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**IN THE UNITED STATES DISTRICT COURT**

**CENTRAL DISTRICT OF CALIFORNIA**

| | |
|---|---|
| ERIC AYALA and ADRIAN AVILES, on behalf of themselves and all others similarly situated, and as "aggrieved employees" on behalf of other "aggrieved employees" under the Labor Code Private Attorneys General Act of 2004,<br><br>*Plaintiff(s),*<br><br>vs.<br><br>UPS SUPPLY CHAIN SOLUTIONS, INC., a Delaware corporation; UPS SUPPLY CHAIN SOLUTIONS GENERAL SERVICES, INC., a Delaware corporation; and DOES 1 10, inclusive,<br><br>*Defendant(s).* | Case No.: 5:20-cv-00117-PSG-AFM<br><br>**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR AWARD OF ATTORNEYS' FEES AND COSTS, SETTLEMENT ADMINISTRATION COSTS, AND CLASS REPRESENTATIVE SERVICE AWARDS**<br><br>**Date:** January 14, 2022<br>**Time:** 1:30 p.m.<br>**Courtroom:** 6A<br>**Judge:** Hon. Philip S. Gutierrez |

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**Statutes**





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**Rules**



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# MEMORANDUM OF POINTS AND AUTHORITIES

## I. INTRODUCTION

Plaintiffs Eric Ayala and Adrian Aviles ("Plaintiffs") submit this memorandum of points and authorities in support of their motion for an award of (1) attorneys' fees to David G. Spivak of The Spivak Law Firm ("Ayala Class Counsel") and Norman B. Blumenthal, Kyle R. Nordrehaug, and Aparajit Bhowmik of Blumenthal Nordrehaug Bhowmik De Blouw LLP ("Aviles Class Counsel") (collectively "Class Counsel"), (2) costs and expenses to Class Counsel, (3) settlement administration costs to Phoenix Settlement Administrators, and (4) Class Representative Service Award to Plaintiffs.

For almost two years, Plaintiffs and Class Counsel have dedicated their time and energy to litigating this case on behalf of the Settlement Class. Plaintiffs filed their Motion for Preliminary Approval of Class Action Settlement and supporting evidence on July 2, 2021. *See* Declaration of David Spivak ("Spivak Decl."), ¶ 3. This Court granted preliminary approval of the "Joint Stipulation of Class Action Settlement" ("the Settlement") on August 24, 2021. Spivak Decl., ¶ 3, Exhibits A-B. Class Counsel undertook such efforts on a pure contingency with no promise of payment. Spivak Decl., ¶ 12; *see also generally* Declaration of Kyle Nordrehaug ("Nordrehaug Decl."), ¶ 7. Class Counsel achieved a laudable result in the face of a strong defense, fueled by Defendants' ample resources and their attorneys' extensive experience. The Settlement obtained provides for a Gross Settlement Amount ("GSA") of $1,800,000.00 to compromise risky, and contested claims for alleged violations of the California wage and hour laws. For their efforts in achieving this exceptional result, Class Counsel seek an award of attorneys' fees in the amount of $600,000.00 (33.33% of the GSA) as a percentage-of-the-fund and reimbursement of their out-of-pocket costs and expenses in the amount of up to $133,347.82. They also seek $20,000.00 for each Plaintiff as Class

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Representative Service Awards in recognition of his service as a Class Representative in this case.

By any measure, the result here is outstanding, particularly considering the task of litigating a complicated case in the face of contrary precedents, and the enormous risk of non-payment involved in undertaking this litigation. The result is outstanding not only because of the amount Defendants will pay, but because Defendants have agreed to change its security procedures so that employees will be on the clock for time spent undergoing such procedures. The work performed by Class Counsel was extensive. Among other things, Class Counsel:

- Conducted initial investigations and developed the theories and facts to support Plaintiffs' claims as to Defendants' alleged violations;
- Submitted detailed notices to the California Labor and Workforce Development Agency ("LWDA");
- Researched and drafted initial complaints;
- Sought and obtained formal and informal discovery, including, but not limited to, the production of Defendants' relevant written company policies;
- Reviewed and analyzed hundreds of pages of policies and other documents produced by Defendants;
- Interviewed class members;
- Prepared a detailed brief with liability exposure calculations for two days of mediation, each with a different mediator, that led to the Settlement;
- Engaged in difficult and protracted settlement negotiations with Defendants, including two days of mediation, each with a different mediator;
- Conducted several depositions of defense witnesses over several days and defended the depositions of Plaintiffs;
- Drafted and revised settlement agreements, motions, and proposed orders for preliminary approval, and related documents; and

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- Incurred over $133,166.02 in costs to date and estimates to incur an additional $131.80 in costs for a total of $133,347.82.

Spivak Decl., ¶ 11; Nordrehaud Decl., ¶ 11. Moreover, in litigating this case against Defendants, Plaintiffs and Class Counsel faced serious risks, including, but not limited to, the risks of obtaining, and maintaining, class certification, and defeating summary judgment, risk of a prolonged and expensive trial, and the risk of lengthy appeals. *Id.*

Despite the many risks faced by Class Counsel – not least of which was an order by this Court denying class certification for comparable claims against Defendants brought previously by another plaintiff[1], and the difficulty in prosecuting this case, they nevertheless achieved an outstanding result for the Settlement Class. Accordingly, Class Counsel's request for attorneys' fees of 33.33% of the GSA is fair and reasonable. In fact, this amount is well-earned, supported by controlling case law, and is within the fee range awarded by courts within the Ninth Circuit in similar complex cases. Furthermore, a lodestar cross-check reveals that the requested fee award would be no windfall for Class Counsel, and in fact is equivalent to Class Counsel's lodestar to date.

