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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

RONDA AUSTIN, CHRISTOPHER CORDUCK, ERNEST DIAL, BILLY WAYNE GIBSON, and BOBBY G. SMITH, on behalf of themselves and others similarly situated;

Plaintiffs,

vs.

FOODLINER, INC.,

Defendant.

Case No. 4:16-cv-07185-HSG

PLAINTIFFS' MOTION FOR ATTORNEYS' FEES, COSTS, AND CLASS REPRESENTATIVE INCENTIVE PAYMENTS

Date: January 24, 2019
Time: 2:00 p.m.
Ctrm.: 2, 4th Floor
Judge: Hon. Haywood S. Gilliam, Jr.

NOTICE IS HEREBY GIVEN that on January 24, 2018, at 2:00 p.m. or as soon thereafter as the matter may be heard in Courtroom 2, 4th Floor of the United States District Court for the Northern District of California, located at 1301 Clay Street, Oakland, CA 94612, before the Honorable Haywood S. Gilliam Jr., Plaintiffs Ronda Austin, Christopher Corduck, Ernest Dial, Billy Wayne Gibson, and Bobby G. Smith ("Plaintiffs") as individuals and on behalf of all others similarly situated, will and do hereby move this Court for an order awarding attorneys' fees and costs, and class representative incentive payment against Defendant Foodliner, Inc. ("Foodliner" or "Defendant").

Pursuant to the proposed class action settlement agreement and the Ninth Circuit "benchmark",[1] Class Counsel seek an award of attorneys' fees of $300,000.00, or 25% of the Gross Settlement Amount, an award of $22,221.37 for reimbursement of actual costs, and an incentive payment of $10,000 to Plaintiff Austin and $7,500 each to Plaintiffs Corduck, Dial, Gibson, and Smith as compensation for their role in bringing and prosecuting this action, and assisting Class Counsel.

This motion is based on this notice of motion, the attached memorandum of points and authorities, the declaration of Hunter Pyle and exhibits attached thereto, the declarations of Plaintiffs, the pleadings and other papers filed in this action, and on any further oral or documentary evidence or argument presented at the time of hearing.

[1] The Ninth Circuit explained in *In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d 935, 942 (9th Cir. 2011) that "[w]here a settlement produces a common fund for the benefit of the entire class, courts have discretion to employ either the lodestar method or the percentage-of-recovery method. *Id*. (citing *In re Mercury Interactive Corp.*, 618 F.3d 988, 992 (9th Cir.2010) and *Powers v. Eichen*, 229 F.3d 1249, 1256 (9th Cir.2000)). The court continued, "[b]ecause the benefit to the class is easily quantified in common-fund settlements, we have allowed courts to award attorneys a percentage of the common fund in lieu of the often more time-consuming task of calculating the lodestar. Applying this calculation method, courts typically calculate 25% of the fund as the 'benchmark' for a reasonable fee award, providing adequate explanation in the record of any 'special circumstances' justifying a departure. *Id*. (citing *Six (6) Mexican Workers v. Ariz. Citrus Growers,* 904 F.2d 1301, 1311 (9th Cir.1990); *accord Powers,* 229 F.3d at 1256–57; *Paul, Johnson, Alston & Hunt v. Graulty,* 886 F.2d 268, 272 (9th Cir.1989).

Dated: November 6, 2018

HUNTER PYLE LAW

By: */s/ Hunter Pyle*
Hunter Pyle

Attorneys for Plaintiffs and the Putative Class

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I. INTRODUCTION

On August 17, 2018, the Court granted preliminary approval of this proposed class action settlement. ECF No. 51 ("Preliminary Approval Order"). Pursuant to the Preliminary Approval Order, Plaintiffs now move for an award of Class Counsel's attorneys' fees and costs, and incentive payments to the Class Representatives Ronda Austin, Christopher Corduck, Ernest Dial, Billy Wayne Gibson, and Bobby G. Smith ("Plaintiffs"). Pursuant to the Settlement Agreement,[2] Class Counsel seek an award of attorneys' fees of $300,000, which is 25% of the Gross Settlement Amount ("GSA") of $1,200,000, and reimbursement for verified costs of $22,221.37. Plaintiffs also request that the Court approve an incentive payment of $10,000 to Plaintiff Austin and $7,500 each to Plaintiffs Corduck, Dial, Gibson, and Smith based on their efforts in bringing this action, assisting Class Counsel throughout the litigation, their general releases of claims, and the financial and reputational risks they assumed to vindicate both their rights and those of their fellow Class Members.

