIOR COURT OF CALIFORNIA**
8 **IN AND FOR THE COUNTY OF SAN FRANCISCO**

9
10 GERARDO GUTIERREZ, individually, and
on behalf of all others similarly situated,

11 Plaintiff,

12 vs. FRAICHE CATERING, INC., a
13 California corporation, and DOES 1 through
50, inclusive,

14 Defendants.

CASE NO. CGC-23-605255

MEMORANDUM OF POINTS &
AUTHORITIES IN SUPPORT OF MOTION
FOR FINAL APPROVAL OF CLASS ACTION
SETTLEMENT, AND REQUEST FOR
ATTORNEY'S FEES AND COSTS

[Filed concurrently with Notice of Motion and
Motion; Declarations of J. Kirk Donnelly and
Nick Castro; [Proposed] Order]

Date: July 12, 2024

Time: 9:30 a.m.

Dept.: 302

1 **I. INTRODUCTION**

2 Plaintiff and Class Representative Gerardo Gutierrez seeks final approval of a non-
3 reversionary class action settlement resolving wage and hour claims on behalf of 204 individuals
4 who worked for Fraiche Catering, Inc. (“Fraiche” or “Defendant”) in certain defined job positions
5 during the period of March 20, 2019 to October 1, 2023.¹ The proposed \$175,000 total settlement
6 provides about \$94,667 in cash payments to the Class, with an average award of about \$466, plus
7 additional amounts payable under PAGA. The remaining balance will cover a modest service
8 award to Plaintiff, settlement administration costs, civil penalties to the state, and reasonable
9 attorney’s fees and costs. The parties and their counsel finalized the settlement after extensive and
10 difficult arms-length negotiations overseen by an experienced and highly-regarded mediator. The
11 Court conditionally certified the Class and preliminarily approved the settlement on April 5,
12 2024. Since then, the Court-approved notice form was mailed to the Class Members on May 22,
13 2024, and they reacted very favorably to the settlement. As of the filing of this motion, only one
14 Class Member requested exclusion, and there are no objections.

15 Class Counsel secured an excellent settlement with Fraiche after extensive
16 investigation, litigation, and settlement negotiation and administration, all without any
17 compensation for services rendered or costs expended. The class notice duly informed
18 the class members that Class Counsel would request attorney’s fees not to exceed one-
19 third of the Gross Settlement Amount, or \$58,333.33, along with reimbursement of no
20 more than \$9,000 for actual costs incurred litigating this matter. As of the filing of this
21 motion, *not one Class Member objected* to the proposed fee award. Consistent with the
22 Settlement and notice, Plaintiff now respectfully requests the Court award Class
23 Counsel’s fees in the amount of \$58,333.33 and costs in the amount of \$8,000, as
24 described in the Declaration of J. Kirk Donnelly (“Donnelly Decl.”) filed herewith. The
25 requested attorney’s fees are well within the range of reasonableness, especially
26 considering the complex and risky nature of this litigation, the contingent risk assumed,

27

¹ The initial class period end date changed from January 13, 2024 to October 1, 2023 because the Settlement
28 Agreement’s “Escalator Clause” was triggered and Defendant elected to shorten the Class Period rather than increase
 the Gross Settlement Amount under Paragraph 4.1 of the Settlement Agreement.

1 the nearly two-plus delay in payment and, when subjected to a lodestar crosscheck,
2 result in a base lodestar that is higher than the actual fee request.

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

6 **II. FACTUAL BACKGROUND AND PROCEDURAL POSTURE**

7 The details of the procedural and factual background of this matter were outlined in
8 the Plaintiffs' Motion for Preliminary Approval of Class Action Settlement (filed on or about
9 February 28, 2024). To re-familiarize the Court with this litigation, on March 20, 2023,
10 Plaintiff, on behalf of himself and all others similarly situated, filed a class action complaint
11 against Defendant for several alleged violations of the Labor Code and IWC Wage Orders.
12 Plaintiff filed his claims on behalf of a putative class of individuals who worked for Fraiche in
13 several job categories, including dishwasher, cook, lead cook, event
14 coordinator/specialist/producer, financial controller, marketing manager, bartender, server and/or
15 delivery. Defendant Fraiche provides high-end event catering services throughout the Bay Area,
16 and caters corporate events, weddings, anniversaries, private parties, etc., and also provides "do it
17 yourself" catering where Fraiche delivers the food but does not provide staff for the event. While
18 many of Fraiche's employees work full-time, many others such as the servers, bartenders and
19 drivers, are part-time, and work intermittently depending on the availability of work, how much
20 they wanted to work, etc. Their pay records suggest they worked as little as 4-5 hours in a pay
21 period up to 40-50 hours or more in a pay period. [Declaration of J. Kirk Donnelly ("Donnelly
22 Decl."), ¶ 2.]