Likewise, it is fair that Class Counsel be reimbursed for their expenses. All of the expenses incurred were reasonable and necessary to the prosecution of this action and administration of this Settlement and are of the kind that courts routinely approve. Finally, Plaintiffs' request for $20,000.00 each for Class Representative Service Awards also warrants approval because it is fair and reasonable in view of their efforts in this case, and the risks they have undertaken. Thus, for the reasons set forth herein, Plaintiffs respectfully request for this Court to grant this Motion in its entirety.

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[1] *La Tasha Coates v. UPS*, CV 18-3012 PSG (AFMx), July 2, 2019. Spivak Decl., ¶ 11, Exhibit R.

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## II. ARGUMENT

### A. THIS COURT SHOULD GRANT CLASS COUNSEL'S REQUEST FOR ATTORNEYS' FEES BECAUSE THE AMOUNT SOUGHT IS FAIR AND REASONABLE.

Rule 23(h) of the Federal Rules of Civil Procedure provides that a court may award reasonable attorney's fees and costs in a certified class action when authorized "by the parties' agreement." In this case, the Settlement provides that Plaintiffs may seek an award of attorneys' fees in the amount of $600,000.00 (33.33% of the GSA) and reimbursement of costs of up to $145,000.00.[2] Settlement, ¶ 4.C(5). Pursuant thereto, Plaintiffs, on behalf of Class Counsel, move for an award of attorneys' fees in amount of $600,000.00 and an award of costs in the amount of $133,347.82. As discussed below, this Court should grant Class Counsel's requests because Plaintiffs have given adequate notice of the requested fees to Settlement Class Members in accordance with Rule 23(h)(1) and, more importantly, because the amounts sought are fair, adequate, and reasonable under the circumstances of this case.

#### 1. The U.S. Supreme Court Has Endorsed the Percentage-of-the-Recovery Method for Awarding Attorneys' Fees Where Class Action Litigation Results in the Creation of a Common Fund.

"[T]he Supreme Court has indicated that the parties to a class action properly may negotiate not only the settlement of the action itself, but also the payment of attorneys' fees." *Williams v. MGM-Pathe Communs. Co.*, 129 F.3d 1026, 1027 (9th Cir. 1997) (*citing Evans v. Jeff D.*, 475 U.S. 717, 734-35 (1986));[3] *see also Williams v. Costco Wholesale Corp.*, 2010 U.S. Dist. LEXIS 67731 (S.D. Cal. 2010) ("Parties to a class action may appropriately negotiate the payment of attorneys' fees and costs in conjunction with the settlement of the action itself.").

[2] The Settlement is attached as Exhibit A to Spivak Decl.

[3] The Supreme Court held in *Jeff D* that plaintiff's counsel could refuse to accept the settlement even at 100 cents on the dollar to the plaintiffs, just because there was not a sufficient amount for attorney's fees included. *See* 475 U.S. at 722.

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It also "has recognized consistently that a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975) (common fund doctrine permits recovery of attorneys' fees and costs from money obtained from defendants).

In *Blum v. Stenson*, 465 U.S. 886, 900 n.16 (1984), the Supreme Court explained that under the common fund doctrine, a reasonable fee may be based "on a percentage of the fund bestowed on the class." This method "rests on the presumption that persons who obtain benefits of a lawsuit without contributing to its cost are unjustly enriched at the successful litigant's expense." *Staton v. Boeing Co.*, 327 F.3d 938, 967 (9th Cir. 2003). This rule is designed to prevent unjust enrichment by distributing the costs of litigation among those who benefit from the efforts of the litigants and their counsel. *Paul, Johnson, Alston & Hunt v. Graulty*, 886 F.2d 268, 271 (9th Cir. 1989). Thus, it is only fair that Settlement Class Members who benefit from the Settlement pay their *pro rata* share of attorneys' fees.

**2. Courts in the Ninth Circuit Have Explicitly Endorsed the Percentage-of-the-Recovery Method in Awarding Attorneys' Fees in the Context of Class Action Settlements.**

The Ninth Circuit has repeatedly endorsed the use of the "percentage-of-recovery" method in common fund cases.[4] *See, e.g., Glass v. UBS Fin. Servs.*, 331 Fed. Appx. 452, 457 (9th Cir. 2009) (affirming district court's use of percentage-

[4] Other circuits and commentators have expressly approved the use of the percentage method. *See, e.g., In re Cendant Corp. Prides Litig.*, 243 F.3d 722 (3d Cir. 2001); *Harman v. Lyphomed, Inc.*, 945 F.2d 969, 975 (7th Cir. 1991); *Brown v. Phillips Petroleum Co.*, 838 F.2d 451, 454 (10th Cir. 1988). Moreover, two circuits have even ruled that the percentage method is *mandatory* in common fund cases. *See Swedish Hosp. Corp. v. Shalala*, 1 F.3d 1261 (D.C. Cir. 1993); *Camden I Condo. Ass'n v. Dunkle*, 946 F.2d 768, 774-75 (11th Cir. 1991).



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of-recovery method); *See Paul, Johnson, Alston & Hunt v. Graulty*, *supra*, 886 F.2d at 271–72 (explaining that it is well-settled that a lawyer who helps create a common fund should be allowed to share in the award); *Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370 (9th Cir. 1993); *Six (6) Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301 (9th Cir. 1990); *Vincent v. Hughes Air West, Inc.*, 557 F.2d 759, 769 (9th Cir. 1977) ("a private plaintiff, or his attorney, whose efforts create, discover, increase or preserve a fund to which others also have a claim is entitled to recover from the fund the costs of his litigation, including attorneys' fees"); *In re Oracle Sec. Litig.*, 131 F.R.D. 688, 694 (N.D. Cal. 1990), *order modified*, 132 F.R.D. 538 (N.D. Cal. 1990) ("there is growing recognition in the courts that the percentage contingent fee is a suitable method for compensating counsel in a common fund class action … . Indeed, when compared to the murky criteria of the lodestar approach, contingent fee compensation is vastly superior").

