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SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF STANISLAUS

BRETT KELLY on behalf of himself, all
others similarly situated, and on behalf of
the general public,

Plaintiffs,

v.

CONRAD WOOD PRESERVING CO. dba
CONRAD FOREST PRODUCTS; and
DOES 1-100,

Defendants.

Case No. CV-23-003516

[Consolidated with Case No. CV-23-004867]

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

Date: October 10, 2024
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Dept.: 24

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1 **I. INTRODUCTION**

2 This motion seeks final approval of a non-reversionary \$900,000 proposed wage and hour
3 class action settlement by Plaintiff Brett Kelly (hereinafter “Plaintiff”) on behalf of himself and all
4 current and former non-exempt, hourly employees of Defendant Conrad Wood Preserving Co. dba
5 Conrad Forest Products (“Defendant”) (hereinafter, Plaintiff and Defendant are collectively
6 referred to as the “Parties”) at any time between June 26, 2019, to March 2, 2024¹ (“Class Period”).
7 To date, there is a 100% participation rate amongst Class Members—that is, there were no
8 objections, no disputes, and no requests for exclusion. **The proposed settlement is projected to**
9 **pay an average estimated payment of \$1,900.90 per Class Member, with a high payment of**
10 **\$5,290.14.**²

11 This case required 336 hours of attorney time from Class Counsel and sought relief for 263
12 individuals. This litigation involved investigations with Class Members throughout California,
13 extensive discovery, the production of hundreds of documents by Defendant, and a full day of
14 mediation.

15 Plaintiff moves for final approval of attorneys’ fees in the amount of \$300,000, which
16 represents 33 1/3% of the Gross Settlement Amount (“GSA”). As will be demonstrated herein,
17 Plaintiff’s attorney fee request is supported using the percentage fee method and the lodestar
18 method. Second, Plaintiff moves for final approval of litigation costs in the amount of \$26,112.06
19 incurred in litigating this matter. Third, Plaintiff moves for final approval of the Class
20 Representative Enhancement Payment in the amount of \$15,000 to compensate the Class

21 ¹ After the class workweek data was provided to the Settlement Administrator, it was determined
22 that the workweeks worked by Class Members during the original Class Period of June 26, 2019,
23 to April 13, 2024, exceeded 23,100, triggering the Escalator Provision in the Joint Stipulation and
24 Settlement Agreement (“Settlement Agreement”). Declaration of David Mara, Esq. (“Mara Dec.”),
25 **Exhibit 5**, III(51)(A). The provision provided if the actual number of workweeks exceeded 23,100
26 (greater than a 5% increase from the originally contemplated 22,000 workweeks), Defendant could
27 either increase the Gross Settlement Amount proportionately according to the number of additional
28 workweeks over the 5% cap, or close the Class Period just before the date the workweeks exceeded
this 5% cap. *Id.* Defendant chose to close the Class Period just before the date the workweeks
exceeded this 5% cap. Based on the workweek data provided, the Settlement Administrator
determined that the Class Period would need to close on March 2, 2024, to avoid the total
workweeks exceeding the 23,100 cap contained in the Escalator Provision.

² Declaration of Mayra Gonzalez (“Gonzalez Dec.”) ¶ 13.

1 Representative for a general release of his claims against Defendant, including his contemplated
2 wrongful termination claims, and for the time he spent on and the risks absorbed in undertaking
3 this case. Plaintiff played a vital role in representing the other individuals in this case and
4 spearheading the lawsuits to seek monetary relief for them. Fourth, Plaintiff moves for final
5 approval of payment of \$8,950 to the Settlement Administrator, Phoenix Settlement
6 Administrators (“Phoenix”) for the costs and fees of administering settlement. Fifth, Plaintiff
7 moves for final approval of payment to the Labor and Workforce Development Agency
8 (“LWDA”) under the Private Attorneys’ General Act (“PAGA”) in the amount of \$37,500 (75%
9 of \$50,000 allocated to PAGA penalties).

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

20 **II. BACKGROUND, INVESTIGATION, DISCOVERY**

21 Defendant engages in the operation of facilities which produce lumber and wood products
22 to serve Defendant’s customers in the State of California. In order to carry out its business,
23 Defendant employs hourly non-exempt employees, like Plaintiff. Mara Dec. ¶ 9.

24 On June 21, 2023, Plaintiff sent notice to the LWDA of his intent to pursue various wage
25 and hour claims against Defendant on behalf of similarly situated aggrieved employees. Shortly
26 thereafter, Plaintiff filed a putative class action complaint on June 26, 2023, against Defendant in
27

28 ³ Gonzalez Dec. ¶ 5, **Ex. A.**

⁴ Gonzalez Dec. ¶¶ 8-10.

the San Stanislaus County Superior Court, Case No. CV-23-003516, alleging causes of action for: (1) Failure to Pay All Straight Time Wages; (2) Failure to Pay All Overtime Wages; (3) Failure to Provide Meal Periods; (4) Failure to Authorize and Permit Rest Periods; (5) Failure to Adopt a Compliant Sick Pay/Paid Time Off Policy; (6) Knowing and Intentional Failure to Comply with Itemized Employee Wage Statement Provisions; (7) Failure to Pay All Wages Due at the Time of Termination of Employment; (8) Failure to Reimburse Business Expenses; and (9) Violation of Unfair Competition Law. Plaintiff also filed a separate action alleging identical violations of the California Labor Code and seeking civil penalties under the PAGA on August 28, 2023, against Defendant in the Stanislaus County Superior Court, Case No. CV-23-004867. The Parties later agreed to consolidate both cases, with CV-23-003516 designated as the lead case. Mara Dec ¶ 10.