23 Plaintiff Gerardo Gutierrez worked for Fraiche as a full-time cook and lead cook from
24 about 2015 to May 2020, when he moved out of state. He then returned to work for Fraiche in
25 February 2022 until September 2022, when he was seriously injured in a car accident and went
26 out on disability. He claims he was terminated in and around December 2022 when Fraiche
27 allegedly did not allow him to return to work after he recovered from his injuries. [Donnelly
28 Decl., ¶ 3.]

1 Plaintiff alleged that Fraiche failed to pay the class all wages due by (a) paying certain
2 individuals by “salary,” i.e. paying them a set amount per week regardless of hours worked,
3 thereby failing to pay for overtime hours worked, and (b) failing to include all forms of
4 compensation received in the employees’ “regular rate of pay” used for calculating the correct
5 overtime rate, which resulted in underpayment of overtime wages. Plaintiff also alleged Fraiche
6 failed to provide all required meal and rest breaks on a fully compliant basis. Based on
7 information obtained from Plaintiff and review of payroll and time records and other information
8 received from Fraiche, Plaintiff alleges numerous de facto violations where the class members’
9 meal breaks were late or lasted less than 30 minutes, and second meal periods were not provided
10 on shifts lasting longer than 10 hours. Further, class members never received an extra hour of
11 premium pay in lieu of a missed meal or rest break. Plaintiff next contends he and the class
12 members had to use their own personal phones for work purposes, such as receiving texts and
13 phone calls from supervisors, taking pictures of their work, navigating to catering jobs, etc., all
14 without any reimbursement from Fraiche. [Donnelly Decl., ¶ 4.]

15 Based on these allegations, Plaintiff’s class action complaint asserted claims for damages
16 for: (1) failure to pay all wages due, (2) failure to provide all required meal and rest breaks or
17 compensation in lieu thereof; (3) failure to reimburse business expenses; (4) failure to provide
18 accurate, itemized wage statements; (4) failure to pay all wages due upon termination of
19 employment; and (5) unfair competition. Plaintiff filed a First Amended Complaint on April 11,
20 2023 that added a claim for civil penalties under PAGA based on the same alleged violations.
21 The FAC is the operative complaint for purposes of settlement. [Donnelly Decl., ¶ 5.]

22 Fraiche has at all times denied Plaintiff’s allegations and maintained its meal and rest
23 break and payroll policies and procedures comply with California law, and that it provided the
24 class members with required meal and rest breaks. Fraiche also argued it accurately tracked and
25 paid for all hours worked by its employees, including overtime hours. Additionally, Fraiche
26 strongly contends the case cannot be maintained as any kind of class or representative action,
27 arguing that to the extent class members missed meal and/or rest breaks, that such breaks were
28 non-compliant, it would have been intermittent and infrequent and evidence of such missed

breaks or off the clock work would be purely anecdotal, and therefore individualized issues would predominate and trial would be unmanageable. [Donnelly Decl., ¶ 6.]

After Plaintiff filed his complaint, the Parties met and conferred on discovery, potential law and motion, and other case management issues, and ultimately agreed to attempt early mediation. The Parties then engaged in extensive informal discovery to facilitate an exchange of information necessary to engage in a meaningful mediation. The Parties then engaged Mark LeHocky, Esq., a highly respected mediator with extensive wage and hour class action experience and, on November 13, 2023, participated in a full day mediation with Mr. LeHocky and by the end of the day, after a mediator's proposal, the Parties were able to reach agreement on all major issues. [Donnelly Decl., ¶¶ 7-8.] The Court granted preliminary approval to the settlement on April 5, 2024.

Class Notices were mailed to class members on May 22, 2024, with a 45-day window (to July 6, 2024) for class members to opt out or object to the proposed settlement. [Declaration of Nick Castro ("Castro Decl."), ¶¶ 7, 11-12.]

III. THE PROPOSED SETTLEMENT TERMS

Under the settlement, Fraiche will pay \$175,000.00 into a common fund, the Gross Settlement Amount. Reasonable attorney's fees of up to 1/3 of the GSA, or \$58,333.33, litigation costs of up to \$8,000, an enhancement award of up to \$2,500 to Plaintiff, settlement administration costs of no more than \$6,500, and \$5,000 for PAGA civil penalties,² all will be paid from the Gross Settlement Amount. The remainder of approximately \$94,667 will be allocated pro rata among the Participating Class Members based on their total compensation earned during the Class Period. No portion of the Class Settlement Amount will revert to Fraiche. [Donnelly Decl., ¶ 9.]

A. Certification of the Settlement Class

The Court conditionally certified a settlement class defined to include all individuals who worked for Defendant in the job positions of dishwasher, cook, lead cook, event

² Per PAGA, the \$3,750 of this amount will go to the Labor & Workforce Development Agency as the State's share of the civil penalties, and the remaining \$1,250 will be distributed pro rata to the Aggrieved Employees

1 coordinator/specialist/producer, financial controller, marketing manager, bartender, server and/or
2 delivery during the Class Period, which runs from March 20, 2019 to October 1, 2023. As noted
3 above, there would have been 217 class members under the original class period, which number
4 exceeded the allowed variance under the Escalator Clause. In accordance with the terms of the
5 Settlement Agreement, Fraiche exercised its discretion to shorten the Class Period.
6 Consequently, the Settlement Administrator ultimately mailed class notices to 204 individuals
7 identified as members of the Class. [Castro Decl., ¶¶ 5-7.] Nothing has changed to require
8 reconsideration of the Court's certification of the Settlement Class.