**3. Courts in the Ninth Circuit Have Also Found That A Request for Fees of One-Third of the Entire Common Fund Is Fair and Reasonable.**

The Ninth Circuit has adopted a 25 % "benchmark" for attorneys' fees in common fund cases. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1029 (9th Cir. 1998); *Powers v. Eichen*, 229 F.3d 1249, 1256 (9th Cir. 2000); *see also Vizcaino v. Microsoft Corp.*, 290 F.3d 1043 (9th Cir. 2002). However, a number of Ninth Circuit courts have indicated that the benchmark may be one third or higher. *See, e.g., In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 460 (9th Cir. 2000) (affirming award of fees equal to one-third of total recovery); *In re Pac. Enters. Sec. Litig.*, 47 F.3d 373, 379 (9th Cir. 1995) (awarding 33% of $12 million common settlement fund); *Romero v. Producers Dairy Foods, Inc.*, 2007 U.S. Dist. LEXIS 86270 (N.D. Cal. 2007) (33% fee awarded); *Singer v. Becton Dickinson & Co.*, 2010 U.S. Dist. LEXIS 53416, at *8 (S.D. Cal. 2010) (approving attorney fee award of 33.33% of the common fund and holding that the award was similar to awards in three other wage and hour class actions where fees

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ranged from 30.3% to 40%); *In re Heritage Bond Litig.*, 2005 U.S. Dist. LEXIS 13555 (C.D. Cal. 2005) (33.33% percentage of common fund fee award approved); *Singh v. Roadrunner Intermodal Servs., LLC*, 2019 U.S. Dist. LEXIS 11724 (E.D. Cal. 2019) (following *Laffitte* to approve 33% fee award with cross-check lodestar multiplier of 2.03); *Emmons v. Quest Diagnostics Clinical Labs., Inc.*, 2017 U.S. Dist. LEXIS 27249 (E.D. Cal. 2017) (following *Laffitte* to approve 33% fee award); *Estakhrian v. Obenstine*, 2019 U.S. Dist. Lexis 112828 (C.D. Cal. 2019) (approving 30% fee award); *Mathein v. Pier 1 Imports*, 2018 U.S. Dist. LEXIS 71386, at *35 (E.D. Cal. 2018) (approving one-third fee award); *Brulee v. Dal Global Servs.*, 2018 U.S. Dist. LEXIS 211269, at *30 (C.D. Cal. 2018) (approving 33% fee award); *Lee v. Global Tel*Link Corp.*, 2018 U.S. Dist. LEXIS 163410 (C.D. Cal. 2018) (approving lodestar multiplier of 3.0); *Warner v. Toyota Motor Sales, U.S.A., Inc.*, 2017 U.S. Dist. LEXIS 77576 (C.D. Cal. 2017) (approving lodestar multiplier of 2.92); *Barbosa v. Cargill Meat Solutions Corp.*, 297 F.R.D. 431 (E.D. Cal. 2013) (approving one-third award). This is also consistent with Class Counsel's experience and other attorneys have also had similar experience in representing class actions. Spivak Decl., ¶¶ 12-13; Exhibit D; Nordrehaug Decl., ¶ 10.

As discussed below and explained in *Figueroa v. Capital One*, 2021 U.S. Dist. LEXIS 11962 (S.D. Cal. Jan. 21, 2021), in this case involving the enforcement of substantive California state law claims, California law under *Laffitte* should also control the award of fees on those claims.

In actions involving state law claims, federal courts in diversity case should apply state law both to determining the right to fees and the method of calculating them. See *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047 (9th Cir. 2002); *Mangold v. California Public Utils. Comm'n*, 67 F.3d 1470, 1478 (9th Cir. 1995); *Rodriguez v. Disner*, 688 F. 3d 645, 653, n.6 (9th Cir. 2012) ("If ...we were exercising our diversity jurisdiction, state law would control whether and attorney

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is entitled to fees and the method of calculating such fees.") "Under the percentage method, California has recognized that most fee awards based on either a lodestar or percentage calculation are 33 percent". *Smith v. CRST Van Expedited, Inc.*, 2013 U.S. Dist. LEXIS 6049, 2013 WL 163293, *5 (S.D. Cal. 2013). This settlement primarily involves statutory claims under California law. For such state law claims, Courts may apply "state law in determining not only the right to fees, but also in the method of calculating the fees." *Estakhrian v. Obenstine*, 2019 U.S. Dist. LEXIS 112828, *6 (2019). The reason for this rule under the *Erie* rule is to prevent forum shopping, and "the *Erie* principles apply equally in the context of pendent jurisdiction." *Mangold v. California Public Utils. Comm'n*, 67 F.3d 1470, 1478 (9th Cir. 1995).

In applying the percentage-of-the-fund approach to settlements, it is proper to calculate attorneys' fees based on the entirety of a common fund rather than the portion that is actually claimed. *See Boeing Co. v. Van Gemert*, *supra*, 444 U.S. at 480–81 ("[class members'] right to share the harvest of the lawsuit . . . , whether or not they exercise it, is a benefit in the fund created by the efforts of the class representatives and their counsel"); *Masters v. Wilhelmina Modeling Agency, Inc.*, 473 F.3d 423, 437 (2d Cir. 2007) ("An allocation of fees by percentage should therefore be awarded on the basis of the total funds made available, whether claimed or not."); *Waters v. Int'l Precious Metals Corp.*, 190 F.3d 1291, 1295 (11th Cir. 1999); *Williams v. MGM-Pathe Commc'n Co., supra*, 129 F.3d at 1027 (finding abuse of discretion where district court based fee negotiated as part of settlement on percentage of fund paid out rather than entire fund); *Six (6) Mexican Workers v. Ariz. Citrus Growers*, *supra*, 904 F.2d at 1306.