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

a. Discovery and Investigation

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

This discovery, in conjunction with the Parties' meet and confer efforts, resulted in the production of hundreds of documents and thousands of lines of data, including Defendant's employee handbooks, policies, and practices, and a sampling of wage and time records for Plaintiff and Class Members. Using the time and wage records for the Class provided and the data surrounding the number of current and former employees, Plaintiff and his expert were able to

1 establish a potential exposure model in preparation for mediation. Mara Dec. ¶ 13.

2 **b. The Parties' Staunchly Conflicting Positions**

3 The gravamen of Plaintiff's claims is that Defendant failed to provide lawful meal periods
4 and rest breaks to Class Members in violation of *Labor Code* sections 512 and 226.7, Wage Orders,
5 *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, and *Augustus v. ABM Security*
6 *Services, Inc.* (2016) 2 Cal.5th 257, failed to pay Class Members for all hours worked as defined
7 in Wage Order 1-2001, and failed to reimburse business expenses in violation of Labor Code §
8 2802. This proposed Settlement was only possible following significant discovery and evaluation
9 of Defendant's relevant policies, procedures, and records, which permitted Plaintiff's Counsel to
10 engage in a comprehensive analysis of liability and potential damages to prepare for the mediation
11 and class certification. Mara Dec. ¶ 14.

12 Defendant vigorously denies Plaintiff's contentions, claiming that all meal and rest breaks
13 were provided in compliance with California law, that Class Members were paid for all time
14 worked, and that Class Members did not incur any unreimbursed business expenses. Specifically,
15 Defendant contends that Plaintiff's and Class Members' claims for meal periods are meritless due
16 to the fact that Defendant maintained lawful meal period policies and practices throughout the
17 Class Period, eliminating any purported liability for the failure to provide meal periods. Second,
18 while Defendant disagrees that California law requires employers to permit employees to leave the
19 premises for rest periods, Defendant denies that employees were prevented from leaving the
20 premises, contends that employees are not under its control and command during rest periods, and
21 contends that employees are provided with duty-free breaks in which they can choose to do
22 whatever they want. Therefore, Defendant contends Plaintiff faces a difficult burden of proof at
23 certification to show their claims are common to all putative Class Members, as it would require
24 individual testimony as to their understanding of Defendant's meal and rest period policies. Mara
25 Dec. ¶ 15.

26 Further, Defendant contends that beyond the limited accusations of Plaintiff, there is no
27 evidence that Defendant had a policy or practice resulting in any purported failure to be paid for
28 all hours worked. As such, Defendant contends that the Court would have to ask each and every

1 single Class Member if they were paid appropriately, devolving into individualized issues that are
2 unsuitable for class certification. In addition, Defendant contends that they never have required
3 Plaintiff or Class Members to use their personal cell phone for business purposes, and if they did
4 decide to use their personal cell phones for business communications, that it was solely their
5 choice, and not the result of any purported mandate by Defendant. Mara Dec. ¶ 16.

6 As evidenced above, the Parties took staunchly conflicting positions with respect to
7 Plaintiff's claims.

8 **c. The Parties Attended Mediation Which Led to Settlement**

9 The Parties agreed to attend mediation with respected wage and hour mediator Jeff Ross
10 on February 13, 2024. After a full day of mediation, the Parties were able to reach a settlement in
11 principle. The Parties then met and conferred regarding all the terms of the settlement and finalized
12 their agreement in the Joint Stipulation and Settlement Agreement that the Parties now seek to
13 finally approve. Mara Dec. ¶ 17; **Exhibit 5**.

14 **III. THE PROPOSED SETTLEMENT AND THE CLASS MEMBERS' RESPONSE**

15 **a. Terms of the Proposed Settlement**

16 The Parties agreed (subject to and contingent upon the Court's approval) that this action
17 be settled and compromised for the non-reversionary total sum of \$900,000 ("Gross Settlement
18 Amount" or "GSA") which includes, subject to Court approval: (a) attorneys' fees of up to
19 \$300,000 (33 1/3% of the GSA) to compensate Class Counsel for work already performed and all
20 work remaining to be performed in documenting the settlement, administering the settlement and
21 securing Court approval; (b) litigation costs of \$26,112.06 (originally estimated not to exceed
22 \$30,000); (c) Class Representative Enhancement Payment to the named class representative, Brett
23 Kelly, in a sum not to exceed \$15,000 each in consideration for general releases of his claims
24 against Defendant, including his contemplated wrongful termination claims, and for initiating and
25 prosecuting this Class Action, serving as Class Representative, work performed, and risks
26 undertaken for the payment of Defendant's attorneys' fees and costs in the event he had been
27 unsuccessful in either matter; (d) claims administration fees and expenses to Phoenix, in the
28 amount of \$8,950; and (e) the \$50,000 allocated to Plaintiff's claims under the PAGA. Mara Dec.

