

1 JAMIE SERB (SBN 289601)
jamie@crosnerlegal.com
2 BRANDON BROUILLETTE, ESQ. (SBN 273156)
bbrouillette@crosnerlegal.com
3 ZACHARY M. CROSNER, ESQ. (SBN 272295)
zach@crosnerlegal.com
4 **CROSNER LEGAL, PC**
5 9440 Santa Monica Blvd. Suite 301
Beverly Hills, CA 90210
6 Tel: (866) 276-7637
Fax: (310) 510-6429

7 Attorneys for Plaintiff CHARMAINE TATE
8 As an individual and on behalf of all others similarly situated

9
10 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
11 **COUNTY OF EL DORADO**

12 CHARMAINE TATE, as an individual and
on behalf of all others similarly situated,

13 Plaintiff,
14

15 v.

16 PRO ENERGY SERVICES GROUP, LLC,
a Delaware Limited Liability Company;
17 and DOES 1-100, inclusive,

18 Defendants.
19
20
21
22
23
24
25
26
27
28

Case No.: 23CV0586

Assigned for All Purposes to:
Hon. Gary S. Stossberg
Dept. 9

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

Date: February 21, 2025
Time: 8:30 a.m.
Dept. 9

TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	FACTUAL BACKGROUND AND PROCEDURAL POSTURE	2
III.	THE PROPOSED SETTLEMENT TERMS.....	4
A.	Certification of the Settlement Class.....	4
B.	The Benefit Conferred on the Settlement Class	5
C.	Settlement Administration.....	6
D.	Release of Claims.....	6
E.	PAGA Claims and Notice to the LWDA	6
IV.	ARGUMENT	7
A.	Standard of Review for a Class Action Settlement	7
B.	The Proposed Settlement Merits Final Approval	8
1.	The Settlement Is the Product of Arm's-Length, Informed Negotiations	8
2.	The Class Reacted Favorably to the Settlement.....	8
3.	The Proposed Settlement Meets the Dunk and Kullar Factors and is within the Range of Reasonableness.....	9
V.	PLAINTIFFS' ENHANCEMENT AWARDS.....	14
VI.	SETTLEMENT ADMINISTRATION COSTS	15
VII.	ATTORNEY'S FEES AND COSTS	15
A.	The Attorney's Fees Requested Are Fair and Reasonable and Should Be Approved	15
B.	The Requested Fee Award Is Reasonable and Appropriate	16
C.	Class Counsel's Fees are Justified When Calculated as a Percentage of the Common Fund.....	17

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

D. The Award is Supported By 1) the Results Achieved; 2) the Risk, 3) the Skill Required, 4) the Contingent Nature of the Fee and 5) Awards in Similar Cases 18

1. The Results Achieved..... 19

2. Class Counsel Bore Considerable Risk. 19

3. The Skill Required and the Quality of Work. 20

4. The Contingent Nature of the Fee and Risk Assumed 20

5. Awards in Other Cases 21

F. Class Counsel’s Costs and Expenses are Reasonable 21

VIII. CONCLUSION 23

TABLE OF AUTHORITIES

	Page(s)
Cases	
<u>7-Eleven Owners for Fair Franchising v. Southland Corp.</u> (2000) 85 Cal.App.4th 1135.....	14
<u>Alvarado v Dart Container Corp.</u> (2018) 4 Cal.5th 770.....	10
<u>Amaral v. Cintas Corp. No. 2</u> (2008) 163 Cal.App.4th 1157.....	12
<u>In re: American Bank Note Holographics,</u> 127 F.Supp.2d 418 (S.D.N.Y. 2001).....	9
<u>Blum v. Stenson</u> (1984) 465 U.S. 886	16
<u>Boeing Co. v. Van Gernert</u> (1980) 444 U.S. 472	17
<u>Carrington v. Starbucks Corp.</u> (2018) 30 Cal.App.5th 504.....	12
<u>Cazares v. Saenz</u> (1989) 208 Cal.App.3d 279.....	21
<u>Clarke v. AMN Servs. Inc.</u> (9th Cir. 2021) 987 F.3d 848.....	10
<u>Class Plaintiffs v. City of Seattle</u> (9th Cir. 1992) 955 F.2d 1268, <u>cert. denied</u> , 506 U.S. 953	7
<u>Cochran v. Schwan’s Home Service, Inc.</u> (2014) 228 Cal. App. 4th 1137.....	11
<u>Deposit Guaranty Nat’l Bank, Jackson, Miss. v. Roper</u> (1980) 445 U.S. 326, <u>rehg. den.</u> 446 U.S. 947	15
<u>Dunk v. McCoy Motor Co.</u> (1996) 48 Cal.App.4th 1794.....	7, 8
<u>Evans v. Jeff D.</u> (1986) 475 U.S. 717	16
<u>Harris v. Marhoefer</u> (9th Cir. 1994) 24 F.3d 16.....	22

1	<u>Hensley v. Eckerhart</u>	
2	(1983) 461 U.S. 424	16
3	<u>Hernandez v. Restoration Hardware, Inc.</u>	
4	(2018) 4 Cal.5th 260.....	17
5	<u>Jennings v. Open Door Mktg. Inc.</u>	
6	(N.D. Cal. Oct. 3, 2018) 2018 U.S. Dist. LEXIS 171356	13
7	<u>Ketchum v. Moses</u>	
8	(2001) 24 Cal.4th 1122.....	21
9	<u>Laffitte v. Robert Half Int'l., Inc.</u>	
10	(2016) 1 Cal.5th 480.....	17, 19
11	<u>Lane v. Facebook, Inc.</u>	
12	(9th Cir. 2012) 696 F.3d 811	14
13	<u>Lealao v. Beneficial Cal., Inc.</u>	
14	(2000) 82 Cal.App.4th 19.....	15, 16
15	<u>Levy v. Toyota Motor Sales, U.S.A.</u>	
16	(1992) 4 Cal.App.4th 807	15
17	<u>Mandujano v. Basic Vegetable Prods., Inc.,</u>	
18	541 F.2d 832 (9th Cir. 1976).....	9
19	<u>McKittrick v. Gardner</u>	
20	(4th Cir. 1967) 378 F.2d 872	20
21	<u>In re Omnivision Techs., Inc.,</u>	
22	559 (N.D. Cal. 2008)	19
23	<u>Paul, Johnson, Alston & Hunt v. Gaulty</u>	
24	(9th Cir. 1989 886 F.2d 268, 272).....	18
25	<u>Potter v. Pacific Coast Lumber Co.</u>	
26	(1951) 37 Cal.2d 592	7
27	<u>Powers v. Eichen</u>	
28	(9th Cir. 2000) 229 F.3d 1249	20
	<u>Rider v. County of San Diego</u>	
	(1992) 11 Cal.App.4th 1410.....	22
	<u>Rodriguez v. W Publ'g Corp.</u>	
	(9th Cir. 2009) 563 F.3d 948	14
	<u>Serrano v. Priest</u>	
	(1977) 20 Cal.3d 25	17, 21