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

10 At least \$94,667 from the Gross Settlement Amount will be distributed to the Participating
11 Class Members. This is a cash settlement that does not require Participating Class Members to
12 submit a claim form to receive their settlement share. Participating Class Members will receive
13 their settlement checks automatically via First Class U.S. Mail. Twenty percent of each
14 settlement share will be allocated to wages and the remaining eighty percent will be allocated to
15 expenses, penalties and interest, which allocation is consistent with Fraiche's potential liability as
16 discussed below. Fraiche will pay all applicable employer-side payroll taxes separately from the
17 GSA. Subject to the Court's approval, any amounts not claimed (because a class member does
18 not cash his or her settlement check) will be forwarded to the California State Controller's
19 Unclaimed Property Fund. [Donnelly Decl., ¶ 10.]

20 Each Participating Class Member will receive a pro rata share of the Net Settlement
21 Amount based on their total wages paid by Fraiche during the Class Period while working in a
22 covered job position. Thus, each Individual Settlement Payment will be calculated using
23 formulaic criteria equally applied to all Class Members in order to proportionately compensate
24 them for the actual value of their claims relative to fellow class members. Similarly, each Class
25 Member's Individual Settlement Payment will be calculated using criteria that would typically be
26 used in determining appropriate amounts of unpaid wages and damages in wage and hour
27 litigation under applicable law. These methods are intended to ensure each Class Member
28 receives a portion of the available settlement funds corresponding to the relative value of his or

1 her potential claims. The proposed allocation provides the most reasonable way to compensate
2 Class Members based on the amount of time they worked for Fraiche and the number of instances
3 they were not compensated properly or may have been denied required breaks. The pro rata
4 allocation formula, based on earnings for each class member versus earnings of entire class, will
5 account for the fact that certain Class Members, primarily the “full time” employees, worked
6 longer tenures, worked more hours, and/or earned a higher hourly wages, and accordingly have
7 proportionally more damages than those “part-time” employees who may have worked only a few
8 shifts per month. [Donnelly Decl., ¶ 11.]

9 The average class award will be approximately \$878, and the largest award will be over
10 \$8,500. There are 121 Class Members also eligible to receive a share of the PAGA civil penalties,
11 and their average PAGA award will be about \$10. [Castro Decl., ¶ 13.]

12 **C. Settlement Administration**

13 ILYM Group, Inc., as the Court-approved Settlement Administrator, mailed the Notice
14 Packet to the Class members after making all reasonable effort to ascertain the best mailing
15 address, including running each address through the National Change of Address database
16 and "skip-tracing" any Notice Packets returned as undeliverable. [Castro Decl., ¶¶ 3-10.]
17 The Class Notice, previously approved by the Court, duly informed Class Members of the
18 settlement terms, including the estimated relief each Class Member will receive, the amounts
19 to be requested for attorney’s fees and the class representative enhancement awards, and the
20 right to opt out of or object to the settlement. [Castro Decl., ¶ 7, Exh. A.] After application of
21 the Escalator Clause, ILYM mailed 204 Notice Packets on May 22, 2024. [Castro Decl., ¶
22 7.] Ultimately, 11 Notice Packets were deemed undeliverable, representing a 95% success
23 rate. [Castro Decl., ¶ 10] The 45-day response window for objecting to the settlement will
24 expire on July 6, 2024. [Castro Decl., ¶¶ 11-12.] As of the filing of this motion, ILYM has
25 received one request for exclusion (for a 99.51% participation rate), and zero objections to
26 the settlement. No disputes have been submitted regarding the information used to calculate
27 class member settlement shares. ILYM will submit a supplemental declaration updating the
28 Court on the status of administration prior to the hearing [Castro Decl., ¶¶ 11-12.]

1 **D. Release of Claims**

2 All Participating Class Members will be deemed to release defendant Fraiche from all
3 claims alleged in the operative complaint, or that could have been brought based on the facts
4 asserted in the operative complaint, including PAGA claims, from March 20, 2019 to October 1,
5 2023. The release is limited to the claims that were actually pleaded or could have been pleaded
6 based on the alleged facts in the operative complaint. [Donnelly Decl., ¶ 12.]

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

8 As noted, the Parties allocated \$5,000 to payment of alleged civil penalties under PAGA,
9 which amount Plaintiff submits is fair, reasonable, and adequate, and furthers PAGA's underlying
10 purposes. As required by Labor Code section 2699(l)(2), Plaintiff gave notice of the settlement
11 and the approval hearing to the LWDA via its online portal. [Donnelly Decl., ¶ 13; Exh. 1.]