¶ 18.

After all Court-approved deductions from the GSA, it is estimated that \$499,937.94, (“Net Settlement Amount” or “NSA”), less all applicable employee taxes, will be distributed to Class Members – **with an average estimated payment of \$1,900.90 per Class Member, and a high payment of \$5,290.14.** One hundred percent (100%) of the NSA will be paid to the Class Members, less taxes. Subject to the terms and conditions of the settlement, the NSA will be allocated among Settlement Class Members according to each Settlement Class Member’s workweeks during the Class Period as a *pro rata* portion of the total combined workweeks of all the Settlement Class Members during the Class Period as derived from Defendant’s records.

Furthermore, the Settlement allocates \$50,000 in consideration for the settlement of Plaintiff’s PAGA claims, which is to be distributed separately from the NSA. Settlement Class Members who were employed by Defendant from June 21, 2022, one year prior to the submission of the written notice of Labor Code violations to the LWDA pursuant to Labor Code § 2699.3(a)(1), through March 2, 2024 (“PAGA Period”) are also deemed “Aggrieved Employees” and able to recover their share of the civil penalties under the settlement. 75% of this \$50,000, or \$37,500, will be paid to the LWDA, while the remaining 25%, or \$12,500, will be distributed to the Aggrieved Employees – with an average estimated payment of \$75.76 per Aggrieved Employee, and a high payment of \$122.25. These payments will also be made according to each Aggrieved Employee’s workweeks during the PAGA Period as a *pro rata* portion of the total combined workweeks of all the Aggrieved Employees during the PAGA Period.

Under no circumstances will any portion of the \$900,000 settlement revert to Defendant.

b. Released Claims

Under the terms of the Settlement, the Plaintiff and the Settlement Class Members will release and discharge the Released Parties from all claims alleged or could have been alleged based on the facts alleged in the Class Action which arose during the Class Period. *See* Mara Dec., **Exhibit 5**, I (37). Plaintiff and the Aggrieved Employees will also release any claims for civil penalties under the California Labor Code and the Private Attorneys General Act, to the extent such claims are predicated

upon the Labor Code violations alleged or could have been alleged based on the facts alleged in the
PAGA Action and Plaintiff's notice to the LWDA which arose during the PAGA Period. *Id.* at I (38).

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

On May 14, 2024, the Court granted preliminary approval, conditionally certified the Class,
appointed Phoenix to act as the Settlement Administrator, approved the notice to be sent to the
Class, and directed that the notice be mailed to the Class by First Class U.S. Mail. On May 9, 2024,
Phoenix received the class data file from Counsel for Defendant, which contained the contained
names, last known mailing addresses, Social Security numbers, and dates of employment for each
Settlement Class Member. Gonzalez Dec. ¶ 3. On June 5, 2024, Phoenix conducted a National
Change of Address ("NCOA") search in an attempt to update the class list of addresses as
accurately as possible. *Id.* at ¶ 4. A search of this database provides updated addresses for any
individual who has moved in the previous four (4) years and notified the U.S. Postal Service of
their change of address. *Id.* On June 14, 2024, the Notice was mailed, via U.S First Class Mail, to
all two hundred sixty-three (263) individuals contained in the Class List. *Id.* at ¶ 5.

Thirty-three (33) Notices were returned to Phoenix by the Post Office. Gonzalez Dec. ¶ 6.
Phoenix performed a computerized skip trace on the returned Notices that did not have a
forwarding address, in an effort to obtain an updated address for purpose of re-mailing the Notice.
Id. Twenty-three (23) Notices were re-mailed as a result of the skip trace. *Id.* Ten (10) Notices
remain undeliverable since an updated address could not be obtained via skip trace. *Id.* at ¶ 8.

In sum, the settlement was received with overwhelming support from the Class Members.
Specifically, there were no objections, disputes, and no requests for exclusion submitted by Class
Members. Gonzalez Dec. ¶¶ 8-10. This means all two hundred sixty-three (263) Class Members,
or 100%, will receive a settlement payment. *Id.* at ¶ 11.

IV. ARGUMENT

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

California Rule of Court, Rule 3.769, requires court approval for class action settlements.
California Rule of the Court, Rule 3.769(g). California courts favor settlement. *Stambaugh v.*

1 *Superior Court* (1976) 62 Cal. App. 3d 231, 236, *Potter v. Pacific Coast Lumber Co. of Cal.* (1951)
2 37 Cal. 2d 592, 602 (“[T]he law wisely favors settlements”). Accordingly, the Court must give
3 “[due] regard to what is otherwise a private consensual agreement between the parties.” *Wershba*
4 *v. Apple Computer, Inc.* (2001) 91 Cal. App. 4th 224, 245.

5 In deciding whether to approve a class settlement, a court evaluates whether the proposed
6 settlement is “fair, adequate, and reasonable.” *Dunk v. Ford Motor Co.* (1996) 48 Cal. App. 4th
7 1794, 1801 (citing *Officers for Justice v. Civil Serv. Comm’n of City & Cnty. of S.F.* (9th Cir. 1982)
8 688 F.2d 615, 625); *Cho v. Seagate Tech. Holdings, Inc.* (2009) 177 Cal. App. 4th 734, 742 43. A
9 court enjoys broad discretion to make its fairness determination. *Dunk*, 48 Cal. App. 4th at 1801.