1	<u>Slavkov v. First Water Heater Partners I</u>	
2	(N.D. Cal. July 25, 2017) 2017 U.S. Dist. LEXIS 116303	12
3	<u>Staton v. Boeing</u>	
4	(9th Cir. 2003) 327 F.3d 938 . [Brouillette Decl..]	14
5	<u>In re Taco Bell Wage and Hour Actions</u>	
6	(E.D. Cal. Apr. 8, 2016) 2016 U.S. Dist. LEXIS 48557	12
7	<u>Van Bronkhorst v. Safeco Corp.</u>	
8	(9th Cir. 1976) 529 F.2d 943,950.....	7
9	<u>Van Kempen v. Matheson Tri-Gas, Inc.</u>	
10	(N.D. Cal. Aug. 25, 2017) 2017 U.S. Dist. LEXIS 137182	12
11	<u>Vincent v. Hughes Air West, Inc.</u>	
12	(9th Cir. 1977) 557 F.2d 759	17
13	<u>In re Warner Communications Sec. Litig.</u>	
14	(S.D.N.Y. 1985) 618 F.Supp. 735	18, 21
15	<u>Wershba v. Apple Computer</u>	
16	(2001) 91 Cal.App.4th 224.....	7, 8, 13, 17
17	<u>White v. Experian Information Solutions, Inc.</u>	
18	(C.D. Cal. 2011) 803 F.Supp.2d 1086.....	14
19	<u>White v. Starbucks Corp.</u>	
20	(N.D. Cal. 2007) 497 F.Supp.2d 1080	10

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Statutes

Cal. Rule of Court 3.769 7, 15

Labor Code Section 226 3

Labor Code § 2699(e)(2) 12

Labor Code section 2699(l)(2) 7

Other Authorities

Attorney Fee Awards (2d ed. 1993) § 104 18

Managing Class Action Litigation: A Pocket Guide for Judges (3d ed. 2010),
available at [http:// www.fjc.gov/sites/default/files/2012/ClassGd3.pdf](http://www.fjc.gov/sites/default/files/2012/ClassGd3.pdf)..... 14

Newberg on Class Actions (3d ed.) § 14.03 18, 21

Newberg on Class Actions (4th ed. 2002), § 11.41 7

1 **I. INTRODUCTION**

2 Plaintiffs and Class Representatives Charmaine Tate and Dave Crockett seek final
3 approval of a non-reversionary class action settlement resolving wage and hour claims on behalf
4 of 1,754 individuals employed by Defendant Pro Energy Services Group, LLC (“Pro Energy” or
5 “Defendant”) in California at any time during the Class Period of April 20, 2019 to June 5, 2024.
6 The proposed \$900,000 total settlement provides about \$487,500 in cash payments to the Class,
7 with an average award of about \$278, plus additional amounts payable under PAGA. The
8 remaining balance will cover modest service award to Plaintiffs, settlement administration costs,
9 civil penalties to the state, and reasonable attorney’s fees and costs. The parties and their counsel
10 finalized the settlement after extensive and difficult arms-length negotiations overseen by an
11 experienced and highly-regarded mediator. The Court conditionally certified the Class and
12 preliminarily approved the settlement on October 11, 2024. Since then, the Court-approved notice
13 form was mailed to the Class Members on January 3, 2025, and they have reacted very favorably
14 to the settlement. As of the filing of this motion, there are no objections and only one Class
15 Member has requested exclusion.

16 Class Counsel secured an excellent settlement with Defendant after extensive
17 investigation, litigation, and settlement negotiation and administration, all without any
18 compensation for services rendered or costs expended. The class notice duly informed the
19 class members that Class Counsel would request attorney’s fees not to exceed one-third
20 of the Gross Settlement Amount, or \$300,000, along with reimbursement of no more than
21 \$15,000 for actual costs incurred litigating this matter. As of the filing of this motion, *not*
22 *one Class Member objected* to the proposed fee award. Consistent with the Settlement
23 and notice, Plaintiffs now respectfully request the Court award Class Counsel's fees in the
24 amount of \$300,000 and costs in the amount of \$15,000, as described in the Declaration
25 of Brandon Brouillette (“Brouillette Decl.”) and the Declaration of Larry Lee (“Lee
26 Decl.”), filed herewith. The requested attorney’s fees are well within the range of
27 reasonableness, especially considering the complex and risky nature of this litigation, the
28 contingent risk assumed, the nearly two-plus year delay in payment and, when subjected

1 to a lodestar crosscheck, result in a base lodestar that is larger than the fees requested on a
2 percentage of the recovery basis.

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

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

7 Defendant Pro Energy provides a wide range of construction support services for the utility
8 industry, and partners with companies engaged in the construction, maintenance, repair, planning,
9 design, testing, and inspection of electrical infrastructure and facilities. Plaintiff Tate worked for
10 the Defendant for approximately one month until she resigned in September of 2022. Her title
11 was 'Flagger' or traffic helper' and she was on the flag team that assisted with road closures and
12 traffic management. She was a member of the Local IBW union. She would work anywhere from
13 6-12 hours per day, 5 days a week. Plaintiff Crockett worked for the Defendant for approximately
14 four years as a Senior Program Manager. He oversaw construction managers, inspectors, and
15 traffic control workers. In addition to hourly pay, a significant portion of his weekly income was
16 paid as "Per Diems." Unlike Plaintiff Tate, he was not a union employee. [Declaration of Brandon
17 Brouillette ("Brouillette Decl."), ¶ 2.]

18 Plaintiffs allege several wage and hour violations by Defendant. First, they allege
19 Defendant failed to pay employees for all hours worked, and that supervisors were tasked with
20 logging hours at each job site resulting in accurate timekeeping. Plaintiff Tate also alleges she
21 sometimes was required to ride in a company van while picking up various employees from
22 different jobs sites after her shift had ended, which time she claims was not recorded or paid for.
23 Plaintiff Crockett further alleges that Pro Energy failed to include per diem payments in the
24 calculation of the "regular rate" used to determine overtime wages and, as a result, that they and
25 class members were underpaid for their overtime hours. [Brouillette Decl., ¶ 3.]

26 Plaintiffs also claim meal and rest break violations and allege Defendant did not provide
27 1st or 2nd meal periods to Plaintiffs and other flaggers who were required to eat while working
28 and 30 minutes "auto deducted" from their time. Plaintiffs similarly claim Defendant did not

1 provide Plaintiffs and other flaggers with any rest periods. Lastly, Plaintiffs argued they had to use
2 their personal cell phones for work purposes such as communicating with supervisors during a
3 shift, and that they received no reimbursement [Brouillette Decl., ¶ 4.]