12 **IV. ARGUMENT**

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

27 On a motion for final approval, the trial court is charged with determining whether, in
28 light of the total circumstances of the action and the response of the class members to the

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

13 **A. The Proposed Settlement Merits Final Approval**

14 The proposed settlement of this action warrants final approval under the standards
15 summarized above. The settlement is fair, reasonable and adequate, and represents a
16 favorable resolution of highly disputed claims. Further, the settlement thus far has been
17 overwhelmingly approved by the class members, as there are no objections and only one
18 Class Member requested exclusion.

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

21 The settlement is not the result of fraud or collusion. Rather, the proposed settlement
22 was reached following arm's-length negotiations presided over by Mark LeHocky, Esq., a
23 highly respected and well-known mediator with extensive experience mediating wage and
24 hour class actions. [Donnelly Decl., ¶ 7.] Moreover, Plaintiff and his counsel were well-
25 informed about the facts and the law, and counsel J. Kirk Donnelly has years of litigation
26 experience, including litigating wage and hour class actions. Plaintiff's counsel are well-qualified
27 to evaluate the risks and benefits of pursuing further litigation or settling the matter. [Donnelly
28 Decl., ¶¶ 29-31.] Defendant Fraiche likewise was represented by highly-qualified and

1 experienced defense counsel. Both sides advocated vigorously for their clients, and nothing
2 was "left on the table."

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

4 The settlement was well-received by the class. As of the filing of this motion, no
5 objections have been filed, and only one Class Member requested exclusion out of 204
6 settlement class members. [Castro Decl., ¶¶ 11-12.] As many courts recognize, class member
7 reaction to the settlement is one of the most important factors to consider in determining if final
8 approval should be granted. Mandujano v. Basic Vegetable Prods., Inc., 541 F.2d 832, 837 (9th
9 Cir. 1976); see also In re: American Bank Note Holographics, 127 F.Supp.2d 418, 425 (S.D.N.Y.
10 2001) ("It is well-settled that the reaction of the class to the settlement is perhaps the most
11 significant factor to be weighed in considering its adequacy") (internal quotation marks omitted).

12 **3. The Settlement Is Fair and Reasonable Considering the Benefits** 13 **Conferred, the Case Value, and Significant Litigation Risks**

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

22 Prior to mediation, the parties engaged in extensive informal discovery to facilitate
23 settlement discussions. As a result, Plaintiff reviewed documents and information regarding
24 Fraiche's payroll practices, pay stubs and time records for a sampling of class members, meal and
25 rest break policies, etc., and information from Defendant regarding class size and breakdown of
26 job positions, work weeks, rates of pay, and other information used to formulate a damages
27 model. Plaintiff's counsel are confident they obtained sufficient information to enable them to
28 understand the law and facts of this case and make an informed decision regarding the proposed

1 settlement and whether it is in the best interests of the class. [Donnelly Decl., ¶¶ 7, 14.]

2 Using that data, Plaintiff ran various calculations under different theories of liability and
3 estimated Fraiche’s maximum exposure on the class claims at approximately \$885,000, including
4 about \$182,000 on the unpaid wage/salary claim, \$43,000 on the regular rate/underpaid overtime
5 claim, \$272,000 on the meal and rest break claims, \$15,000 on the expense reimbursement
6 claims, \$139,000 on the wage statement claims, and \$234,000 on the waiting time penalty claims.
7 [Donnelly Decl., ¶ 15.] Plaintiff substantially discounted the value of these claims, however, in
8 light of the multiple and considerable risks posed by proceeding with the litigation.

9 First, on the unpaid wage claims, Plaintiff alleged Fraiche wrongfully paid both he and
10 other class members with a base salary regardless of the number of hours worked, or essentially
11 treated them as an “exempt” employee. In order to qualify as exempt,³ however, an employee
12 must be primarily engaged in duties that meet the test of the exemption, customarily and regularly
13 exercise discretion and independent judgment in performing his or her duties, and earn a monthly
14 salary equivalent to no less than two times the state minimum wage. E.g., Wage Order 5-2001, §§
15 1(B)(1)(a), (d), and (f). Here, Plaintiff contends Defendant failed to pay class members on the
16 required salary basis,⁴ that the duties and responsibilities of the class members’ job positions did
17 not involve management or administration of the business, and they didn’t exercise any
18 discretion/independent judgment such that they met the requirements of any potentially
19 applicable overtime exemption. Accordingly, Plaintiff argues he and other class members were
20 entitled to receive overtime wages in conformance with California law on top of any salary paid
21 for the base 40 hour work week. [Donnelly Decl., ¶ 16.]

22 Plaintiff also alleges Defendant failed to incorporate regular bonus payments made to the
23 Class Members into the regular rate of pay calculations when paying overtime as required by
24 Alvarado v. Dart Container Corp. (2018) 4 Cal.5th 542. In particular, Plaintiff argues amounts

26 ³ It is unclear if Fraiche relied on either the administrative exemption, Wage Order 5-2001 §1(B)(2), or
27 the executive exemption, Wage Order 5-2001, § 1(B)(1), although Plaintiff contends this is irrelevant and
that neither exemption applies.