10 However, “a presumption of fairness exists where: (1) the settlement is reached through
11 arm’s-length bargaining; (2) investigation and discovery are sufficient to allow counsel and the
12 court to act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of
13 objectors is small.” *Dunk*, 48 Cal. App. 4th at 1802; *accord Wershba*, 91 Cal. App. 4th at 245. In
14 addition, a court should consider additional relevant factors, including the strength of the plaintiff’s
15 case compared to the settlement amount; the risk, expenses, complexity, and likely duration of
16 further litigation; and the fair treatment of class members in relation to each other. *Dunk*, 48 Cal.
17 App. 4th at 1802.

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

26
27 ⁵ See Memorandum of Points and Authorities in Support of Preliminary Approval, filed on March
28 21, 2024. In addition to the *Dunk* factors, Class Counsel also detailed the other factors such as the
strengths of Plaintiff’s case, risks and costs of further litigation, as well as the reasonableness of
the GSA amount in light of *Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116. *Id.*

Furthermore, although Plaintiff is confident in the strengths of his claims and believes this case is suitable for certification on the basis that there are company-wide policies and practices that he contends violate California law and uniformly affect Class Members, Defendant's counterarguments raise uncertainties with respect to both class certification and success on the merits. As the California Supreme Court ruled in *Sav-On v. Superior Court* (2004) 34 Cal.4th 319, class certification is always a matter of the trial court's sound discretion. Decisions following *Sav-On* have reached different conclusions, with respect to certification of wage and hour claims.⁶ In light of Defendant's defenses, supporting evidence, and position that the action is not suitable for class treatment, the settlement amount of \$900,000 — **with an average settlement share estimated at \$1,900.90, with a high payment of \$5,290.14** — Plaintiff and his counsel believe this is a reasonable and fair settlement. Mara Dec. ¶ 19.

V. THE COURT SHOULD APPROVE THE REQUESTED FEES AND COSTS

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

Class Counsel applies for an award of attorneys' fees in the sum of \$300,000 (one-third of the GSA), and litigation costs of \$26,112.06 (originally estimated not to exceed \$30,000). Mara Dec. ¶ 20. California courts have recognized an appropriate method for determining an award of attorneys' fees is based on a percentage of the total value of benefits to Class Members by the settlement, also known as the "common fund" method. *Serrano v. Priest* (1977) 20 Cal.3d 25, 34 (*Serrano III*) 34 ("when a number of persons are entitled in common to a specific fund, and an action brought by a plaintiff or plaintiffs for the benefit of all results in the creation or preservation of that fund, such plaintiff or plaintiffs may be awarded attorney's fees out of the fund."); *Serrano v. Unruh*, 32 Cal.3d 621, 627 (1982) (in awarding a fee from the common fund obtained for the benefit of all parties, the trial court acts within its equitable power to prevent the other parties'

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

1 unjust enrichment.); *Rawlings v. Prudential-Bache Properties, Inc.*, 9 F.3d 513, 516 (6th Cir.
2 1993) (the percentage of the fund method for calculating attorney’s fees more accurately reflects
3 the results achieved for the putative class than the lodestar method and “establishes reasonable
4 expectations on the part of plaintiffs’ attorneys as to their expected recovery; and it encourages
5 early settlement, which avoids protracted litigation.”); *In re Rite Aid Corp. Securities Litigation*,
6 396 F.3d 294, 300 (3d Cir. 2005) (“The percentage-of-recovery method is generally favored in
7 common fund cases because it allows courts to award fees from the fund ‘in a manner that rewards
8 counsel for success and penalizes it for failure.’”).

9 The purpose of the common fund/percentage approach is to “spread litigation costs
10 proportionally among all the beneficiaries so that the active beneficiary does not bear the entire
11 burden alone.” *Vincent v. Hughes Air West, Inc.* (9th Cir. 1977) 557 F.2d 759, 769. In *Quinn v.*
12 *State of California* (1995) 15 Cal.3d 162, 167, the Court stated: “[O]ne who expends attorneys’
13 fees in winning a suit which creates a fund from which others derive benefits may require those
14 passive beneficiaries to bear a fair share of the litigation costs.” Similarly, in *City and County of*
15 *San Francisco v. Sweet* (1995) 12 Cal.4th 105, 110, the California Supreme Court recognized that
16 the common fund doctrine has been applied “consistently in California when an action brought by
17 one party creates a fund in which other persons are entitled to share.” The reasons for applying the
18 common fund doctrine include: “...fairness to the successful litigant, who might otherwise receive
19 no benefit because his recovery might be consumed by the expenses; correlative prevention of an
20 unfair advantage to the others who are entitled to share in the fund and who should bear their share
21 of the burden of its recovery; encouragement of the attorney for the successful litigant, who will
22 be more willing to undertake and diligently prosecute proper litigation for the protection or
23 recovery of the fund if he is assured that he will be properly and directly compensated should his
24 efforts be successful.” *Id.*

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

27 The recognized advantages of the percentage method - including relative ease of
28 calculation, alignment of incentives between counsel and the class, a better
approximation of market conditions in a contingency case, and the encouragement

1 it provides counsel to seek an early settlement and avoid unnecessarily prolonging
2 the litigation—convince us the percentage method is a valuable tool that should not
3 be denied our trial courts.