Notice was mailed to the Class on September 27, 2018. As of this date, not a single class member has filed an objection to the requested fees, costs, and incentive payments.

Plaintiffs respectfully request that the Court approve the request for $300,000.00 in attorneys' fees, which is less than Class Counsel is permitted to seek pursuant to the terms of the Settlement. The following evidence justifies the request: (1) the substantial recovery obtained for the Class in the face of heavily litigated and disputed claims; (2) Class Counsel's efforts in diligently and aggressively litigating the class claims; (3) Class Counsel's skill and wage and hour class action experience; (4) the complexity of the issues regarding the claims for unpaid wages; (5) the significant risk of non-payment due to Class Counsel taking this matter on a purely contingent basis; (6) the fact that, as of this date, no Class Member has objected to the requested fees and costs; and (7) that the requested 25% fee request yields a reasonable 1.38 multiplier when compared to Class Counsel's lodestar.

[2] The capitalized terms used herein have the same meanings as those defined in the Settlement Agreement, which can be found at ECF No. 49-2.

II. BACKGROUND

This Litigation was filed by Plaintiffs on November 3, 2016 in Alameda County Superior Court. Declaration of Hunter Pyle in Support of Plaintiffs' Motion for Attorneys' Fees, Costs, and Class Representative Incentive Payments ("Pyle Fee Decl."), ¶ 16. Defendant removed the lawsuit to the Northern District of California. *Id*.

On October 17, 2017, Plaintiffs filed a First Amended Complaint ("FAC") in this Court, which added PAGA claims. Pyle Fee Decl., ¶ 17. The FAC alleges the following causes of action: Failure to Pay Minimum Wages (Cal. Lab. Code §§ 1182.11-1182.13, 1194, 1194.2, 1197 & 1198); Failure to Provide Off-Duty Meal Periods (Cal. Lab. Code §§ 226.7, 512, IWC Wage Order No. 9); Failure to Authorize and Permit Rest Periods (Cal. Lab. Code § 226.7, IWC Wage Order No. 9); Failure to Reimburse Business Expenses (Cal. Lab. Code § 2802); Failure to Provide Adequate Wage Statements (Cal. Lab. Code § 226, IWC Wage Order No. 9); Unlawful Business Practices (Cal. Bus. & Prof. Code §§ 17200, *et seq*.); and Penalties under the Labor Code Private Attorneys General Act of 2004 (Cal. Lab. Code §§ 2698, *et seq*.). Pyle Fee Decl., ¶ 18.

Class Counsel have conducted a thorough investigation of the facts in the Litigation and have diligently pursued an investigation of Class Members' claims against Foodliner. Plaintiffs and Foodliner have also engaged in substantial investigation in connection with the mediation. The Parties informally exchanged a large volume of information, including confidential information, regarding the claims asserted in the Litigation, the defenses available to Foodliner, and other relevant issues. Pyle Fee Decl., ¶ 19. Additionally, Plaintiffs moved to compel further responses to discovery, which was referred to Magistrate Judge Ryu and granted on March 6, 2018. ECF No. 41.

Plaintiffs and Foodliner have also each made formal discovery requests. Foodliner responded to Plaintiffs' written discovery on October 13, 2017; January 19, 2018; and March 16, 2018. Plaintiffs responded to Defendant's discovery on January 8, 2018. Pyle Fee Decl., ¶ 20.

Foodliner has produced, and Class Counsel have reviewed and analyzed, relevant wage and hour policies, relevant meal period and rest break policies, payroll information for the Class Members, wage statements for the Class Members, driver logs for Class Members and other documents related to the Class Members' employment with Foodliner. Pyle Fee Decl., ¶ 21.

On August 16, 2017, the Parties held an all-day mediation with mediator Mark Rudy. The case did not settle at that mediation. On April 4, 2018, Mr. Rudy made a mediator's proposal. The Parties accepted that proposal as modified and have since memorialized its terms in a Memorandum of Understanding. Pyle Fee Decl., ¶ 22.