28 ⁴ For example, in 2022 Plaintiff’s “salary” was \$4,333.33/mo. even though a salary of \$5,200/mo. was
required to meet the exemption.

1 Fraiche paid to the class members as “tips” were not true gratuities but rather a share of
2 mandatory charges Fraiche imposed on client bills. Under California law, these “tips” are more
3 properly characterized as a bonus and must be included in the calculation of the regular rate of
4 pay for purposes of determining overtime and double time pay. As explained by the DLSE on its
5 website: “[W]hen an employer distributes all or part of a service charge to its employees, the
6 distribution may be at the discretion of the employer and the service charge, which would be in
7 the nature of a bonus, would be included in the regular rate of pay when calculating overtime
8 payments.” Dept. of Indus. Relations, Labor Comm’rs Office, Tips and Gratuities,
9 https://www.dir.ca.gov/dlse/faq_tipsandgratuities.html. Plaintiff contends Fraiche paid overtime
10 at 1.5 times the base hourly rate only, and did not pay any overtime due on the tip/bonus
11 payments. In response, Fraiche denies Plaintiff’s contentions, claiming its compensation policies
12 properly paid Plaintiff and the class members for all hours worked, noting there is nothing
13 improper about paying non-exempt employees a “salary” for 40 hours of work per week, and that
14 its records show Plaintiff and the class members rarely worked more than 40 hours per week and
15 that it paid for documented overtime at the correct rates. [Donnelly Decl., ¶ 17.]

16 Plaintiff also contends Fraiche failed to maintain a fully compliant written meal and rest
17 break policy and, regardless of whether the policies were compliant, that Fraiche failed to provide
18 all required meal and rest periods to Class Members. In support of this argument, Plaintiff
19 contends Defendant’s own records show numerous “de facto” violations where meal periods were
20 not recorded, especially with respect to second meal periods, or started after the fifth hour of
21 work and thus were non-compliant. Plaintiff’s review of the pay records provided further
22 suggested Fraiche did not pay the required premium pay for these documented violations.
23 [Donnelly Decl., ¶ 18.]

24 Defendant denies Plaintiff’s contentions, claiming it made meal and rest breaks available
25 to Class Members in compliance with California law. Defendant contends its meal and rest break
26 policies are lawful and that Class Members were frequently reminded they were required to take
27 all meal and rest breaks. Defendant also contends that time records demonstrate that Class
28 Members took duty-free, timely meal and rest breaks. Finally, Defendant argues that Plaintiff’s

1 meal and rest break claims are not susceptible to common proof, as the claims would require
2 individualized inquiry, including whether there was an unlawful companywide policy, whether
3 employees had the opportunity to take meal and rest periods, whether they voluntarily chose to
4 forego their meal and rest periods, and whether Defendant ever prevented them from taking meal
5 and rest periods. Accordingly, Defendant contends these claims are vulnerable to a ruling that
6 class treatment is not appropriate. [Donnelly Decl., ¶ 19.]

7 On the expense reimbursement claim, Plaintiff alleges that throughout his employment, he
8 and the class members were required to use their personal cell phones in order to communicate
9 with supervisors and other employees during work hours, take pictures of their work, and
10 navigate to catering job locations. However, Defendant did not reimburse Plaintiffs and the class
11 members for this expense. Cochran v. Schwan's Home Serv., Inc. (2014) 228 Cal.App.4th 113.
12 On the other hand, Defendant argued there would be no conceivable need for employees to use
13 their phones for work and that any use of employee phones was purely for personal convenience
14 and therefore not reimbursable. [Donnelly Decl., ¶ 20.]

15 Plaintiff also alleged derivatively that, as a result of the above alleged violations,
16 Defendant failed to provide accurate wage statements and failed to timely pay all wages that were
17 due and owing upon separation of employment. Thus, should the primary claims fail, Plaintiff's
18 derivative claims would also fail. Defendant also contends it would not be liable for waiting time
19 penalties because a "good faith dispute" exists over the payment of past wages. Amaral v. Cintas
20 Corp. No. 2 (2008) 163 Cal.App.4th 1157, 1201. Further, Defendant contends Plaintiff would
21 have to prove that Defendant "willfully" failed to pay Class Members appropriate wages due
22 upon separation of employment. Defendant contends that any failure to pay wages upon
23 separation was not willful. [Donnelly Decl., ¶ 21.]