**4. Class Counsel's Request for Attorneys' Fees as a Percentage of the Entire Settlement Fund Is Reasonable in View of the Ninth Circuit's Fee Range and Other Relevant Factors.**

In view of the authorities discussed above, Class Counsel's request for

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attorney's fees in the amount of 33.33% of the GSA is fair, adequate, and reasonable under the percentage of the fund approach, and falls within the fee range in the Ninth Circuit and elsewhere. *See Williams v. Centerplate, Inc.*, Case No. 11-CV-2159 H-KSC, 2013 WL 4525428 pp. 7-8 (S.D. Cal. Aug. 26, 2013). This amount is less than the amount that Class Counsel would receive if they individually represented each Settlement Class Member under their regular contingency fee agreements that authorize fees of up to 40% of the ultimate recovery. Spivak Decl., ¶ 12. It would be unfair to compensate Class Counsel at a lesser rate because they obtained relief for numerous Settlement Class Members. Thus, while Class Counsel agree to submit their hours for purposes of a lodestar cross-check, if necessary, Plaintiffs submit that an award based on a percentage of the fund method is reasonable. Spivak Decl., ¶¶ 19-20.

**i. Contingent Nature of the Litigation and Associated Risks**

The contingent nature of this litigation is an important factor that shows the reasonableness of the requested attorneys' fees. *Vizcaino*, 290 F.3d at 1049–50. Contingent fees that may far exceed the market value of the services if rendered on a non-contingent basis are accepted in the legal profession as a legitimate way of assuring competent representation for plaintiffs who could not afford to pay on an hourly basis regardless whether they win or lose. *In re Washington Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1299 (9th Cir. 1994). As noted by the court in *In re Washington Pub. Power Supply Sys. Sec. Litig.*, it is an established practice to reward attorneys who take on the added risk of a contingency case. *Id.* Indeed, it is an established practice in the private legal market to reward attorneys for taking the risk of non-payment by paying them a premium over their normal hourly rates for winning contingency cases. *See* Richard Posner, *Economic Analysis of Law* §21.9, at 534- 35 (3d ed. 1986).

Moreover, fee awards in successful cases, such as the present action,

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encourage and support meritorious class actions, and thereby promote private enforcement of, and compliance with, employee and consumer protection laws. *See, e.g., Alpine Pharmacy, Inc. v. Charles Pfizer & Co., Inc.*, 481 F.2d 1045, 1050 (2d Cir. 1973) ("[i]n the absence of adequate attorneys' fee awards, many antitrust actions would not be commenced…."); *Mashburn v. Nat'l Healthcare, Inc.*, 684 F.Supp. 679, 687 (M.D. Ala. 1988) ("[A] financial incentive is necessary to entice capable attorneys, who otherwise could be paid regularly by hourly-rate clients, to devote their time to complex, time-consuming cases for which they may never be paid."); *accord Gentry v. Super. Ct. (Circuit City Stores, Inc.)*, 42 Cal.4th 443, 462 (2007); *Bell v. Farmers Ins. Exch.*, 115 Cal.App.4th 715, 745 (2004).

In this case, Class Counsel are being paid entirely on contingency and have not been paid any attorneys' fees since assuming representation of Plaintiffs. Spivak Decl., ¶ 12; Nordrehaug Decl., ¶ 7. In turn, Class Counsel and their staff members have devoted numerous hours that they could have spent on other matters, albeit lower risk contingency or hourly ones, on this particular litigation. During that time period, in addition to the time they have spent working on this case, Class Counsel have also incurred out-of-pocket costs and expenses totaling $133,166.02 and estimated that they will incur additional out-of-pocket costs and expenses totaling $131.80, all of which they would likely not have been able to recover if this litigation had been unsuccessful. Spivak Decl., ¶ 21. Further, as discussed below, they expended these sums, and incurred these costs, in the pursuit of highly risky litigation. Accordingly, the contingent nature of the fee and surrounding circumstances show that the amount of Class Counsel's attorney's fees request is fair and reasonable.

In this case, Class Counsel have a total lodestar of approximately $638,099.25 without the use of any multiplier, which results in a multiplier *below one* (0.940) when compared against the $600,000 request for attorneys' fees. *Id.*, Spivak Decl., ¶¶ 19-20, 22, Exhibits H, J; Nordrehaug Decl., ¶ 8, Exhibit 2. As

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such, the requested fee award would not constitute a windfall or even any additional compensation for the contingent risks inherent in prosecuting this action.

This award is justified here because Class Counsel achieved a strong result for the Settlement Class Members while bearing the substantial burdens of contingency representation and the fees requested are within the market rate. *Vizcaino v. Microsoft Corp.* (9th Cir. 2002) 290 F.3d 1043, 1048-1049. In addition, Class Counsel will await reimbursement for litigation costs incurred in the amount of $ $133,347.82.[5] Spivak Decl., ¶¶ 21-22, Exhibit I-J; Nordrehaug Decl. ¶ 11. Moreover, Class Counsel have expended time, effort, and money that they could have expended on less risky cases instead. Class Counsel expect to perform additional work on this case overseeing administration process and Class Counsel also expect to perform additional work if the Court grants final approval of the Settlement, including supervision of the Settlement Administrator's disbursement of the settlement funds to Participating Settlement Class Members.