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

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

8 Several studies of class action fee awards have found that the median common fund fee
9 award is approximately one-third of the total settlement fund.⁸ The requested fee falls in the mid-
10 range of percentage class fee awards, which generally range from 20% to 50% of a common fund,
11 and it constitutes fair compensation for undertaking complex, risky, expensive, and time-
12 consuming litigation on a contingent basis and compensates Class Counsel for their efforts, as well
13 as the result achieved for the benefit of the Class. Numerous state and federal courts in California
14 routinely approve fee requests equal to or greater than 33% of the common fund. Indeed, courts
15 have found that an award of 33% of the common fund represents the “benchmark” in California.⁹
16 In short, Plaintiff’s counsels’ fee request of \$300,000 (33 1/3% of the GSA) is in line with awards
17 in similar cases in California and nationwide and demonstrates that Plaintiff’s counsels’ fee request
18 is consistent with market rates and is reasonable.

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

24 ⁸ *See, e.g., Chavez v. Netflix, Inc.* (2008) 162 Cal. App. 4th 43, 66, n.11 (numerous studies have
25 shown that “fee awards in class actions average around one-third of the recovery.”); Reagan W.
26 Silber and Frank E. Goodrich, *Common Funds and Common Problems: Fee Objections and Class*
27 *Counsel’s Response*, 17 Rev. Litig. 525, 546 ; T. Willging, L. Hooper and R. Niemic, *Empirical*
28 *Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee*
on Civil Rules, 90 (1996) (finding that attorneys’ fees in class litigation “were generally in the
traditional range of approximately one-third of the total settlement”).

⁹ *Smith v. CRST Van Expedited, Inc.* (S.D. Cal. Jan. 14, 2013) 10-CV-1116- IEG WMC, 2013 WL
163293, *5 (“These percentages compare favorably with both California (33%) and federal (25%)
benchmarks.”); *Dennis v. Kellogg Co.* (S.D. Cal. Nov. 14, 2013) 09-CV-1786-L WMC, 2013 WL
6055326, at *7 (“This percentage compares favorably with both California (33%) and federal
(25%) benchmarks and the requested fee compares well with a lodestar cross-check as well.”).

1 **c. A Lodestar Cross-Check with a Modest Multiplier Confirms the**
2 **Reasonableness of the Requested Fee**

3 Class Counsel’s fee request is reasonable when calculated using the lodestar method.
4 Under the lodestar method, a base fee amount is calculated from a compilation of time reasonably
5 spent on the case and the reasonable hourly compensation of the attorney. *Serrano v. Priest* (1977)
6 20 Cal. 3d 25, 48. The court then may enhance this lodestar figure by a “multiplier” to account for
7 a range of factors, such as the novelty and difficulty of the case, its contingent nature, and the
8 degree of success achieved. *Id.* at 49; *see also Ketchum v. Moses*, 24 Cal.4th 1122, 1132-36 (2001);
9 *Thayer v. Wells Fargo Bank*, 92 Cal.App.4th 819, 834 (2001), [“[t]here is no...rule limiting the
10 factors that may justify an exercise of judicial discretion to [adjust the] lodestar”]. Courts
11 “routinely enhance[] the lodestar to reflect the risk of non-payment in common fund cases.”
12 *Vizcaino v. Microsoft Corp.* (9th Cir. 2002) 290 F.3d 1043, 1051; *Graham v. DaimlerChrysler*
13 *Corp.* (2004) 34 Cal.4th 553, 579 (“One of the most common fee enhancers [...] is for contingency
14 risk.”) Such an enhancement “mirrors the established practice in the private legal market of
15 rewarding attorneys’ fees for taking the risk of nonpayment by paying them a premium over their
16 normal hourly rates for winning contingency cases.” *Vizcaino, supra*, 220 F.3d at 1051; *Ketchum*,
17 24 Cal.4th at 1132-33. A risk multiplier also serves to bring the financial incentives for enforcing
18 important rights “into line with incentives [attorneys] have to undertake claims for which they are
19 paid on a fee-for-service basis. *Ketchum*, 24 Cal.4th at 1132. In determining whether or not to
20 enhance or reduce the lodestar, California courts take into account multiple factors, including: the
21 time and labor required; the skill requisite to perform the legal services properly; the preclusion of
22 other employment by the attorney due to the acceptance of the case; the contingent nature of the
23 fee; the amount involved and results obtained; the experience, reputation, and ability of the
24 attorney; and awards in similar cases. *Cates v. Chiang* (2013) 213 Cal.App.4th 791, 822.

25 As of the date of filing this Motion for Final Approval, Plaintiff’s counsel has worked a
26 total of 336 hours on this case and calculated the base lodestar at \$254,600 at rates reflecting those
27 currently earned in the marketplace, which would require a modest 1.179 multiplier. Mara Dec. ¶¶
28 21-23, 27-28, **Exhibit 1**. All of the work and tasks performed by Plaintiff’s counsel were
 reasonable and necessary to the prosecution of this case. Mara Dec. ¶¶ 21-23, 27-28.