24 As far as potential PAGA liability, the Aggrieved Employees theoretically are entitled to
25 penalties totaling upwards of \$350,000 should Plaintiff prevail on all claims and establish
26 violations of the multiple Labor Code sections at issue. [Donnelly Decl., ¶ 22.] As with the class
27 claims, Plaintiff discounted the potential PAGA penalties since the Court possesses wide
28 discretion to reduce such penalties, or to decline to award penalties at all. Labor Code §

1 2699(e)(2); Carrington v. Starbucks Corp. (2018) 30 Cal.App.5th 504 (trial court awarded
2 penalties of \$5 per pay period after a bench trial, which decision was upheld on appeal); In re
3 Taco Bell Wage and Hour Actions (E.D. Cal. Apr. 8, 2016) 2016 U.S. Dist. LEXIS 48557
4 (PAGA penalties denied after trial). Accordingly, the Parties allocated \$5,000 to PAGA penalties,
5 which amount Plaintiff submits is reasonable under the circumstances and in line with
6 comparable settlements in other wage and hour class actions in California. *E.g.*, Van Kempen v.
7 Matheson Tri-Gas, Inc. (N.D. Cal. Aug. 25, 2017) 2017 U.S. Dist. LEXIS 137182 (granting final
8 approval of \$5,000 PAGA penalty from \$370,000 settlement, or 1.4 percent of total settlement);
9 Slavkov v. First Water Heater Partners I (N.D. Cal. July 25, 2017) 2017 U.S. Dist. LEXIS
10 116303 (finding a \$7,500 PAGA payment reasonable when measured against the overall
11 settlement of \$345,000 and the possible weaknesses in Plaintiffs' case, or 2.2 percent of total
12 settlement). Additionally, the LWDA has been informed of the terms of the PAGA portion of the
13 settlement, and will be able to weigh in as necessary. Jennings v. Open Door Mktg. Inc. (N.D.
14 Cal. Oct. 3, 2018) 2018 U.S. Dist. LEXIS 171356, at *27 (approving settlement with PAGA
15 penalties of 0.6% where "[p]laintiffs [have] submitted the settlement agreement to the LWDA,
16 and the LWDA has not objected to the settlement.

17 Thus, Defendant raised various defenses to each of Plaintiff's claims, any one of which, if
18 successful, could have derailed Plaintiffs' case. Accordingly, Plaintiff faced risky issues going
19 forward with this litigation, and given the need to secure class certification, try the case, and deal
20 with post-trial appeals, it would have taken years to realize any recovery in this action. Plaintiff
21 and his counsel discounted the value of the class claims consistent with the risks discussed above,
22 and carefully weighed the likelihood of the class receiving substantially greater benefit if the
23 litigation continued. Plaintiff and counsel concluded – in light of these very real and substantial
24 risks – settlement on the proposed terms and without prolonged and costly litigation was in the
25 best interests of the class. [Donnelly Decl., ¶¶ 23-24.]

26 The overall recovery represents a significant percentage of Defendant's potential exposure
27 and, given the risks addressed above, a total recovery for the class of \$175,000, which will result
28 in average awards of some \$466 per class member, and with a maximum award of over \$8,500, is

1 a significant result well within the range of reasonableness considering all potential outcomes, and
2 it will provide direct monetary awards to all Class Members without further delay. [Donnelly
3 Decl., ¶ 24.]

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

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

26 Under the terms of the settlement, Plaintiff seeks a modest incentive award of \$2,500 for
27 his service in bringing these claims on behalf of the Class. The request is reasonable given the
28 risks he undertook on behalf of the Class Members. By contacting and retaining counsel to

1 pursue these claims, Plaintiff helped make this settlement possible for the absent Class Members,
2 while shouldering the risk of being liable for Defendant's litigation costs. Plaintiff also exposed
3 himself to unwanted notoriety related to filing a public lawsuit (discoverable even through a
4 simple google search) for the benefit of other employees, placing himself at risk of discrimination
5 by future prospective employers. As set forth in more detail in his declaration submitted with the
6 preliminary approval motion, among taking many other actions assisting in the successful
7 litigation of this case, Plaintiff provided substantial factual information and documents to
8 counsel, attended numerous meetings/phone conferences with counsel to discuss the case, and
9 kept abreast of all significant developments. [Declaration of Gerardo Gutierrez, ¶¶ 2-9; Donnelly
10 Decl., ¶ 25.] Accordingly, the requested enhancement payments to Plaintiff is appropriate and
11 justified as part of the settlement.

12 **VI. SETTLEMENT ADMINISTRATION COSTS**

13 The settlement provides for a payment to ILYM for its services as the Settlement
14 Administrator. As set forth in the Declaration of Nick Castro, ILYM has performed and will
15 continue to perform its required duties through final distribution of the settlement funds and
16 incurred \$6,500.00 in fees and expenses. [Castro Decl., ¶ 14.] Accordingly, Plaintiff respectfully
17 requests the Court approve payment of \$6,500 to ILYM from the GSA. [Donnelly Decl., ¶ 26.]

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

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

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

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

4 As addressed in detail above, at the time the parties reached the tentative settlement
5 success for Plaintiff and the putative class was far from certain. Plaintiff faced a real risk that
6 some or all the claims would not be certified for class treatment, as Defendant had strong
7 arguments that its compensation policies were legal and properly compensated the class
8 members, that the class might not be sufficiently numerous, and that many putative class
9 members previously waived the claims at issue. Even if Plaintiff certified some or all of the
10 claims and ultimately prevailed on the merits, it undoubtedly would have taken several years
11 to realize any recovery while they pursued class certification, trial, and an almost certain
12 appeal. [Donnelly Decl., ¶¶ 16-24.]