On August 17, 2018, this Court granted preliminary approval to the Settlement and provisionally certified the following Class:

> All individuals employed by Foodliner as truck drivers in California at any time during the class period, which means November 3, 2012 continuing through and including the date of the Court's order regarding preliminary approval of the Settlement [August 17, 2018].

See ECF No. 51 at 2. The Court also approved the PAGA Subclass, defined as: "all Class Members who were employed at any time during the time period from October 31, 2015, through the date of Preliminary Approval of the Settlement [August 17, 2018]." *Id.*

III. SUMMARY OF SETTLEMENT TERMS

The full terms of the settlement are set forth in the Settlement. The primary material terms are as follows:

(a) Defendant will pay a maximum of $1,200,000.00, known as the "Gross Settlement Amount," under the Settlement. The GSA is inclusive of all payments to Class Members, the Class Counsel Fees and Costs Payment, the Class Representative Service Payment, the Settlement Administration Fees, and PAGA payments. It does not include the Employer's Share of Payroll Taxes. Settlement at ¶ 15.

(b) Each Class Member who does not opt out will be paid an Individual Settlement Payment, subject to certain taxes and withholdings. Settlement at ¶ 16. This is not a claims-

made settlement and no part of the Gross Settlement Amount will revert to Defendant. Settlement at ¶ 41.

(c) The Class Representatives' Service Payments requested are $10,000 for Plaintiff Austin and $7,500 for each of the other Plaintiffs. Settlement at ¶¶ 45-46.

(d) If a Class Member has not cashed his or her check within 180 days of issuance, the funds representing the "uncashed checks" shall be transmitted by the Settlement Administrator to Legal Aid at Work, a nonprofit organization that furthers the objectives and purposes underlying this case and that provides civil legal services to the indigent. Settlement at ¶ 44. Pyle Fee Decl., ¶ 23.

If the Court grants these requests, the Net Settlement Fund will be $772,225.63:

Gross Settlement Fund:	**$**	**1,200,000.00**
Less Attorneys' Fees	-$	300,000.00
Less Litigation Costs	-$	22,221.37
Less Settlement Administration	-$	4,500.00
Less Enhancement Awards	-$	40,000.00
Less PAGA Payment to LWDA	-$	61,053.75
Net Settlement Fund	**$**	**772,225.63**

Pyle Fee Decl., ¶ 24.

IV. THE COURT SHOULD APPROVE THE FEE AWARD

A. Legal Standards

Federal Rule of Civil Procedure 23(h) provides that, "[i]n a certified class action, the court may award reasonable attorney's fees and non-taxable costs that are authorized by law or by the parties' agreement." *See* Fed. R. Civ. Proc. 23(h).

The California Supreme Court[3] recently confirmed that "[t]he percentage of the common fund method is appropriate in class action cases." *Laffitte v. Robert Half Int'l, Inc.*, 1 Cal. 5th 480, 506 (2016). Specifically, in *Laffitte*, the California Supreme Court held:

[3] Federal courts […] are required to apply state law in diversity actions with regard to the allowance or disallowance of attorney's fees. *Schulz v. Lamb*, 591 F.2d 1268, 1273 (9th Cir. 1978), citing *Michael-Regan Co. v. Lindell*, 527 F.2d 653, 656 (9th Cir. 1975).

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

Id. at 503; *see also Serrano v. Priest*, 20 Cal. 3d 25, 34 (1977) ("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 of 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' unjust enrichment.).

Laffitte also held trial courts have discretion to assess reasonableness of fee awards with tools such as the lodestar cross-check, although they need not do so. *Laffitte*, 1 Cal. 5th at 506 ("[w]e hold further that trial courts have discretion to conduct a lodestar cross-check on a percentage fee…they also retain the discretion to forgo a lodestar cross-check and use other means to evaluate the reasonableness of a requested percentage fee."). Under the lodestar method, the court first multiplies the number of hours reasonably expended by each attorney or legal staff member by their hourly rate to calculate the lodestar. *Ketchum v. Moses*, 24 Cal. 4th 1122, 1132 (2001); *Serrano*, 20 Cal. 3d at 48. The court may enhance this lodestar figure by a multiplier to account for a range of factors, such as the novelty and difficulty of the case, its contingent nature and the degree of success achieved. *See Ketchum*, 24 Cal. 4th at 1132-36; *Serrano*, 20 Cal. 3d at 49.