4 Based on these allegations, Plaintiff Tate filed a class action complaint in April 2023
5 alleging causes of action against Defendant for unpaid minimum wages, unpaid overtime wages,
6 failure to provide meal periods, failure to provide rest periods, violations of Labor Code Section
7 226, failure to timely pay all wages due upon separation of employment, failure to reimburse for
8 business expenses, unfair competition. On July 27, 2023, after notice to the LWDA and
9 exhausting administrative remedies, Plaintiff Tate filed an amended complaint adding a claim for
10 violations under PAGA based on the various alleged Labor Code violations identified in her
11 PAGA notice letter. On July 21, 2023, Plaintiff Crockett filed a separate class action complaint
12 against Defendant in the Placer County Superior Court, alleging causes of action against
13 Defendant for unpaid overtime wages, violations of Labor Code Section 226, and unfair
14 competition. [Brouillette Decl., ¶ 5.]

15 Pro Energy has at all times denied Plaintiffs' collective allegations and maintained its
16 payroll and timekeeping policies and procedures comply with California law, that it paid the class
17 members for all wages due and provided all required meal and rest breaks on a fully-compliant
18 basis. Defendant also contends there would be no need for any class member to use their own
19 phone on company business and therefore no reimbursement is owed. Additionally, Pro Energy
20 strongly contends the case cannot be maintained as a class action, arguing for example that to the
21 extent class members worked off the clock, or missed any breaks, it was intermittent and
22 infrequent and evidence of such off the clock work would be anecdotal, and therefore
23 individualized issues would predominate. Lastly, Pro Energy emphasized that, like Plaintiff Tate,
24 a significant portion of the putative class were union employees and the terms of their employment
25 controlled by the terms of the relevant Collective Bargaining Agreements. Thus, per Defendant,
26 the claims of many class members were subject to federal preemption under the Labor
27
28

1 Management Relations Act and further subject to the grievance and arbitrations procedures of the
2 CBAs. [Brouillette Decl., ¶ 6.]

3 After Plaintiffs filed their respective complaints, the Parties met and conferred on
4 discovery, potential law and motion, and other case management issues, and ultimately agreed to
5 attempt early mediation. The Parties then engaged in extensive informal discovery to facilitate an
6 exchange of information necessary to engage in a meaningful mediation. The Parties then
7 engaged Louis Marlin, Esq., a highly respected mediator with extensive wage and hour class
8 action experience and, in March 2024, participated in a full day mediation with Mr. Marlin. By the
9 end of the day, the Parties were able to reach agreement on all major issues. [Brouillette Decl.,
10 ¶¶ 7-8.] The Court granted preliminary approval to the settlement on October 11, 2024.

11 Class Notices were mailed to class members on January 3, 2025, with a 45-day
12 window (to February 17, 2025) for class members to opt out or object to the proposed
13 settlement. [Declaration of Mayra Gonzalez (“Gonzalez Decl.”), ¶¶ 5, 7-9.]

14 **III. THE PROPOSED SETTLEMENT TERMS**

15 Under the settlement, Pro Energy will pay \$900,000.00 into a common fund, the Gross
16 Settlement Amount (“GSA”). Reasonable attorney’s fees of up to one-third of the GSA, or
17 \$300,000.00, actual litigation costs of up to \$15,000, modest enhancement awards of up to
18 \$10,000 for each plaintiff, settlement administration costs of \$17,500, and \$60,000 for alleged
19 civil penalties under PAGA,¹ all will be paid from the GSA. The remainder of approximately
20 \$487,500 will be allocated among the Participating Class Members based on their total weeks
21 worked during the Class Period. No portion of the GSA will revert to Pro Energy. [Brouillette
22 Decl., ¶ 9.]

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

24 The Court conditionally certified a settlement class including all persons employed by Pro
25 Energy in California and classified as a non-exempt hourly employee who worked for Pro Energy
26 during the Class Period of April 20, 2019 to June 5, 2024. The Settlement Administrator
27

28 ¹ Consistent with PAGA, \$45,000 of that amount will go the LWDA for the State’s share of the civil penalties, and the remaining \$15,000 will be distributed pro rata to the Aggrieved Employees.

ultimately mailed class notices to 1,754 individuals identified as members of the Class. [Gonzalez Decl., ¶ 5.] Nothing has changed to require reconsideration of the Court's certification of the Settlement Class.

B. The Benefit Conferred on the Settlement Class

As noted, the settlement obligates Pro Energy to pay \$900,000 to resolve the Settlement Class's claims, inclusive of attorney's fees and costs. At least \$487,500 from the GSA will be distributed to the Participating Class Members. This is a cash settlement that does not require Participating Class Members to submit a claim form to receive their settlement share. Participating Class Members will receive their settlement checks automatically via First Class U.S. Mail. Twenty percent of each settlement share will be allocated to wages and the remaining eighty percent will be allocated to expenses, penalties and interest. Pro Energy will pay any and all applicable employer-side payroll taxes separately and in addition to the GSA. Subject to the Court's approval, any amounts not claimed (because a class member does not cash his or her settlement check) will be forwarded to the California State Controller's Unclaimed Property Fund. [Brouillette Decl., ¶ 10.]

Each Participating Class Member will receive a share of the Net Settlement Amount based on his or her position held and total weeks worked for Pro Energy during the Class Period while employed as a non-exempt employee. Thus, each Class Member's Individual Settlement Payment will be calculated using criteria typically used in determining appropriate amounts of alleged unpaid wages, unpaid premium wages for missed meal breaks, unreimbursed expenses, and potential statutory penalties under applicable law. These methods are intended to ensure each Class Member receives a portion of the available settlement funds corresponding to the relative value of his or her potential claims. The proposed allocation provides a reasonable way to compensate Class Members based on the amount of time they worked for Pro Energy, and the number of instances they missed a break, were not provided compensation in lieu of such missed breaks, or lost wages due to underpaid overtime. [Brouillette Decl., ¶ 11.]

The average class award will be approximately \$278, and will range from a low of about \$6 to a high of about \$1,491. There are approximately 1,044 Aggrieved Employees also eligible to

1 receive a share of the PAGA civil penalties, and the average PAGA award will be about \$14.37.
2 [Gonzalez Decl., ¶¶ 12-13.]