1 Courts “routinely enhance[] the lodestar to reflect the risk of non-payment in common fund
2 cases.” *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1051 (9th Cir. 2002); *Graham v.*
3 *DaimlerChrysler Corp.*, 34 Cal.4th 553, 579 (2004) (“One of the most common fee enhancers [...] is for contingency risk.”) Such an enhancement “mirrors the established practice in the private
4 legal market of rewarding attorneys’ fees for taking the risk of nonpayment by paying them a
5 premium over their normal hourly rates for winning contingency cases.” *Vizcaino*, 220 F.3d at
6 1051. A risk multiplier also serves to bring the financial incentives for enforcing important rights
7 “into line with incentives [attorneys] have to undertake claims for which they are paid on a fee-
8 for-service basis.” *Ketchum*, 24 Cal.4th at 1132. In determining whether or not to enhance or
9 reduce the lodestar, California courts take into account multiple factors, including: the time and
10 labor required; the skill requisite to perform the legal services properly; the preclusion of other
11 employment by the attorney due to the acceptance of the case; the contingent nature of the fee; the
12 amount involve and results obtained; the experience, reputation, and ability of the attorney; and
13 awards in similar cases. *Cates v. Chiang* (2013) 213 Cal. App. 4th 791, 822.

15 As discussed above, this was a highly-contested matter which required a significant amount
16 of time and labor. Class Counsel had to investigate and analyze hundreds of pages of documents
17 and thousands of lines of data. In addition, Class Counsel had to marshal the evidence in a manner
18 in which it could be adjudicated on a class-wide basis, an endeavor which cannot be underscored.
19 So often, lawyers unskilled in the class action aspect of wage and hour cases do not pay attention
20 to or put the work into how the evidence must be presented for class-wide adjudication. Strong
21 class-wide cases perish in the hands of inexperienced counsel because the case has not been
22 worked up to succeed at certification. Class Counsel here has considerable experience in class
23 litigation and, from the beginning of the case, is marshalling the evidence with a sharp focus on
24 class-wide proof needed for the matter to get certified. This case was no different. Throughout the
25 matter, as evidence was being gathered through documents and witness interviews, Class Counsel
26 was reducing the data to a “living class certification motion.” This filtering of voluminous evidence
27 into class-wide proof while keeping an eye on the merits of the litigation resulted in a considerable
28 amount of attorney time and skill. Mara Dec. ¶ 29.

1 Most importantly, all services were performed by Class Counsel on a contingent basis.
2 Both California and federal courts recognize that attorneys should be compensated for taking on
3 such contingent risks and provided with financial incentives to enforce important rights and
4 protections like those at issue in this case. *See, e.g., Vizcaino*, 290 F.3d at 1051; *Ketchum*, 24
5 Cal.4th at 1132-33. Here, Class Counsel bore the risk that, in spite of all of their efforts and skill
6 employed, there may be no recovery. Thus, a risk multiplier is appropriate. Mara Dec. ¶ 30.

7 Class Counsel respectfully requests a fee of \$300,000, which, based on the total attorney
8 hours expended and rates, would require a modest 1.179 multiplier to raise the generated fees of
9 \$254,600 to the requested amount. Far greater multipliers have been awarded in similar cases, and
10 the total amount of fees sought by Class Counsel is also reasonable compared to fees awarded in
11 like cases. Courts routinely enhance lodestar amounts based on multipliers that “range from 2 to 4
12 or even higher.”¹⁰ Thus, consideration of the lodestar method as a cross-check to the percentage
13 figure sought strongly supports the reasonableness of the requested fee award. Class Counsel
14 moves for and respectfully requests that the Court grant attorneys’ fees in the amount of \$300,000.

15 **d. Class Counsel’s Hourly Rates Are Reasonable**

16 Plaintiff’s counsels’ hourly rates are between \$650 and \$850 and are in line with rates
17 typically approved in wage and hour class action litigation and which rates have been approved by
18 Courts in California in the Los Angeles, Sacramento, San Francisco, Alameda, Orange and San
19 Diego County Superior Courts.¹¹ A reasonable hourly rate is the prevailing rate charged by
20 attorneys of similar skill and experience in the relevant community. *PLCM Group, Inc v. Drexler*
21 (2000) 22 Cal. 4th 1084, 1095. When determining a reasonable hourly rate, courts may consider
22 factors such as skill and experience, the nature of the work performed, the relevant area of expertise

23
24 ¹⁰ *Wershba v. Apple Computer, Inc.*, 91 Cal.App.4th 224, 255 (2001); *see, e.g., Vizcaino*, 290 F.3d
25 at 1051 (approving multiplier of 3.65); *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 123
26 (2d Cir. 2005) (approving multiplier of 3.5); *Craft v. County of San Bernardino*, 624 F. Supp. 2d
27 1113, 1125 (C.D. Cal. 2008) (awarding multiplier of 5.2 and collecting cases with cross-check
28 multipliers ranging from 4.5 to 19.6); *Glendora Community Redevelopment Agency v. Demeter*,
155 Cal.App.3d 465, 479-80 (1984) (approving fee award with multiplier of 12).