The Ninth Circuit offers similar guidance. In awarding attorneys' fees from a common fund, courts have discretion to employ the percentage-of-recovery method. *See In re Bluetooth Headset Products Liability Litigation*, 654 F.3d 935, 942 (9th Cir. 2011); *Adoma* v. *The University of Phoenix, Inc.*, 913 F. Supp. 2d 964, 981-982 (E.D. Cal. December 20, 2012) (applying percentage of recovery method in wage and hour action). Moreover, courts utilizing the percentage-of-the-fund approach can use a lodestar as a cross-check on the reasonableness of the requested percentage award. *See Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1050-51

(9th Cir. 2002). Despite the availability of a lodestar cross-check, courts are not required to perform one before approving an award of attorneys' fees using the percentage-of-recovery approach. *See Craft* v. *County o/San Bernardino*, 624 F. Supp. 2d 1113, 1122 (C.D. Cal. April 1, 2008) ("A lodestar cross-check is not required in this circuit, and in some cases is not a useful reference point.").

In the Ninth Circuit, the typical range of reasonable attorney's fees is 20 to 40 percent of the total settlement value, with 25% considered a benchmark percentage. *See Powers* v. *Eichen*, 229 F.3d 1249, 1256 (9th Cir. 2000); *Cicero* v. *DirecTV, Inc.*, Case No. EDCV 07-1182, 2010 WL 2991486 at *6 (C.D. Cal. July 27, 2010). The percentage applied in a particular case, however, depends on the facts of each case, and "in most common fund cases, the award exceeds that benchmark" percentage. *See Knight* v. *Red Door Salons, Inc.*, Case No. 08-01520 SC, 2009 WL 248367 at *6 (N.D. Cal. February 2,2009); *see also Chavez* v. *Netflix, Inc.*, 162 Cal. App. 4th 43,66, n.11 (2008) ("Empirical studies show that, regardless whether the percentage method or the lodestar method is used, fee awards in class actions average around one-third [33%] of the recovery") (quoting *Shaw* v. *Toshiba America Information Systems, Inc.*, 91 F. Supp. 2d 942,972 (E.D. Tex. January 28, 2000). Notably, "courts usually award attorneys' fees in the 30-40% range in wage and hour class actions that result in recovery of a common fund under $10 million." *Cicero*, 2010 WL 2991486 at *6; *see also Vasquez* v. *Coast Valley Roofing, Inc.*, 266 F.R.D. 482,491-92 (E.D. Cal. March 9, 2010); *Smith* v. *CRST Van Expedited, Inc.*, Case No. 10-CV-1116-IEG (WMC), 2013 WL 163293 at *5 (S.D. Cal. January 14, 2013) ("Under the percentage method, California has recognized that most fee awards based on either the lodestar or percentage calculation are [33%] and has endorsed the federal benchmark of 25 percent.").

Here, Class Counsel seek a benchmark award of 25% of the common fund based on: (1) the substantial recovery obtained for the Class in the face of heavily litigated and disputed claims; (2) Class Counsel's efforts in diligently and aggressively litigating the class claims; (3) Class Counsel's skill and wage and hour class action experience; (4) the complexity of the

issues regarding the claims for unpaid wages; (5) the significant risk of non-payment due to Class Counsel taking this matter on a purely contingent basis; (6) the fact that, as of this date, no Class Member has objected to the requested fees and costs; and (7) that the requested 25% fee request yields a reasonable 1.38 multiplier when compared to Class Counsel's lodestar. *See Craft*, 624 F. Supp. 2d at 1116-17; *see also Vizcaino*, 290 F.3d at 1048-50 (in assessing whether percentage requested is fair and reasonable, courts generally consider the results achieved, the risk of litigation, the skill required, the quality of work performed, the contingent nature of the fee and the financial burden, and the awards made in similar cases).