3 **C. Settlement Administration**

4 Phoenix Settlement Administrators, as the Court-approved Settlement Administrator,
5 mailed the Notice Packet to the Class members after making all reasonable effort to ascertain
6 the best mailing address, including running each address through the National Change of
7 Address database and "skip-tracing" any Notice Packets returned as undeliverable. [Gonzalez
8 Decl., ¶¶ 3-6.] The Class Notice, previously approved by the Court, duly informed Class
9 Members of the settlement terms, including the estimated relief each Class Member will
10 receive, the amounts to be requested for attorney's fees and the class representative
11 enhancement awards, and the right to opt out of or object to the settlement. [Gonzalez Decl.,
12 ¶ 5, Exh. A.] Phoenix mailed 1,754 Notice Packets on January 3, 2025. [Gonzalez Decl., ¶ 5.]
13 As of the filing of this motion, zero Notice Packets have been deemed undeliverable,
14 representing a 100% success rate. [Gonzalez Decl., ¶¶ 6, 10.] The 45-day response window
15 for objecting to the settlement will expire on February 17, 2025. [Gonzalez Decl., ¶¶ 7-9.]
16 As of the filing of this motion, Phoenix has received zero requests for exclusion and zero
17 objections to the settlement. No disputes have been submitted regarding the information used
18 to calculate class member settlement shares. [Gonzalez Decl., ¶¶ 7-9.] Once the notice period
19 expires, Phoenix will submit a supplemental declaration to update the Court prior to the
20 hearing.

21 **D. Release of Claims**

22 All Participating Class Members will be deemed to release Pro Energy from all claims
23 alleged in the operative complaint, or that could have been brought based on the allegations in the
24 operative complaint, including PAGA claims, from March 21, 2018 to April 13, 2024. The release
25 is limited to the claims that were actually pleaded or could have been pleaded based on the alleged
26 facts in the operative complaint. [Brouillette Decl., ¶ 12.]

27 **E. PAGA Claims and Notice to the LWDA**

28 The Parties allocated \$60,000 to payment of civil penalties under PAGA for such claims

1 against Pro Energy, as addressed in more detail below, and which amount Plaintiffs submit is fair,
2 reasonable and adequate and consistent with PAGA's underlying purposes. As required by Labor
3 Code section 2699(l)(2), Plaintiffs gave notice of the settlement and preliminary approval hearing
4 to the LWDA via its online portal, and further served the LWDA with this motion. [Brouillette
5 Decl., ¶ 13; Exh. 1.]

6 **IV. ARGUMENT**

7 **A. Standard of Review for a Class Action Settlement**

8 The law favors settlement, particularly in class actions where substantial resources can
9 be conserved by avoiding the time, cost, and rigors of formal litigation. H. Newberg & A.
10 Conte, 4 Newberg on Class Actions (4th ed. 2002), § 11.41; Class Plaintiffs v. City of Seattle
11 (9th Cir. 1992) 955 F.2d 1268, 1276, cert. denied, 506 U.S. 953; Van Bronkhorst v. Safeco
12 Corp. (9th Cir. 1976) 529 F.2d 943,950; Potter v. Pacific Coast Lumber Co. (1951) 37 Cal.2d
13 592, 602. Nevertheless, to make certain the rights of absent parties are not unjustly
14 compromised, the settlement of a class action requires court approval. Cal. Rule of Court
15 3.769; Dunk v. McCoy Motor Co. (1996) 48 Cal.App.4th 1794, 1801; Wershba v. Apple
16 Computer (2001) 91 Cal.App.4th 224, 245. The purpose of that judicial review is to protect
17 against fraud or collusion, and to ensure fairness to absent class members. Dunk, 48
18 Cal.App.4th at 1800-01; Newberg, at §§ 11.22, *et seq.* Review is accomplished through a
19 two-step process intended to determine whether, under the totality of circumstances, the
20 settlement is fair, reasonable and adequate. Dunk, 48 Cal.App.4th at 1801; Wershba, 91
21 Cal.App.4th at 245.

22 On a motion for final approval, the trial court is charged with determining whether, in
23 light of the total circumstances of the action and the response of the class members to the
24 proposed settlement, the settlement is fair, reasonable, and adequate. Dunk, 48 Cal.App.4th at
25 1801-02; Wershba, 91 Cal.App.4th at 244-45. The court has broad discretion in making that
26 determination and may consider a number of relevant factors, including: the strength of
27 plaintiff's case; the likelihood of potential recovery; the risk, expense and likely duration of
28 further litigation; the amount offered in settlement; the extent of discovery and stage of the

1 proceedings; the experience and opinion of counsel; and the reaction of class members to the
2 settlement. Id. In light of the strong judicial policy favoring the settlement of class actions,
3 courts generally apply a presumption of fairness to a proposed class action settlement when:
4 (1) the settlement is reached through arm's-length bargaining; (2) investigation and discovery
5 are sufficient to allow counsel and the court to act intelligently; (3) counsel is experienced in
6 similar litigation; and (4) the percentage of objectors is small. Dunk, 48 Cal.App.4th at 1802;
7 Wershba, 91 Cal.App.4th at 245.

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

9 The proposed settlement of this action warrants final approval under the standards
10 summarized above. The settlement is fair, reasonable and adequate, and represents a
11 favorable resolution of highly disputed claims. Further, the settlement thus far has been
12 overwhelmingly approved by the class members, as there are no objections and no Class
13 Member requested exclusion.

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

15 The settlement is not the result of fraud or collusion. Rather, the proposed settlement
16 was reached following arm's-length negotiations presided over by Louis Marlin, Esq., a highly
17 respected and well-known mediator with extensive experience mediating wage and hour class
18 actions. [Brouillette Decl., ¶ 8.] Moreover, Plaintiffs and their counsel were well-informed about
19 the facts and the law, and counsel Zachary Crosner, Jamie Serb, and Brandon Brouillette and
20 Crosner Legal, PC, and Larry Lee and Simon Yang and Diversity Law Group, all have years of
21 litigation experience, including litigating wage and hour class actions. Plaintiffs' counsel are well-
22 qualified to evaluate the risks and benefits of pursuing further litigation or settling the matter.
23 [Brouillette Decl., ¶¶ 29-39; Lee Decl., ¶¶ 4-6; Declaration of Simon Yang ("Yang Decl."), ¶¶ 3-6.]
24 Defendant likewise was represented by highly-qualified and experienced defense counsel. Both
25 sides advocated vigorously for their clients, and nothing was "left on the table."

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

27 The settlement was well-received by the class. As of the filing of this motion, no
28 objections have been filed, and no Class Member has requested exclusion out of 1,754 settlement

1 class members. [Gonzalez Decl., ¶¶ 7-8.] As many courts recognize, class member reaction to the
2 settlement is one of the most important factors to consider in determining if final approval should
3 be granted. Mandujano v. Basic Vegetable Prods., Inc., 541 F.2d 832, 837 (9th Cir. 1976); see also
4 In re: American Bank Note Holographics, 127 F.Supp.2d 418, 425 (S.D.N.Y. 2001) (“It is well-
5 settled that the reaction of the class to the settlement is perhaps the most significant factor to be
6 weighed in considering its adequacy”) (internal quotation marks omitted).