¹¹ Mara Dec. ¶¶ 23, 28; **Ex. 2** Westlaw Court Express’s Legal Billing Report, Volume 14, Number
3, California Region for December 2012; **Ex. 3**, 2014 Declaration of Richard M. Pearl in
Hohnbaum v. Brinker Restaurant Corp. SDSC GIC834348; **Ex. 4**, 2012 National Law Journal
Survey of Hourly Billing Rates for Partners and Associates.

1 and the attorney's customary billing rates. *Flannery v. California Highway Patrol* (1998) 61 Cal.
2 App. 4th 629, 632.

3 Plaintiff's counsels' skill and experience support their hourly rates. Their practice is limited
4 exclusively to litigation, focusing on the representation of employees in wage and hour and
5 consumer class action matters. Mara Dec. ¶¶ 1-8, 24-26. As prominent attorneys in the field of
6 wage and hour class action litigation, Plaintiff's counsel continually monitors the prevailing
7 market rates charged by both defense and plaintiff law firms and set the billing rates of their
8 attorneys and paralegals to be consistent with the prevailing market rates in the private sector for
9 attorneys and staff of comparable skill, qualifications and experience. Other wage and hour
10 attorneys working as class counsel before California courts charge comparable if not higher rates.¹²
11 Therefore, as they are in line with those of the relevant community, Class Counsels' hourly rates
12 are reasonable.

13 **e. Class Counsel's Total Hours are Reasonable**

14 In determining a lodestar fee, reasonable hours include, in addition to time spent during
15 litigation, the time spent before the action was filed, including time spent interviewing clients,
16 investigating the facts and the law, and preparing the initial pleadings. *See New York Gaslight*
17 *Club, Inc. v. Carey* (1980) 447 U.S. 54, 62. The fee award should include fees incurred to establish
18 and defend the attorneys' fee claim. *Serrano v. Priest* (1982) 32 Cal.3d 621, 639.

19 To date, Plaintiff's Counsel has expended a total of 336 hours litigating this case. The work
20 performed to achieve a settlement that will provide valuable consideration to the Class, **averaging**
21 **an estimated payment of \$1,900.90**,¹³ is summarized by Class Counsel in the declarations
22 submitted herewith. Mara Dec. ¶¶ 22-23, 27-28; **Ex. 1**. Counsel's many tasks, in summary form,
23 included the following: pre-filing investigation and legal research; communicating with the class
24 representatives; interviewing and meeting with putative Class Members; research and
25 investigation of California's ever evolving wage and hour laws; investigation into Defendant's

26 ¹² Mara Dec. ¶¶ 23, 28, **Ex. 2**, Westlaw Court Express's Legal Billing Report, Volume 14, Number
27 3, California Region for December 2012; **Ex. 3**, 2014 Declaration of Richard M. Pearl in
28 *Hohnbaum v. Brinker Restaurant Corp.* SDSC GIC834348; **Ex. 4**, 2012 National Law Journal
Survey of Hourly Billing Rates for Partners and Associates).

¹³ See Gonzalez Dec. ¶ 13.

1 pay-structures and policies for its hourly employees; drafting and filing pleadings; drafting and
2 filing notice to the LWDA; numerous conferences with Defendant's counsel regarding a variety
3 of issues throughout the litigation, mediation, and settlement process; numerous interoffice
4 discussions about litigation strategy and theories of liability; draft and propound discovery; draft
5 stipulations and case management conference statements; appearing at hearings and case
6 management conferences; review and analyze documents produced by Defendant, create exhibits
7 for use in the case; review case file for mediation; numerous discussions with expert retained to
8 analyze time and wage records; draft mediation brief and exposure analysis; interoffice discussions
9 about mediation and mediation brief; prepare for and attend mediation; review and revise
10 memorandum of understanding; draft and revise long form settlement agreement; draft motion for
11 preliminary approval and supporting documents; communicate with the settlement administrator
12 throughout the administration process; and draft motion for final approval and supporting
13 documents. All tasks and work performed were reasonable and necessary to the prosecution of this
14 case. The work performed was justified in light of the result achieved. Mara Dec. ¶¶ 22-23, 27-28.

15 **f. Costs of Litigation**

16 Class Counsel seeks reimbursement of the litigation costs and expenses of \$26,112.06
17 (originally estimated not to exceed \$30,000). These costs were all reasonable and necessary to the
18 prosecution of this case and the results achieved and are fair, and reasonable. Mara Dec. ¶ 31,

19 **Exhibit 1.**

20 **VI. THE CLASS REPRESENTATIVE ENHANCEMENT PAYMENT IS REASONABLE**

21 In addition, Plaintiff agreed to a general release of his claims against Defendant in
22 exchange for the \$15,000 Class Representative Enhancement Payment. Courts routinely approve
23 service payments, or incentive awards, to compensate a named plaintiff for the services he or she
24 provides and the risks he or she incurs during class litigation. *See In re Cellphone Fee Termination*
25 *Cases* (2010) 186 Cal.App.4th 1380, 1393; *see also Bell v. Farmers Ins. Exch.* (2004) 11
26 Cal.App.4th 715, 725-26 (upholding services payments to class representatives); *Munoz v. BCI*
27 *Coca-Cola Bottling Co. of Los Angeles* (2010) 186 Cal.App.4th 399, 412 (upholding incentive
28 awards to plaintiffs that, when added to their individual recoveries, amounted to more than twice