B. The Requested 25% Attorneys' Fees Award Is Justified

1. Class Counsel Obtained a Substantial Recovery for the Class

Plaintiffs obtained a substantial recovery for the Settlement Class in the face of hotly disputed claims, and Defendant raised numerous defenses that had the potential to defeat Plaintiffs' claims. With respect to Plaintiffs' claim for failure to pay all wages for non-productive time and rest breaks, Defendant argued that Class Members were paid on an hourly basis, rather than on a per-load basis as asserted by Plaintiffs. If successful, this argument would eliminate one of Plaintiffs' primary causes of action.

As stated in Plaintiffs' Motion for Preliminary Approval, Foodliner asserted potentially successful defenses to each of Plaintiffs' claims. *See* ECF No. 49 at 13-19. Additionally, in the Preliminary Approval Order, the Court stated:

> Given the substantial litigation risks enumerated by Plaintiffs, the Court finds that this amount [22% of the total possible recovery] weighs in favor of granting preliminary approval. For example, Plaintiffs acknowledge that their claim that Defendant failed to provide appropriate meal and rest periods "carried significant risks of both non-certification and reduction on the merits," [Pyle Decl.] ¶ 41, and that there "was significant risk of non-recovery" on their waiting time penalties claim "given Defendant's good-faith defenses to Plaintiffs' underlying claims," *id.* ¶ 47; *see also id.* ¶¶ 37 (highlighting risks to Plaintiffs' claim that Defendant failed to pay wages for all hours worked), 45 (reimbursement claim), 51 (wage statements claim), 53 (PAGA claims).

ECF No. 51 at 12.

As detailed in Plaintiffs' Motion for Preliminary Approval, this Settlement compensates Class Members for their underpaid wages under California law, as well as for meal and rest period

violations. It also provides additional compensation for disputed penalty claims. Indeed, the average settlement payment for Class Members is estimated to be approximately $3,600, which Plaintiffs contend is a substantial recovery where Defendant asserted compelling defenses to liability. Pyle Fee Decl. at 25; *see also Schiller v. David's Bridal, Inc*., No. 1:10-CV-00616-AWI, 2012 WL 2117001 at *17 (E.D. Cal. June 11, 2012), ("Class Members will receive an average of approximately $198.70, with the highest payment ... being $695.78. Plaintiff contends that this is a substantial recovery where Defendant asserted compelling Plaintiffs also note several similar actions where the gross recoveries ... [averaged] less than $90 ... Overall, the Court finds that the results achieved are good"); *Williams* v. *Centerplate, Inc.*, Case Nos. ll-CV-2159 H-KSC, 12-cv-0008-H-KSC, 2013 WL 4525428 (S.D. Cal. August 26, 2013) (granting final approval of class action settlement where average recovery was approximately $108); *Mora* v. *Bimbo Bakeries USA, Inc.*, Case No. CV 10-3748 JAK (RZx) (C.D. Cal. April 16, 2012) (granting final approval of settlement where average recovery was $561.58); *Sorenson* v. *PetSmart, Inc.*, Case No. 2:06-CV-02674-JAMDAD (E.D. Cal. November 22, 2006) (wage and hour class action settlement approved where average recovery was approximately $60).

In sum, given the risks and uncertainty in moving forward to prove damages before a trier of fact, the GSA of $1.2 million, or approximately 22% of Defendant's maximum potential exposure, is a substantial and reasonable recovery for the Class. ECF No. 49 at 19.

The Settlement furthers public policy by using the class action procedure to provide redress to those individuals who would otherwise not be able to access the judicial system to recover their unpaid wages. As the Ninth Circuit stated in *Leyva* v. *Medline Industries, Inc.*, "[i]n light of the small size of the putative class members' potential individual monetary recovery, class certification may be the only feasible means for them to adjudicate their claims." 716 F.3d 510, 515 (9th Cir. 2013); *see also Local Joint Executive Bd. of Culinary/Bartender Trust Fund* v. *Las Vegas Sands, Inc.*, 244 F.3d 1152, 1163 (9th Cir. 2001) ("If plaintiffs cannot proceed as a class, some – perhaps most – will be unable to proceed as individuals because of the disparity between…litigation costs and what they hope to recover.").

2. Class Counsel's Efforts Support the Requested Fee Award

As detailed in Plaintiffs' Motion for Preliminary Approval (*see* ECF No. 49), Class Counsel diligently litigated this case from the outset. Class Counsel's efforts led to a substantial recovery for the Class.