7 **3. The Proposed Settlement Meets the Dunk and Kullar Factors and is**
8 **within the Range of Reasonableness**

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

17 Prior to settlement, the Parties engaged in formal and informal discovery to facilitate
18 settlement discussions. Thus, Plaintiffs reviewed documents and information regarding Pro
19 Energy’s payroll practices, a random sampling of pay stubs and time records from class members,
20 applicable compensation plans, meal and rest break policies, etc., and information from Defendant
21 regarding class size and breakdown, work weeks/pay periods, rates of pay, and other information
22 used to formulate a damages model. Plaintiffs then had that information analyzed by a consulting
23 expert to assist in determining potential violation rates and other data used to formulate a damages
24 model. Plaintiffs’ counsel are confident they obtained sufficient information to understand the law
25 and facts of this case and make an informed decision regarding the proposed settlement and whether
26 it is fair and reasonable. [Brouillette Decl., ¶¶ 7, 14.]

27 Using that data, Plaintiffs ran various calculations and estimated Defendant’s theoretical
28 maximum exposure on the class claims at about \$32.719 million. More specifically, the theoretical

1 maximum includes approximately \$920,300 in unpaid wages due to alleged off the clock work,
2 about \$3,736,800 in underpaid overtime based on the alleged regular rate issue, around \$4,432,800
3 for alleged meal break violations, about \$276,300 for alleged rest break violations, about
4 \$11,294,500 on the expense reimbursement claims, \$694,500 for alleged expense reimbursement,
5 approximately \$3,106,050, on the wage statement claims, and waiting time penalties of about
6 \$8,534,300. [Brouillette Decl., ¶ 15.] Plaintiffs’ counsel substantially discounted the value of these
7 claims, however, in light of the multiple and considerable risks posed by proceeding with the
8 litigation, as Pro Energy raised numerous defenses and vigorously defended against these claims.

9 First, Plaintiffs contend they and class members worked “off the clock” when they would
10 travel in company vehicles after clocking out of their shift. In response, Defendant countered that
11 it accurately tracked employee time and paid class members all wages due as required under
12 applicable law. Defendant further argued it had a strict policy against off the clock work and
13 therefore if any such work occurred it was aberrational and against company policy, and done
14 without employer knowledge or consent. White v. Starbucks Corp. (N.D. Cal. 2007) 497 F.Supp.2d
15 1080, 1083 (employer must have actual or constructive knowledge of the off the clock work). For
16 the same reasons, Pro Energy argued it would require individualized inquiries to determine what
17 alleged “off the clock” work occurred and whether such work was potentially compensable, and
18 therefore class certification would not be appropriate on the claim. On the underpaid overtime claim,
19 Plaintiffs allege Pro Energy failed to include certain per diem payments in the calculation of the
20 employee’s “regular rate” of pay then used to determine the correct overtime rate. Alvarado v Dart
21 Container Corp. (2018) 4 Cal.5th 770; Clarke v. AMN Servs. Inc. (9th Cir. 2021) 987 F.3d 848. In
22 response, Defendant argued it accurately accounted for, calculated and paid all overtime hours at
23 the correct rates of pay in accordance with the applicable CBAs and applicable law. [Brouillette
24 Decl., ¶ 16.]

25 Plaintiffs next contend Defendant failed to provide legally compliant meal and rest breaks,
26 and that Defendant essentially had an “auto deduct” policy where 30 minutes of time was
27 deducted from employee hours worked regardless of whether they received a fully-compliant
28 lunch or not. Plaintiffs further argued that lunch breaks frequently were not compliant, and that

1 employees had to work through some or all of their meal breaks, meal breaks started late, and that
2 second meal periods were not always provided on shifts over 10 hours. For similar reasons,
3 Plaintiffs argued they and the class members did not receive required rest breaks either.

4 [Brouillette Decl., ¶ 17.]

5 Defendant deny Plaintiffs' contentions, claiming it made meal and rest breaks available to
6 Class Members in compliance with California law and the CBAs, and noted it paid thousands in
7 meal period premium payments for documented violations. Pro Energy argued its meal and rest
8 break policies are lawful and that Class Members were frequently reminded they were required to
9 take all meal and rest breaks. Defendant also contend that time records demonstrate that Class
10 Members took duty-free, timely meal and rest breaks. Defendant further contends the meal and rest
11 break policies and practices comported with the flexibility the *Brinker* court held was integral to
12 California's meal and rest period requirements. Finally, Defendant argued that Plaintiffs' meal and
13 rest break claims are not susceptible to common proof, as the claims would require individualized
14 inquiries, including whether there was an unlawful companywide policy, whether employees had
15 the opportunity to take meal and rest periods, whether they voluntarily chose to forego their meal
16 and rest periods, and whether Defendant ever prevented them from taking meal and rest periods.
17 Accordingly, Defendant contends these claims are vulnerable to a ruling that class treatment is not
18 appropriate. [Brouillette Decl., ¶ 18.]

19 In the expense reimbursement claim, Plaintiffs claim they and other class members regularly
20 were required to use personal phones while working to, inter alia, communicate with supervisors and
21 each other. Cochran v. Schwan's Home Service, Inc. (2014) 228 Cal. App. 4th 1137, 1144. In response,
22 Defendant argued it provided employees with access to all electronics needed to perform their job
23 duties and, accordingly, if employees used their personal phones it was purely for their own
24 convenience rather than business necessity and therefore would not be reimbursable. [Brouillette
25 Decl., ¶ 19.]

26 As a result of the above alleged violations, Plaintiffs allege Defendant failed to provide
27 accurate wage statements and failed to timely pay all wages that were due and owing upon
28 separation of employment. In response to these derivative claims, Defendant emphasized that,

1 should the primary claims fail, Plaintiffs' claim for wage statement violations and waiting time
2 penalties would also fail. Defendant further argued it would not be liable for waiting time penalties
3 because a "good faith dispute" exists over the payment of past wages. Amaral v. Cintas Corp. No.
4 2 (2008) 163 Cal.App.4th 1157, 1201. Further, Defendant contended Plaintiffs would have to
5 prove Defendant "willfully" failed to pay Class Members appropriate wages due upon separation
6 of employment. [Brouillette Decl., ¶ 20.]

7 Lastly, Pro Energy emphasized that, like Plaintiff Tate, a significant portion of the putative
8 class were union employees and the terms of their employment controlled by the terms of the
9 relevant Collective Bargaining Agreements. Thus, per Defendant, the claims of many class
10 members were subject to federal preemption under the Labor Management Relations Act and
11 further subject to the grievance and arbitrations procedures of the CBAs. [Brouillette Decl., ¶ 21.]