13 Nonetheless, Plaintiff succeeded and expeditiously obtained the relief he set out to
14 obtain, and the settlement provides substantial cash payments to Class Members, with an
15 average award of about \$466, and with a maximum award of over \$8,500. Importantly as
16 well, the Class Members have been overwhelmingly supportive of the Settlement – as of the
17 filing of this motion, there are no objections to the settlement and only one opt out. [Castro
18 Decl., ¶¶ 11-12.]

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

20 The United States Supreme Court has ruled the parties to a class action properly may
21 negotiate not only the settlement of the action itself but also the payment of attorney's fees.
22 Evans v. Jeff D. (1986) 475 U.S. 717, 734-35, 738, fn. 30.) In Hensley v. Eckerhart (1983)
23 461 U.S. 424, 437, the Supreme Court explained that negotiated, agreed-upon attorney's fee
24 provisions are the ideal towards which the parties should strive: "A request for attorney's fees
25 should not result in a second major litigation. Ideally, of course, litigants will settle the
26 amount of a fee." The United States Supreme Court has reemphasized this policy and further
27 stressed trial courts have "a responsibility to encourage agreement" on fees. Blum v. Stenson
28 (1984) 465 U.S. 886, 902 n.19.

1 As part of the Settlement, Fraiche agreed not to object to an award of no more than
2 1/3 of the GSA for attorney's fees, or \$58,333.330, and up to \$8,000 in reimbursement for
3 litigation costs and expenses. Such a fee is commensurate with what the market would
4 provide for similar services and the Court therefore can most certainly enforce the
5 agreement. As California's Court of Appeal has instructed:

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

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

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

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

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

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

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

28 Indeed, both California and federal courts have long recognized an appropriate

1 method for determining the award of attorney's fees is based on a percentage of the total
2 value of benefits afforded to class members by the settlement. Serrano v. Priest (1977) 20
3 Cal.3d 25, 34; Boeing Co. v. Van Gernert (1980) 444 U.S. 472, 478; Vincent v. Hughes Air
4 West, Inc. (9th Cir. 1977) 557 F.2d 759, 769. Awarding a fee based on a percentage of the
5 common fund recovered operates to "spread litigation costs proportionately among all the
6 beneficiaries so that the active beneficiary does not bear the entire burden alone." Vincent,
7 557 F.2d at 769.

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

16 Here, Class Counsel seek a fee award for their successful prosecution and resolution
17 of this action of no more than one-third of the total amount recovered by the Class via the
18 lawsuit, or \$58,333.33. The percentage requested is justified for the reasons set forth further
19 below, and comports with fee awards calculated on a percentage-of-the-benefit basis.
20 Indeed, review of class action settlements shows that courts have historically awarded fees in
21 the range of 20 to 50 percent, depending upon the circumstances of the case. In re Warner
22 Communications Sec. Litig. (S.D.N.Y. 1985) 618 F.Supp. 735, 749-50 (concluding that
23 percentage fees in common fund cases range from 20 to 50 percent); Newberg, Newberg on
24 Class Actions (3d ed.) § 14.03, pp. 13-14 ("Usually 50% of the fund is the upper limit on a
25 reasonable fee award from a common fund in order to assure that the fees do not consume a
26 disproportionate part of the recovery obtained for the class, although somewhat larger
27 percentages are not unprecedented.").

28 /////

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

2 To ensure the fairness of an attorney's fee award, courts frequently conduct a lodestar
3 cross check of counsel's fees. "A lodestar cross-check thus provides a mechanism for
4 bringing an objective measure of the work performed into the calculation of a reasonable
5 attorney fee." Laffitte, 1 Cal.5th at 504. Here, Class Counsel spent 74.7 hours of time on this
6 matter, resulting in a modest and very reasonable lodestar of \$59,835.00.

7 As is fully detailed in the Donnelly Declaration, Class Counsel's efforts included: (1)
8 extensive pre-lawsuit investigation of the claims of Plaintiff and the putative class, including legal
9 research, obtaining Plaintiff's employment records, research into similar claims and claims
10 against other employers in the same industry, and attempts to locate and contact other Fraiche
11 employees; (2) drafting a PAGA notice letter; (3) drafting the initial complaint and related
12 documents; (4) case management, including communications with defense counsel, meeting and
13 conferring/preparing case management statements, etc.; (5) lengthy discussions with defense
14 counsel regarding settlement/mediation and informal discovery needed for meaningful settlement
15 discussions; (6) engaging in substantial informal discovery, including propounding informal
16 discovery "requests" and reviewing documents and other information produced; (7) drafting a
17 mediation brief and accompanying damages model after review and analysis of defendant's
18 informal discovery production; (8) attending an all-day mediation; (9) negotiating and drafting
19 the settlement agreement and related documents; (10) drafting the motion for preliminary
20 approval and attending the hearing thereon; (11) administration of the settlement, including
21 addressing application of the escalator clause, communications with the Settlement Administrator
22 and settlement class members; (12) drafting the motion for final approval and motion for
23 attorney's fees, and attending the final approval hearing; and (13) extensive communications with
24 the Plaintiff regarding case status, case investigation and document review, mediation, and
25 settlement terms. Additionally, Class Counsel will incur additional time to attend the final
26 approval hearing and following final approval to, inter alia, respond to class member inquiries,
27 work with the Settlement Administrator on the distribution of settlement funds, and on the
28 compliance hearing. [Donnelly Decl., ¶ 28, Exh. 2.]