Class Counsel conducted extensive factual investigation of the claims at issue, engaged in substantial written discovery, performed legal research and analysis, met and conferred with Defendant regarding the scope of data needed for a class-wide mediation, attended a day-long mediation session, engaged in law and motion practice, reviewed and analyzed approximately hundreds of pages of documents produced by Defendant, and negotiated for the production of extensive class-wide data, allowing Plaintiff to analyze electronic payroll and timekeeping data for the Class with the assistance of a retained forensic accounting expert. Pyle Fee Decl., ¶¶ 19-22.

With the assistance of their expert, Plaintiffs created damage models to accurately estimate the amount of unpaid wages, meal and rest period premiums, wage statement and late payment penalties, and civil penalties under PAGA. Pyle Fee Decl., ¶ 26. As the Court stated in the Preliminary Approval Order, Class Counsel have exercised "diligence in prosecuting this action to date[.]" ECF No. 51 at 9.

3. Class Counsel's Experience and Skill Also Support the Fee Award

Class Counsel possess significant wage and hour class action experience. *See* Pyle Fee Decl., ¶ 6. Class Counsel bring more than two decades of wage and hour class action experience pertaining to overtime wage, meal period, and rest period claims, and related wage statement and final payment violations. *Id*., ¶ 3. Class Counsel have been certified as class counsel in numerous cases. *Id*., ¶¶ 6-7. "All class counsel are qualified, experienced, and skilled attorneys, who prosecuted this action effectively. As a consequence, this factor weighs in favor of a generous fee award." *Fernandez v. Victoria Secret Stores, LLC*, Case No. CV 06-04149 MMM (SHx), 2008 WL 8150856 at *12 (C.D. Cal. July 21, 2008).

4. The Complexity of the Issues Also Supports the Fee Award

The Litigation involved complex and unsettled issues pertaining to liability regarding Defendant's compensation structure for truck drivers and its meal and rest break obligations under California law, as well as complex issues regarding the imposition of penalties, and proving class-wide liability under *Brinker Restaurant Corp.* v. *Superior Court,* 53 Cal. 4th 1004 (2012), and *Comcast Corp.* v. *Behrend,* 133 S.Ct. 1426 (2013). Among other things, Defendant argued that Class Members were properly compensated for all of their nonproductive time and rest period time pursuant to California Labor Code section 226.2. Plaintiffs alleged that Class Members were paid on a per-load basis, which entitled them to separate compensation for nonproductive time and rest periods under California law. Defendant contended that Class Members were paid for all of their hours worked and that the per-load calculation only applied if it exceeded the hourly pay calculation. This is an unsettled area of the law and Plaintiffs are not aware of any other trucking companies with a similar compensation structure. Pyle Fee Decl., ¶ 27.

Defendant also argued that individualized inquiries could potentially preclude certification as to whether a rest period was or was not in fact authorized and permitted in each specific instance, especially given that rest periods were not recorded, and thus, no means existed by which to conclusively prove whether or not rest periods were actually provided to an employee. Pyle Fee Decl., ¶ 28. Moreover, Defendant argued that the imposition of waiting time penalties was precluded since Plaintiff could not prove that Defendant's alleged failure to pay all final wages at the time of separation was "willful." Pyle Fee Decl., ¶ 29.

Had Defendant defeated a motion for class certification or prevailed on a motion for decertification, it was unlikely that members of the settlement class would have individually pursued their claims. *See Leyva,* 716 F.3d at 515 ("In light of the small size of the putative class members' potential individual monetary recovery, class certification may be the only feasible means for them to adjudicate their claims.").

Because of the complexity of the issues in this case, an attorneys' fee award at the 25% benchmark is warranted because Plaintiffs pursued novel, meritorious claims, and tenaciously litigated the claims. *See, e.g., Murillo* v. *Pacific Gas & Elec. Co.*, Case No. CIV 2:08-1974 WBS-GGH, 2010 WL 2889728 at *12 (E.D. Cal. July 21, 2010) (awarding multiplier of 1.5 because the case "contained multiple novel legal issues, including whether a payment of cash in lieu of health benefits needs to be included in the calculation of overtime"); *Adoma*, 913 F. Supp. 2d at 983 ("It is important that ... employment attorneys be rewarded for pursuing novel claims (so long as they are meritorious) and for litigating these claims with tenacity, rather than cherry-picking simple cases or settling difficult cases for small amounts").