**ii. Experience of Class Counsel**

Class Counsel's previous experience in litigating wage and hour class actions also supports the reasonableness of the fee request, as does the caliber of opposing counsel. *In re Heritage Bond Litig.*, *supra*, 2005 U.S. Dist. LEXIS 13555, at *65 (awarding fees of one-third of common fund where counsel specialized in same type of litigation); *In re Gen. Instruments Sec. Litig.*, 209 F. Supp.2d 423, 432-33 (E.D. Pa. 2001) (experience of counsel justified one-third fee award of common). The quality of Class Counsels' work, and the efficacy and dedication with which it was performed, should be compensated. *See, e.g., J.N. Futia Co. v. Phelps Dodge Indus., Inc.*, 1982 U.S. Dist. LEXIS 15261 (S.D.N.Y. 1982). Class Counsel's previous experience in similar matters was integral in

[5] Class Counsel does not seek reimbursement for the wages they paid to the attorneys, paralegals, and legal assistants to aid in the representation of the Settlement Class Members. Class Counsel bore these expenses over the time since this lawsuit began without expectation of reimbursement.



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evaluating the strengths and weaknesses of the case against Defendants and the reasonableness of the Settlement. Practice in the narrow field of wage and hour litigation requires skill and knowledge concerning the rapidly evolving substantive law, state and federal, as well as the procedural law of class action litigation. Spivak Decl., ¶ 15; Nordrehaug Decl., ¶ 3. Because it is reasonable to compensate Class Counsel commensurate with their skill, reputation, and experience, attorneys' fees of approximately one-third of the GSA is reasonable. Likewise, the caliber and experience of opposing counsel in labor and employment litigation, GBG LLP, supports the fairness and reasonableness of the requested attorneys' fees. See, e.g., *Vizcaino v. Microsoft Corp*. (W.D. Wash. 2001) 142 F. Supp. 2d 1299, 1303; *In re Equity Funding Corp. Sec. Litig.*, 438 F.Supp. 1303, 1337 (C.D. Cal. 1977); *In re King Res. Sec. Litig.*, 420 F. Supp. 620, 634 (D. Colo. 1976). *See* Spivak Decl., ¶¶ 16-18, Exhibits E-G.

Based on these and other factors, Class Counsel have regularly received attorneys' fee awards amounting to approximately the percentage of the common fund requested here. Spivak Decl., ¶ 12 Nordrehaug Decl., ¶ 10. It is an accepted practice in wage and hour class action settlements to award attorneys' fees to Class Counsel based on a percentage of the total settlement value agreed upon by the parties.

Equitable considerations also dictate that Class Counsel should be rewarded for achieving a valuable settlement without protracted litigation. Indeed, several courts have expressed frustration with the lodestar approach for deciding fee awards, which usually involves wading through voluminous, and often indecipherable, time records. Commenting on the lodestar approach, Judge Marilyn Hall Patel wrote in *In re Activision Securities Litigation*, 723 F. Supp. 1373, 1375 (N.D. Cal 1989),

> This court is compelled to ask, 'Is this process necessary?' Under a cost-benefit analysis, the answer

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

The Ninth Circuit has similarly recognized that the lodestar method "creates incentives for counsel to spend more hours than may be necessary on litigating a case so as to recover a reasonable fee, since the lodestar method does not reward early settlement." *Vizcaino v. Microsoft Corp.*, 290 F.3d at 1050, n.5. The Ninth Circuit has thus cautioned that, while a lodestar may be used as a crosscheck on the reasonableness of a percentage fee method if a district court in its discretion chooses to do so, a lodestar calculation is not required and "class counsel should [not] necessarily receive a lesser fee for settling a case quickly." *Id*. As such, district courts in the Ninth Circuit recognize that a crosscheck need not be performed where counsel achieves a significant result through an early settlement. E.g., *Lewis v. Starbucks Corp.*, 2008 WL 4196690 (E.D. Cal. 2008) (favoring percentage method over lodestar for settlements achieved at relatively early litigation stages); *Glass v. UBS Fin. Servs.*, Inc., 2007 WL 221862 (N.D. Cal. 2007) (opining that lodestar crosscheck would unfairly penalize counsel for settling the case without protracted litigation). Accordingly, because this case presents considerable risks, coupled with the ensuing risks of lengthy appeals and risk of no recovery, the excellent result achieved by Class Counsel shows that the amounts allocated to both attorneys' fees and costs under the Settlement warrant

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final approval. As such, the evidence shows that Class Counsel's request for attorneys' fees is reasonable and warrants this Court's final approval.

**iii. Applicability of Fee-Shifting Statutes**

This case involves a statute that allows Plaintiffs to recover attorneys' fees from the opposing party, specifically the fee shifting provisions of California Labor Code §§ 218.5, 226(e) and 2699(g)(1). Where fee-shifting statutes are involved, it is entirely proper for settlement to hinge on negotiation of attorneys' fees. *See Evans v. Jeff D., supra*. In light of these fee-shifting statutes, the parties agreed to accept a contingency award based upon the Ninth Circuit percentage-of-the-recovery fee range. *Williams v. MGM-Pathe Communs. Co., supra*. This consideration also supports the reasonableness of the requested fee award.

**5. The Requested Attorneys' Fees Are Also Justified By The Loadstar Method.**

Fees may be awarded based on the lodestar method (calculated by applying counsel's hourly rates to the time spent and a risk multiplier where appropriate). *Staton v. Boeing Co.*, 327 F.3d 938, 968 (9th Cir. 2003). "District Courts often use the lodestar method as a cross-check on the percentage method in order to ensure a fair and reasonable result." *Vizcaino v. Microsoft Corp.*, 142 F. Supp. 2d 1299, 1305 (W.D. Wash. 2001) aff'd, 290 F.3d 1043 (9th Cir. 2002)(citing *In re Immunex Securities Litigation*, 864 F.Supp. 142, 144 (W.D.Wa.1994)). In using the lodestar approach, the court may apply a risk multiplier (e.g., a number, such as 1.5 or 2), by which the base lodestar figure is multiplied in order to increase (or decrease) the award of attorney fees based on such factors as the risk involved and the length of the proceedings.