12 As far as potential PAGA liability, the theoretical civil penalties likely are around \$15
13 million should Plaintiffs prevail on all claims and establish violations of the multiple Labor Code
14 sections at issue. [Brouillette Decl., ¶ 22.] As with the class claims, Plaintiffs discounted the
15 potential PAGA penalties based on Defendant's various defenses on the merits and also accounted
16 for the Court's wide discretion to reduce such penalties, or to decline to award penalties at all. Labor
17 Code § 2699(e)(2); Carrington v. Starbucks Corp. (2018) 30 Cal.App.5th 504 (trial court awarded
18 penalties of \$5 per pay period after a bench trial, which decision was upheld on appeal); In re Taco
19 Bell Wage and Hour Actions (E.D. Cal. Apr. 8, 2016) 2016 U.S. Dist. LEXIS 48557 (PAGA
20 penalties denied after trial). Accordingly, the Parties allocated \$60,000 to PAGA penalties.

21 Plaintiffs submit this amount is reasonable under the circumstances and in line with
22 comparable settlements in other wage and hour class actions in California. *E.g.*, Van Kempen v.
23 Matheson Tri-Gas, Inc. (N.D. Cal. Aug. 25, 2017) 2017 U.S. Dist. LEXIS 137182 (granting final
24 approval of \$5,000 PAGA penalty from \$370,000 settlement, or 1.4 percent of total settlement);
25 Slavkov v. First Water Heater Partners I (N.D. Cal. July 25, 2017) 2017 U.S. Dist. LEXIS 116303
26 (finding a \$7,500 PAGA payment reasonable when measured against the overall settlement of
27 \$345,000 and the possible weaknesses in plaintiffs' case, or 2.2 percent of total settlement).
28 Additionally, the LWDA has been informed of the terms of the PAGA portion of the settlement,

1 and will be able to weigh in as necessary. Jennings v. Open Door Mktg. Inc. (N.D. Cal. Oct. 3, 2018)
2 2018 U.S. Dist. LEXIS 171356, at *27 (approving settlement with PAGA penalties of 0.6% where
3 "[p]laintiffs [have] submitted the settlement agreement to the LWDA, and the LWDA has not
4 objected to the settlement.

5 The settlement obviates the significant risk that this Court may find any kind of class
6 resolution unachievable or might deny certification of all or some of Plaintiffs' claims. Furthermore,
7 even if Plaintiffs obtained certification of all or some of the claims, continued litigation would be
8 expensive as the parties pursued merits discovery, a probable motion to decertify, as well as trial
9 and possible appeals, and would substantially delay any recovery by the class with no assurance of
10 recovering significantly more than the proposed settlement. Overall, while Plaintiffs are confident
11 in the merits of her claims, a legitimate controversy exists as to each cause of action. Plaintiffs also
12 recognize proving the amount of wages and penalties due each Class Member would be an
13 expensive and uncertain proposition. [Brouillette Decl., ¶¶ 23-24.]

14 Plaintiffs and their counsel discounted the value of the class claims consistent with the
15 risks discussed above, and carefully weighed the likelihood of the class receiving substantially
16 greater benefit if the litigation continued. Plaintiffs and counsel concluded – in light of these very
17 real and substantial risks – settlement on the proposed terms and without prolonged and costly
18 litigation was in the best interests of the class. The overall \$900,000 recovery represents a
19 significant percentage of Defendant's potential exposure and, given the multiple litigation risks
20 addressed above, a total recovery for the class of \$900,000, with an average award of some \$278
21 per class member, is a fair result within the range of reasonableness considering all potential
22 outcomes. [Brouillette Decl., ¶ 24; Lee Decl., ¶¶ 2-3; Yang Decl., ¶ 2.]

23 Importantly, the mere fact that a settlement does not provide the same recovery as might be
24 achieved at trial is not a proper indicator of whether the settlement is fair, reasonable, and adequate.
25 Wershba, 91 Cal.App.4th at 246, 250 ("Compromise is inherent and necessary in the settlement
26 process...even if the relief afforded by the proposed settlement is substantially narrower than it
27 would be if the suits were to be successfully litigated, this is no bar to a class settlement because the
28 public interest may indeed be served by a voluntary settlement in which each side gives ground in

the interest of avoiding litigation”); 7-Eleven Owners for Fair Franchising v. Southland Corp. (2000) 85 Cal.App.4th 1135, 1150 (“The fact that a proposed settlement may amount to only a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved”); White v. Experian Information Solutions, Inc. (C.D. Cal. 2011) 803 F.Supp.2d 1086, 1098 (rejecting contention settlement was not fair and reasonable even though it represented 99% discount off the maximum value of the claims); Lane v. Facebook, Inc. (9th Cir. 2012) 696 F.3d 811, 819 (“[T]he question whether a settlement is fundamentally fair . . . is different from the question whether the settlement is perfect in the estimation of the reviewing court”). Importantly as well, the proposed settlement is non-reversionary and will provide immediate benefits to the Class Members without a claims process. White, 803 F.Supp.2d at 1098; c.f., Federal Judicial Center, Managing Class Action Litigation: A Pocket Guide for Judges (3d ed. 2010) at 20, available at [http:// www.fjc.gov/sites/default/files/2012/ClassGd3.pdf](http://www.fjc.gov/sites/default/files/2012/ClassGd3.pdf) (reversionary provisions and/or cumbersome claims process may indicate lack of fairness). Plaintiffs and counsel submit the settlement is within the “range of reasonableness,” and is fair and adequate for the Class.

V. PLAINTIFFS’ ENHANCEMENT AWARDS

The service payment provided to Plaintiffs as the class representatives is typical in class action cases and reasonable. Rodriguez v. W Publ'g Corp. (9th Cir. 2009) 563 F.3d 948, 958-59 (incentive awards are “intended to compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action, and, sometimes, to recognize their willingness to act as a private attorney general.”). Both devoted time and resources to the litigation, provided documents, assisted Class Counsel with investigating the claims asserted and in preparing for mediation. The proposed \$10,000.00 enhancements are reasonable in recognition of Plaintiffs’ time spent on this matter, the risks they undertook on behalf of the class, and the benefit conferred to the class, as addressed in their respective declarations filed at preliminary approval. See Staton v. Boeing (9th Cir. 2003) 327 F.3d 938, 977 (collecting cases awarding class representatives service and incentive payments ranging from \$2,000 to \$25,000). [Brouillette Decl., ¶ 25.]