1 In pursuing this matter, Class Counsel incurred total attorney's fees of \$59,835.00, the
2 lodestar is based on an eminently reasonable number of hours worked to litigate this matter to a
3 successful conclusion (74.7 attorney and paralegal hours), and the requested attorney hourly rates
4 are reasonable and comport with hourly rates charged by other attorneys with similar experience
5 in this practice area in California. [Donnelly Decl., ¶¶ 29-36; Exh. 3.] On a lodestar basis, the
6 fee request of \$58,333.33 results in a base lodestar that is slightly higher than the fees
7 requested on percentage of the recovery basis and, accordingly, there is no request for a
8 lodestar enhancement. Class Counsel submits the lodestar crosscheck operates to show that
9 the percentage fee request is reasonable considering the fees requested are lower than the
10 actual value of the services rendered when valued via traditional hourly billing.

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

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

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

26 **1. The Results Achieved.**

27 Class Counsel obtained an excellent result in this case for the Class Members. The
28 Settlement provides real monetary benefits to the Class Members, and the Settlement is

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

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

14 At the time of filing the complaint, Class Counsel recognized that they would have to
15 expend a substantial amount of time and advance significant costs to prosecute a statewide
16 class action suit with no guarantee of compensation or reimbursement, in the hope of
17 prevailing against a sophisticated company represented by first-rate attorneys. Despite
18 their belief in the validity of Plaintiff's claims, they also knew they faced substantial risks
19 of class certification and the ability to prove class-wide and individual damages. In light of
20 the highly uncertain nature of this suit, Class Counsel also bore the risk that Defendant
21 would dig in and attempt to bury their small firm in work. Given the small size of Class
22 Counsel's firm, not receiving any compensation for several years while simultaneously
23 advancing litigation costs posed considerable risk and difficulty. [Donnelly Decl., ¶¶ 37-38.]

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

25 Practice in the narrow area of wage and hour litigation requires skill, knowledge and
26 experience. The issues presented in this case required more than just a general appreciation
27 of wage and hour law and class action procedure. This Settlement was possible only
28 because counsel persuaded Fraiche that Plaintiff and the putative class had a realistic

1 chance of prevailing on their claims despite Fraiche's contrary arguments, and that the
2 case would be pursued through class certification and trial if necessary. In successfully
3 navigating these hurdles, Class Counsel displayed appropriate skill while pursuing a
4 risky and difficult case.

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

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

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

24 Here, the contingent fee practices of Plaintiff's counsel simply do not accommodate
25 the investment of unnecessary time in a case, and the adverse resolution of any one of several
26 difficult issues present in this matter could have doomed the entire effort. As discussed, the
27 attorney's fees in this case were not only contingent but fairly risky, and there was always a
28 palpable chance Plaintiff's counsel would receive nothing for any number of reasons.

1 [Donnelly Decl., ¶¶ 37-38.] Accordingly, the contingent nature of the fee and the financial
2 burdens on Class Counsel and Plaintiff also support the fee requested.

3 5. Awards in Other Cases

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

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

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

28 Per the Donnelly Declaration, Class Counsel incurred a total of \$8,373.75 in

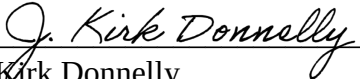
1 expenses in connection with this matter. These expenses include amounts paid for court
2 filing fees, service of process, providing chamber's copies of filings, postage, and
3 mediation fees, all of which are costs normally billed to and paid by the client. These
4 costs were reasonably incurred in the prosecution of this matter, and should be
5 reimbursed up to the limit imposed by the Settlement Agreement. Plaintiff respectfully
6 requests that the Court authorize reimbursement of counsel's costs in the amount of
7 \$8,000.00. [Donnelly Decl., ¶¶ 39-40.]

8 **VIII. CONCLUSION**

9 For all the foregoing reasons, Plaintiff Gerardo Gutierrez respectfully requests that the
10 Court grant this motion and grant final approval of the proposed class action settlement and
11 approve the payment of PAGA penalties to the State. Plaintiff further requests the Court approve
12 payment of the Settlement Administrator's fees and expenses, approve the requested class
13 representative enhancement payment, approve the award of attorney's fees and costs as requested,
14 and enter judgment in this action. Finally, Plaintiff request the Court set a final compliance
15 hearing for July 11, 2025, or a later date convenient for the Court.

16
17 Dated: June 18, 2024

LAW OFFICES OF J. KIRK DONNELLY, APC

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20 J. Kirk Donnelly
21 Attorneys for Plaintiff GERARDO GUTIERREZ
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