1 as much as the average payment to class members). Courts have regularly and routinely granted
2 approval of settlements containing such enhancements. *See, e.g., Staton v. Boeing*, 327 F.3d 938,
3 977 (9th Cir. 2003).¹⁴ In Class Counsel’s experience, the typical enhancement award in wage and
4 hour class action settlements ranges from \$5,000 to \$75,000. Very commonly there is more than
5 one class representative who receives an award in the above range. Mara Dec. ¶ 32.

6 The requested payment is appropriate and reasonable and unopposed by Defendant. This
7 payment is made, in part, in exchange for Plaintiff providing Defendant with a general release of
8 their claims. This general release is far greater than the release signed by class members. In
9 addition, in support of the enhancement request, Plaintiff submitted a declaration detailing the
10 efforts he expended on behalf of the class in order to advance this case to its successful conclusion.
11 *See generally* Declaration of Brett Kelly. There is no question that this case would not have reached
12 the same result but for Plaintiff’s involvement and input at all stages of the litigation. Not only
13 that, Plaintiff had also contemplated bringing a wrongful termination action against Defendant,
14 but willingly agreed to release those claims through his general release, as he opted to champion
15 for the rights of his fellow employees instead.

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

23 Unfortunately, there have been several judgments entered against class representatives, e.g.
24

25 ¹⁴ *See, e.g., Cook v. Niedert*, 142 F.3d 1004, 1015 (7th Cir. 1998); *Roberts v. Texaco*, 979 F. Supp.
26 185 (S.D.N.Y. 1997) (“present or past employee whose present position or employment credentials
27 or recommendation may be at risk by reason of having prosecuted the suit, who therefore lends his
28 or her name and efforts to the prosecution of litigation at some personal peril, a substantial
enhancement award is justified”); *Thornton v. East Texas Motor Freight*, 497 F.2d 416, 420 (6th
Cir. 1974) (“We also think there is something to be said for rewarding those drivers who protect
and help to bring rights to a group of employees who have been the victims of discrimination.”).

1 *Koehl v. Verio, Inc.* 142 Cal.App.4th 1313, 1328 (2006) (a wage and hour class action where
2 Defendant prevailed at trial, the named Plaintiffs were held liable, jointly and severally for the
3 Defendant's attorneys' fees); *Whiteway v. Fedex Kinkos Office & Print Services, Inc.*, 2007 U.S.
4 Dist. LEXIS 95398 (N.D. Cal. 2007) (a wage and hour misclassification case lost on summary
5 judgment, after the case was certified, the named Plaintiff was assessed costs in the sum of
6 \$56,788.). The risk of payment of Defendant's costs, in itself alone, is a sufficient basis for an
7 award of the requested enhancement sum. Few individuals are willing to take this risk, and it is
8 clear that the appointed Class Representative here championed a cause on behalf of others with
9 potentially huge monetary risks.

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

21 The payment request is modest for the work performed, risks undertaken for payment of
22 fees and costs if this case had not been successfully concluded, stigma on future employment
23 opportunities, and the benefits all members of the class as well as all current and future class
24 members will enjoy as a result of Plaintiff's efforts. Thus, the Court should approve the request.

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

26 The Parties agreed to hire Phoenix as the Administrator, and the Court approved this
27 choice. The Administrator was responsible for formatting, printing and mailing the Notice. It was
28 also responsible for updating addresses and re-mailing Notices returned as undeliverable,

1 responding to Class Member inquiries, answering questions from Counsel for the Parties, and
2 providing a declaration to document its duties and responsibilities under the settlement. Plaintiff
3 now requests that the Court finally approve the \$8,950 fee to Phoenix for services rendered and to
4 be rendered. Gonzalez Dec. ¶ 16.

5 Following the grant of final approval, the Administrator's duties will continue in order to
6 calculate and mail the Individual Settlement Payment checks to Class Members, perform tax
7 reporting obligations, disburse other payments as ordered by the Court, and perform such other
8 duties as set forth in the Settlement Agreement. Phoenix's fee of \$8,950 for services rendered and
9 to be rendered is fair and reasonable and should be granted.

10 **VIII. CONCLUSION**

11 Based on the foregoing, Class Counsel respectfully requests the Court grant final approval
12 of the Class Action Settlement, award Class Counsel's attorneys' fees in the sum of \$300,000 and
13 litigation costs of \$26,112.06, award to the named Plaintiff the class representative enhancement
14 payment in the sum of \$15,000, award Phoenix \$8,950 for settlement administration services, and
15 approve of a payment to the LWDA in the amount of \$37,500.

16
17
18 Dated: September 10, 2024

Respectfully submitted,

MARA LAW FIRM, PC

19
20 

David Mara, Esq.

Matthew Crawford, Esq.

21 Attorneys for Plaintiff BRETT KELLY, on
22 behalf of himself and all others similarly situated,
23 and on behalf of the general public
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