////

1 **VI. SETTLEMENT ADMINISTRATION COSTS**

2 The settlement provides for a payment to Phoenix for its services as the Settlement
3 Administrator. As set forth in the Declaration of Mayra Gonzalez, Phoenix has performed and
4 will continue to perform its required duties through final distribution of the settlement funds and
5 incurred \$17,500 in fees and expenses. [Gonzalez Decl., ¶ 15, Exh. B.] Accordingly, Plaintiffs
6 respectfully request the Court approve payment of \$17,500 to Phoenix from the GSA. [Brouillette
7 Decl., ¶ 26.]

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

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

11 This Court has discretion over the amount of attorneys' fees awarded and court
12 approval is required for Class Counsel's fees. Cal. Rule of Court 3.769; Levy v. Toyota
13 Motor Sales, U.S.A. (1992) 4 Cal.App.4th 807, 813; Lealao v. Beneficial Cal., Inc. (2000) 82
14 Cal.App.4th 19. In defining a reasonable fee, the Court should attempt to mimic the
15 marketplace for cases involving significant contingent risk, such as this one. Deposit
16 Guaranty Nat'l Bank, Jackson, Miss. v. Roper (1980) 445 U.S. 326, 338, rehg. den. 446 U.S.
17 947; Lealao, 82 Cal.App.4th at 49-50 (court should attempt "to award the fee that informed
18 private bargaining, if it were truly possible, might have reached" in determining a reasonable
19 fee, and a fee award should approximate a "range of fees freely negotiated in comparable
20 litigation"). Here, Class Counsels' request for attorney's fees and costs is reasonable and
21 justified by the work performed, the benefits obtained, and the contingent risk assumed.

22 As addressed in detail above, at the time the parties reached the tentative settlement
23 success for Plaintiffs and the putative class was far from certain. Plaintiffs faced a real risk
24 that some or all the claims would not be certified for class treatment, as Defendant had strong
25 arguments that its compensation policies were legal and properly compensated the class
26 members, that the class might not be sufficiently numerous, and that many putative class
27 members previously waived the claims at issue. Even if Plaintiffs certified some or all of the
28 claims and ultimately prevailed on the merits, it undoubtedly would have taken several years

1 to realize any recovery while they pursued class certification, trial, and an almost certain
2 appeal. [Brouillette Decl., ¶¶ 16-22.]

3 Nonetheless, Plaintiffs succeeded and expeditiously obtained the relief they set out to
4 obtain, and the settlement provides substantial cash payments to Class Members, with an
5 average award of about \$278, and with a maximum award of almost \$1,500. Importantly as
6 well, the Class Members have been overwhelmingly supportive of the Settlement – as of the
7 filing of this motion, there are no objections to the settlement and no opt outs. [Gonzalez
8 Decl., ¶¶ 7-8.]

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

10 The United States Supreme Court has ruled the parties to a class action properly may
11 negotiate not only the settlement of the action itself but also the payment of attorney's fees.
12 Evans v. Jeff D. (1986) 475 U.S. 717, 734-35, 738, fn. 30.) In Hensley v. Eckerhart (1983)
13 461 U.S. 424, 437, the Supreme Court explained that negotiated, agreed-upon attorney's fee
14 provisions are the ideal towards which the parties should strive: "A request for attorney's fees
15 should not result in a second major litigation. Ideally, of course, litigants will settle the
16 amount of a fee." The United States Supreme Court has reemphasized this policy and further
17 stressed trial courts have "a responsibility to encourage agreement" on fees. Blum v. Stenson
18 (1984) 465 U.S. 886, 902 n.19.

19 As part of the Settlement, Pro Energy agreed not to object to an award of no more than
20 1/3 of the GSA for attorney's fees, or \$300,000, and up to \$15,000 in reimbursement for
21 litigation costs and expenses. Such a fee is commensurate with what the market would
22 provide for similar services and the Court therefore can most certainly enforce the agreement.
23 As California's Court of Appeal has instructed:

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

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

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

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

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

14 The recognized advantages of the percentage method-including relative ease of
15 calculation, alignment of incentives between counsel and the class, a better
16 approximation of market conditions in a contingency case, and the encouragement it
17 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.

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

19 Indeed, both California and federal courts have long recognized an appropriate method
20 for determining the award of attorney's fees is based on a percentage of the total value of
21 benefits afforded to class members by the settlement. Serrano v. Priest (1977) 20 Cal.3d 25,
22 34; Boeing Co. v. Van Gernert (1980) 444 U.S. 472, 478; Vincent v. Hughes Air West, Inc.
23 (9th Cir. 1977) 557 F.2d 759, 769. Awarding a fee based on a percentage of the common fund
24 recovered operates to "spread litigation costs proportionately among all the beneficiaries so
25 that the active beneficiary does not bear the entire burden alone." Vincent, 557 F.2d at 769.

26 In determining a reasonable common fund fee award, courts should also consider the
27 fact that fees serve as an economic incentive for lawyers to bring class action litigation to
28 achieve increased access to the judicial system for meritorious claims and to enhance

1 deterrents to wrongdoing. Conte, Attorney Fee Awards (2d ed. 1993) § 104. Without
2 prosecution on a contingent basis and use of the class action mechanism, the courthouse door
3 would effectively be closed to most class members due to the relatively small size of their
4 individual claims in relation to the enormous time and cost associated with class action
5 litigation.

6 Here, Class Counsel seek a fee award for their successful prosecution and resolution of
7 this action of no more than one-third of the total amount recovered by the Class via the
8 lawsuit, or \$300,000. The percentage requested is justified for the reasons set forth further
9 below, and comports with fee awards calculated on a percentage-of-the-benefit basis.

10 (Broillette Decl., ¶¶ 29-41; Lee Decl., ¶¶ 4-6; Yang Decl., ¶¶ 3-6.) Indeed, review of class
11 action settlements shows that courts have historically awarded fees in the range of 20 to 50
12 percent, depending upon the circumstances of the case. In re Warner Communications Sec.
13 Litig. (S.D.N.Y. 1985) 618 F.Supp. 735, 749-50 (concluding that percentage fees in common
14 fund cases range from 20 to 50 percent); Newberg, Newberg on Class Actions (3d ed.) §
15 14.03, pp. 13-14 ("Usually 50% of the fund is the upper limit on a reasonable fee award from
16 a common fund in order to assure that the fees do not consume a disproportionate part of the
17 recovery obtained for the class, although somewhat larger percentages are not
18 unprecedented.").