Class Counsel's requested attorneys' fees are amply justified under the loadstar method even without a multiplier enhancement. As mentioned above, Class Counsel have a total lodestar of approximately $638,099.25 without the use of any multiplier, which results in a multiplier *below one* (0.940) when compared against the $600,000 request for attorneys' fees. *Id.*, Spivak Decl., ¶ 20, Exhibit H;

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Nordrehaug Decl., ¶ 8.

**B. THIS COURT SHOULD ALSO GRANT CLASS COUNSEL'S REQUEST FOR REIMBURSEMENT OF COSTS AND EXPENSES BECAUSE IT IS FAIR AND REASONABLE.**

Attorneys in common fund cases may be reimbursed for reasonable out-of-pocket expenses. In common fund cases, Ninth Circuit courts frequently award litigation costs and expenses in addition to a percentage-of-the recovery award of attorneys' fees. *See, e.g., In re Businessland Sec. Litig.*, 1991 U.S. Dist. LEXIS 8962, at *8 (N.D.Cal. 1991) (granting fee award plus expenses of $90,574.78, citing several cases from this and other circuits that held similarly); *In re Media Vision Tech. Sec. Litig.*, 913 F. Supp. 1362, 1366 (N.D. Cal. 1996) ("An attorney who has created a common fund has the right to reimbursement …"). Here, Class Counsel's request for reimbursement of $133,347.82 in costs and expenses is fair and reasonable. Class Counsel will have incurred approximately $133,347.82 in costs and expenses through final accounting of the Settlement. Spivak Decl., ¶ 21, Exhibit I; Nordrehaug Decl., ¶ 11. These expenses include but are not limited to filing fees, court reporter and videographer costs, deposition expenses, expert witness fees, photocopy costs, postage costs, and mediator fees, to name just a few. The time, personnel, and out-of-pocket costs and expenses devoted to this case by Class Counsel are the kind of expenses that courts routinely have deemed to be compensable. *See, e.g., In re Media Vision Tech. Sec. Litig., supra*, 913 F. Supp. at 1371 (court fees); *id.* at 1367-68 (photocopying, telephone, and postage charges); *Redding v. Fairman*, 717 F.2d 1105, 1119 (9th Cir. 1983) (travel); *Spicer v. Chicago Bd. Options Exch., Inc.*, 844 F. Supp. 1226, 1264 (N.D. Ill. 1993) (technology services). As the evidence submitted herewith shows, all of these costs and expenses are documented and reasonably incurred. Spivak Decl., ¶ 21, Exhibit I; Nordrehaug Decl., ¶ 11. Accordingly, they warrant final approval.

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**C. ADMINISTRATION COSTS TO PHOENIX SETTLEMENT ADMINISTRATORS.**

No subsequent events have cast any doubt on the Court's determination that the Administration Costs are justifiable and reasonable. Spivak Decl., ¶ 24. Plaintiffs request settlement administration costs in the amount of $19,000.00 to the Settlement Administrator for its services, as set forth in Phoenix Settlement Administrators' declaration. *Id.*, Lee Decl., ¶ 16, Exhibit B. The Settlement Administrator's services and charges are reasonable. Accordingly, this Court should also finally approve Administration Costs of $19,000.00 from the GSA to Phoenix Settlement Administrators.

**D. CLASS REPRESENTATIVE SERVICE AWARDS.**

Service awards reward named plaintiffs for the time and effort expended on behalf of the class, and for exposing themselves to the significant risks of litigation. "Courts routinely approve incentive awards to compensate named plaintiffs for the services they provided and the risks they incurred during the course of the class action litigation." *E.g., Ingram v. Coca-Cola Co.*, 200 F.R.D. 685, 694 (N.D. Ga. 2001) (approving incentive awards of $300,000 to each named plaintiff in recognition of services to class by responding to discovery, participating in mediation process and taking the risk of stepping forward); *Van Vranken v. Atl. Richfield Co.*, 901 F. Supp. 294, 300 (N.D. Cal. 1995) (approving $50,000 participation award). Here, Defendants have agreed not to oppose to a request for Class Representative Service Awards of up to $20,000 to each Plaintiff ($40,000 total). Settlement, ¶ 4.C(4). The proposed Class Representative Service Awards of $20,000 to each Plaintiff is intended to recognize their substantial initiative and significant efforts on behalf of the Settlement Class. The value of each award, if approved, is only about 1.11% of the total amount of the Settlement to each Plaintiff ($20,000 / $1,800,000= 1.11%) and is justified by the following:

**1. General Release**

Unlike the absent Settlement Class Members, Plaintiffs have provided

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Defendants with a general release. Settlement ¶¶ 3.C. This includes a waiver of California Civil Code section 1542. *Id*. This is a significant sacrifice. Further, by agreeing to settle the case in the best interest of the Settlement Class, Plaintiffs have given up the right to pursue individual claims for unpaid wages, unpaid meal and rest period premium wages, and penalties and recover substantially more in unpaid wages, unpaid meal and rest period premium wages, interest, waiting time penalties, pay stub penalties, and civil penalties that they will release as part of this Settlement. *See generally* Declarations of Eric Ayala and Adrian Aviles. Plaintiffs made this sacrifice so that the Settlement Class may benefit. Spivak Decl., ¶ 23.a.

**2. Fiduciary Responsibilities**

As class representatives, Plaintiffs assumed a fiduciary role to Settlement Class Members, including to: (1) consider the interests of the Settlement Class just as they would consider their own interests and, in some cases, to put the interests of the Settlement Class before their own; (2) actively participate in the lawsuit, as necessary, by among other things, answering interrogatories, producing documents to Defendants and giving deposition and trial testimony; (3) travel to give in-person deposition testimony; (4) recognize and accept that any resolution of the lawsuit by dismissal or settlement is subject to court approval and must be designed in the best interest of the Settlement Class as a whole; and (5) follow the progress of the lawsuit and provide all relevant facts to Class Counsel. Plaintiffs agreed to shoulder all of these responsibilities in exchange for a proportionate share of funds made available for distribution to the Settlement Class, with no guarantee of Class Representative Service Awards. Spivak Decl., ¶ 23.b.

In class actions, especially since *Genesis HealthCare Corp., et al. v. Symcyzk* (2013) 569 U.S. 66, 133 S. Ct. 1523, the risk always exists that defendants will offer the named-plaintiff an individual settlement exceeding what he or she can hope to recover as a class member or as an incentive award. There is a high risk of an individual settlement offer to the class representative in the

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context of class actions prosecuted by a low wage worker who may have lost his or her source of income working for the employer-defendants. The Class Representative Service Award Plaintiffs seek are justified in part because, consistent with their fiduciary duties to the Settlement Class Members, they did not seek individual settlement for their wage and hour claims at all, instead choosing to prosecute this matter on behalf of their coworkers. *See generally* Declarations of Eric Ayala and Adrian Aviles. By pursuing the claims of all Settlement Class Members, Plaintiffs also renders their own individual payments uncertain and delay their payment by several months (at the least). *Id*. These are additional grounds for their Class Representative Service Awards.

**3. Plaintiffs' Efforts**

Plaintiffs spent many hours on work related to this lawsuit and Class Counsel depended heavily on Plaintiffs' assistance. *See generally* Declarations of Eric Ayala and Adrian Aviles. Plaintiffs challenged their employers on an allegedly unlawful practice that led to this Settlement. Plaintiffs provided Class Counsel with detailed descriptions of how Defendants' business operates and the hours and scheduling of the employees. Plaintiffs assisted Class Counsel extensively by spending considerable amounts of time working with them to develop and investigate the claims, meeting with their counsel in person and by phone, gathering witness identities and contact information, and connecting them with Class Counsel for interviews. Spivak Decl., ¶ 23.c. Additionally, Plaintiffs gave in-person deposition testimony and participated in two days of mediation. *Id*.

**4. Plaintiffs Assumed Risks Of An Adverse Judgment.**

The law in class actions as it pertains to the obligations of the losing complainant was uncertain at the time Plaintiffs brought their lawsuit. Under Labor Code § 218.5, before it was amended, Plaintiffs could have been ordered to pay the attorneys' fees and costs of Defendants if they did not prevail. *See generally* Declarations of Eric Ayala and Adrian Aviles. On many occasions, courts have

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ordered wage and hour plaintiffs and would-be class representatives to pay outrageous fee and/or cost awards for unsuccessful claims. A few examples are:

- *Zalewa v. Tempo Research Corp.*, No. B238142, 2013 WL 766535 (CA 2nd Dist. March 1, 2013) (court awarded the employer $2,210,360 in attorney's fees to be paid by employee for employee's unsuccessful suit for unpaid bonuses) (Spivak Decl., ¶ 23.d, Exhibit L);
- *Cun v. Café Tiramisu LLC*, No. A131241, 2011 WL 5979937 (CA 1st Dist. Nov. 30, 2011) (court ordered the employee to pay $36,612.50 in attorney's fees and costs to employer for unsuccessful suit for unpaid wages) (Spivak Decl., ¶ 23.d, Exhibit M);
- *Csaszi v. Sharp Healthcare*, No. D038558, 2003 WL 352422 (CA 4th Dist. Feb. 18, 2003) (court ordered the employee to pay $20,269 in attorney's fees and costs to the employer for unsuccessful suit for unpaid wages and overtime) (Spivak Decl., ¶ 23.d, Exhibit N); and
- *Villalobos v. Guertin*, No. CIV. S–07–2778 LKK/GGH, 2009 WL 4718721 (U.S.D.C. Eastern Dist. Dec. 3, 2009) (court ordered Plaintiff's counsel to pay $21,180 in attorney's fees and $1,525.80 in costs to defense counsel for unpaid wages) (Spivak Decl., ¶ 23.d, Exhibit O).

Such cost awards are higher than the estimated share of the Net Settlement Amount (NSA) that Plaintiffs stand to receive as Settlement Class Members. It is unfair in view of the substantial risk of an adverse fee or cost award of several thousand dollars that Plaintiffs receive less as a reward for taking such a risk. Moreover, we cannot lose sight of the fact that Plaintiffs are not high wage earners. Even the lowest of the cost awards listed above would have devastating consequences for Plaintiffs in view of their modest earnings. Spivak Decl., ¶ 23.d.