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

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

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

1. The Results Achieved.

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

2. Class Counsel Bore Considerable Risk.

At the time of filing the complaint, Class Counsel recognized that they would have to expend a substantial amount of time and advance significant costs to prosecute a statewide class action suit with no guarantee of compensation or reimbursement, in the hope of prevailing against a sophisticated company represented by first-rate attorneys. Despite their belief in the merits of Plaintiffs' claims, they also knew they faced substantial risks of class certification and the ability to prove class-wide and individual damages. In light of the highly uncertain nature of this suit, Class Counsel also bore the risk that Defendant would dig in and attempt to bury their small firm in work. Given the small size of Class Counsels'

1 respective firms, not receiving any compensation for several years while simultaneously
2 advancing litigation costs posed considerable risk and difficulty. [Brouillette Decl., ¶¶ 42-43.]

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

4 Practice in the narrow area of wage and hour litigation requires skill, knowledge and
5 experience. The issues presented in this case required more than just a general appreciation of
6 wage and hour law and class action procedure. This Settlement was possible only because
7 counsel persuaded Defendant that Plaintiffs and the putative class had a realistic chance
8 of prevailing on their claims despite Defendant's contrary arguments, and that the case
9 would be pursued through class certification and trial if necessary. In successfully
10 navigating these hurdles, Class Counsel displayed appropriate skill while pursuing a risky
11 and difficult case

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

13 There is a substantial difference between the risk assumed by attorneys being paid
14 by the hour and attorneys working on a contingent fee basis. The attorney being paid by
15 the hour can go to the bank with his fee. Powers v. Eichen (9th Cir. 2000) 229 F.3d 1249,
16 1256. The attorney working on a contingent basis can only log hours while working
17 without pay towards a result that will hopefully entitle him to a market fee considering
18 the risk and other factors of the undertaking. Id. at 1257. Otherwise, the contingent fee
19 attorney receives nothing. Id. In this case, Class Counsel subjected themselves to this
20 risk in this all or nothing contingent fee case wherein the necessity and financial burden
21 of private enforcement makes the requested award appropriate.

22 Counsel retained on a contingency fee basis, whether in private matters or in class
23 action litigation, is entitled to a premium beyond their standard, hourly, non-contingent
24 fee schedule to compensate for both the contingent risk assumed and the delay in
25 payment. The simple fact is that despite the most vigorous and competent of efforts,
26 success is never guaranteed. McKittrick v. Gardner (4th Cir. 1967) 378 F.2d 872, 875.
27 Indeed, if counsel is not adequately compensated for the risks inherent in difficult class
28 actions, competent attorneys will be discouraged from prosecuting similar cases.

1 Ketchum v. Moses (2001) 24 Cal.4th 1122, 1132-33; Cazares v. Saenz (1989) 208
2 Cal.App.3d 279, 287.

3 Here, the contingent fee practices of Plaintiffs' counsel simply do not accommodate
4 the investment of unnecessary time in a case, and the adverse resolution of any one of several
5 difficult issues present in this matter could have doomed the entire effort. As discussed, the
6 attorney's fees in this case were not only contingent but fairly risky, and there was always a
7 chance Plaintiffs' counsel would receive nothing for any number of reasons. [Brouillette
8 Decl., ¶¶ 42-43.] Accordingly, the contingent nature of the fee and the financial burdens on
9 Class Counsel and Plaintiffs also support the fee requested.

10 **5. Awards in Other Cases**

11 As discussed, the attorney's fees requested by Class Counsel are within the range of
12 fees awarded in comparable cases, and review of class action settlements over the past 10
13 years shows that the courts have historically awarded fees in the range of 20 to 50 percent,
14 depending upon the circumstances of the case. In re Warner Communications Sec. Litig.
15 (S.D.N.Y. 1985) 618 F.Supp. 735, 749-50 (concluding that percentage fees in common fund
16 cases range from 20 to 50 percent); Newberg, Newberg on Class Actions (3d ed.) § 14.03, pp.
17 13-14 ("Usually 50% of the fund is the upper limit on a reasonable fee award from a common
18 fund in order to assure that the fees do not consume a disproportionate part of the recovery
19 obtained for the class, although somewhat larger percentages are not unprecedented."). Class
20 Counsels' requested fees equal to 1/3 of the gross amount recovered on behalf of the class and
21 are well within the range of reasonableness under either the percentage of the recovery or the
22 lodestar method in light of the contingent risk assumed, the delay in payment, the result
23 achieved, and the overall quality of the representation.

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

25 Plaintiffs' counsel also requests reimbursement of actual out-of-pocket expenses incurred
26 to prosecute this action. These expenses were incidental and necessary to the effective
27 representation of the employees, and Plaintiffs' counsel is permitted to recover litigation costs and
28 expenses under the common fund doctrine and the Settlement Agreement. Serrano, 20 Cal.3d at 35

(common fund doctrine permits recovery of fees and costs from the fund); Rider v. County of San Diego (1992) 11 Cal.App.4th 1410, 1424 n.6 (costs are recoverable from the common fund “[o]f necessity, and for precisely the same reasons discussed above with respect to the recovery of attorneys’ fees by ... [Plaintiffs’] attorneys”). Plaintiffs’ counsel also is entitled to recover “those out-of-pocket expenses that would normally be charged to a fee-paying client.” Harris v. Marhoefer (9th Cir. 1994) 24 F.3d 16, 19.

Per the Brouillette and Lee Declarations, Class Counsel incurred a total of \$21,114.07 in expenses in connection with this matter, including \$19,031.03 to Crosner Legal and \$2,112.77 to Diversity Law Group. These expenses include amounts paid for court filing fees, service of process, postage, expert fees, and mediation fees, all of which are costs normally billed to and paid by the client. These costs were reasonably incurred in the prosecution of this matter, and should be reimbursed up to the cap under the Settlement Agreement. Plaintiffs respectfully request that the Court authorize reimbursement of their counsels’ total costs in the amount of \$15,000. [Brouillette Decl., ¶¶ 44-45; Lee Decl., ¶ 7, Exh A.]

///

///

///

//

///

///

///

///

///

///

///

///

///

1 **VIII. CONCLUSION**

2 For all the foregoing reasons, Plaintiffs Charmaine Tate and Dave Crockett respectfully
3 request that the Court grant this motion and grant final approval of the proposed class action
4 settlement and approve the payment of PAGA penalties to the State. Plaintiffs further request the
5 Court approve payment of the Settlement Administrator's fees and expenses, approve the
6 requested class representative enhancement payments, approve the award of attorney's fees and
7 costs as requested, and enter judgment in this action. Finally, Plaintiffs request the Court set a
8 final compliance hearing for 20, 2026, or a later date convenient for the Court.

9
10 Dated: January 28, 2025

CROSNER LEGAL, PC

11
12 By: 
13 Jamie Serb, Esq.
14 Brandon Brouillette, Esq.
15 Zachary M. Crosner, Esq.
16 Attorneys for Plaintiff
17 CHARMAINE TATE
18
19
20
21
22
23
24
25
26
27
28