**5. <u>Plaintiffs' Individual Shares Of The Recovery Will Be Less Than Those Of Some Absent Settlement Class Members.</u>**

Under the Settlement, Settlement Class Members will receive a share of the

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Settlement proceeds based upon the number of workweeks worked during the Class Period. The average Individual Settlement Award to Settlement Class Members will be approximately $442.08 and the highest Individual Settlement Award to a Settlement Class Member will be approximately $1,692.33 (Lee Decl., ¶ 13) though some Settlement Class Members–those who worked during more of the Class Period–will receive more, and some less. Because Plaintiffs' employment ended before the close of the Class Period, there are Settlement Class Members who will have worked more workweeks during the Class Period than Plaintiffs and, as a result, receive larger shares in the recovery – even though they did not actively participate in the lawsuit. Here, the highest Individual Settlement Award to a Settlement Class Member is four times more than the amount Plaintiff Ayala expect to receive for his Individual Settlement Award as a Settlement Class Member ($1,692.33 / $382.79 = 4.42) and six times more than the amount Plaintiff Aviles expect to receive for his Individual Settlement Award as a Settlement Class Member ($1,692.33 / $252.85 = 6.69). *See* Lee Decl., ¶ 13. While this is a risk that Plaintiffs assumed when they brought the lawsuit, it seems unfair to limit Plaintiffs' recovery to amounts less than an absent Settlement Class Member. *See generally* Declarations of Eric Ayala and Adrian Aviles. To encourage employees like Plaintiffs to don the helm of class champions (and thereby advance the important public policies behind class actions), the Court should award something substantial to Plaintiffs for their readiness to receive less than absent Settlement Class Members, while simultaneously championing their rights. Spivak Decl., ¶ 23.e.

**6. <u>The Public Policy Behind Class Actions Justifies the Class Representative Service Awards.</u>**

The public policy behind class actions that seek an aggregate recovery of otherwise small amounts of money is equally important and has been recognized by the courts. "The policy at the very core of the class action mechanism is to

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overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor." *Amchem Products, Inc. v. Windsor* (1997) 521 U.S. 591 quoting *Mace v. Van Ru Credit Corp*. (1997) 109 F.3d 338, 344. If would-be class action plaintiffs are not adequately incentivized to assume the risk of a substantial cost award, it is unlikely that they will bring such lawsuits in the first place. Spivak Decl., ¶ 23.f.

The average putative class member in this case would be unlikely to pursue his or her individual claims against Defendants because such a claim would be too small to justify the cost and the risk. A putative class member will be unlikely to find an attorney who is willing to pursue an individual's claims because the claims are too small to justify the hundreds of hours of legal work necessary to prove each claim. Only the class action vehicle, which allows for the aggregation of hundreds of risky small dollar value claims, makes such claims advantageous for an attorney to pursue on a contingency basis and there can be no class action without a class member assuming the great fiduciary responsibilities of as class representative. This court should allow the Class Representative Service Awards requested because to do otherwise would discourage employees (and attorneys) from bringing class actions in the first place. Spivak Decl., ¶ 23.f.

If would-be class action plaintiffs are not adequately incentivized to advance the public policy behind class actions in court in light of the time and risk it will entail, it is unlikely that they will bring class action lawsuits in the first place. Once employers realize that such lawsuits are unlikely, they will have no incentive to comply with wage and hour laws. Spivak Decl., ¶ 23.f.

**7. <u>Plaintiffs Risked Future Employment Opportunities.</u>**

Plaintiffs faced the risk that they could face worsened career prospects for suing a former employer for wage and hour violations and serving as the Plaintiffs

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in a class action lawsuit. Spivak Decl., ¶ 23.g; s*ee generally* Declarations of Eric Ayala and Adrian Aviles.

Because they filed lawsuits in court, public records now exist that Plaintiffs sued their employers for Labor Code violations – a fact that will not be lost on prospective employers considering them for a job. Common sense dictates that an employer will think twice about hiring someone who sued their last employer. Legal experts have recognized this fact. Spivak Decl., ¶ 23.g, Exhibits P-Q ("Employees: Better Think Twice Before Suing Your Employer (Four Reasons Why)" and "What To Expect If You Sue Your Employer"). Thus, the risk to Plaintiffs' future employment shows that the Class Representative Service Awards sought are fair, adequate, and reasonable, and warrants final approval of the Court.

**8. The Low Individual Burden On Each Settlement Class Member Justifies The Class Representative Service Awards.**

The burden on each Settlement Class Member to pay the Class Representative Service Award to each Plaintiff is modest. There are approximately 2,100 Settlement Class Members. Dividing the $20,000 Class Representative Service Award to each Plaintiff evenly among the Settlement Class Members yields a per Settlement Class Member payment of only $9.52, approximately two percent of the average estimated Individual Settlement Award to Settlement Class Members ($20,000 / 2,100 = $9.52; $9.52 / $442.08 = 2.15%). For an average Settlement Class Member, this is an extremely small price to pay to have someone else prosecute the absent Settlement Class Member's claims and bear the absent Settlement Class Member's risk of an adverse cost award while the absent Settlement Class Member simply waits to receive his share of the winnings. Spivak Decl., ¶ 23.h.

**9. Plaintiffs have Achieved a Phenomenal Result for the Settlement Class Members.**

In view of the risks, Plaintiffs achieved a phenomenal result for the Settlement Class Members. There were significant risks (outlined in the

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preliminary approval motion) to any award on behalf of the Settlement Class Members and still Plaintiffs achieved a settlement of up to $1,800,000. Spivak Decl., ¶ 23.i. This outstanding result calls for significant awards to Plaintiffs for making the result possible.

Additionally, at $15.00 per hour (the average hourly wage earned by Settlement Class Members), the average estimated Individual Settlement Award to Settlement Class Members is the equivalent of over 30 hours of unpaid wages and unpaid meal and rest period premium wages under Labor Code §§ 226.7, 510, 512, 1194, 1197, and 1198 (the primary remedies sought) ($442.08 / $15.00 = 29.47 hours). Spivak Decl., ¶ 23.i.

## III. CONCLUSION

For the reasons set forth above, this Court should grant Plaintiffs' Motion in its entirety and adopt the concurrently lodged proposed order.

Respectfully submitted,

THE SPIVAK LAW FIRM

Dated: November 8, 2021

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