5. The Risk of Non-Payment Existed at All Times

"A contingent fee must be higher than a fee for the same legal services paid as they are performed. The contingent fee compensates the lawyer not only for the legal services he renders but for the loan of those services." *Graham* v. *DaimlerChrysler Corp.*, 34 Cal. 4th 553, 580 (2004). Here, Class Counsel have litigated this case for two years, on a purely contingent basis. Pyle Fee Decl., ¶ 30. Not only has Class Counsel rendered services without any compensation, but they have also advanced all costs, which are not insubstantial. *Id*.

Because there was a real risk that Class Counsel would not be compensated, the requested fee award is appropriate. *See Barbosa v. Cargill Meat Solutions Corp.*, 297 F.R.D. 431,449 (E.D. Cal. July 2, 2013) ("[W]here recovery is uncertain, an award of one-third of the common fund as attorneys' fees has been found to be appropriate"); *Murillo*, 2010 WL 2889728 at *12 ("Fee enhancements in contingency cases exist to compensate for the risk of loss inherent in such cases and create financial incentives for attorneys to take cases to protect important rights and goals, such as fair labor standards"); *Ketchum*, 24 Cal. 4th at 1133 ("A lawyer who both bears the risk of not being paid and provides legal services is not receiving the fair market value of his work if he is only paid for the second of these functions. If [s]he is paid no more…counsel will be reluctant to accept fee award cases.") [Internal citation omitted].

6. The Reaction of the Class Is Positive

Notice of this Settlement, including the amounts requested for attorneys' fees and costs, and Plaintiffs' incentive awards, was mailed to Class Members on September 27, 2018. Pyle Fee Decl., ¶ 31. As of this date, not a single Class Member has objected to the requested fee award. Pyle Fee Decl., ¶ 32. This strongly supports the requested fee award. *See, e.g., Thieriot v. Celtic Ins. Co.*, Case No. C 10-04462 LB, 2011 WL 1522385 at *6 (N.D. Cal. April 21, 2011) ("The fact that no members of the 390-person class objected to the proposed 33% fee award ... supports an increase in the benchmark rate."); *McPhail v. First Command Financial Planning, Inc.*, Case No. 05cv179-IEG-JMA, 2009 WL 839841 at *6 (S.D. Cal. March 30, 2009) ("The presence of a small minority of objectors strongly supports a finding that the settlement is fair, reasonable, and adequate.").

7. A Cross-Check of Class Counsel's Lodestar Shows that the Requested Fees are Reasonable

Although the Court is not required to conduct a lodestar cross-check, Class Counsel's lodestar also supports the requested 25% fee award. As detailed below, because Class Counsel's lodestar is approximately $217,575.50, the 25% requested fee award reflects a reasonable multiplier of 1.38, and should therefore be approved. *See, e.g., Vizcaino*, 290 F.3d at 1051, n. 6 (noting that the majority of class action settlements approved had fee multipliers that ranged between 1.5 and 3); *Oviatt By and Through Waugh v. Pearce*, 954 F.2d 1470, 1472 (9th Cir. 1992) (attorneys' fees calculated by the lodestar method are "presumptively reasonable"); *Jordan* v. *Multnomah County*, 815 F.2d 1258, 1262 (9th Cir. 1987) ("A strong presumption exists that the lodestar figure represents a reasonable fee"); *Goldkorn v. County of San Bernardino*, Case No. EDCV 06-707-V AP (OPx), 2012 WL 476279 at *10 (C.D. Cal. February 13, 2012) ("Here, Class counsel assert that the lodestar for their fees and costs amounts to $826,117.20. For the purposes of final approval, the amount of $690,000 in attorneys' fees and costs agreed to in the Settlement appears reasonable in comparison to Plaintiffs' lodestar calculation.").

a. The hours expended on this litigation are reasonable

To determine the reasonableness of Class Counsel's requested fee award, the Court should determine "the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Hensley* v. *Eckerhart,* 461 U.S. 424,433 (1983). Referred to as the "lodestar method," the California Supreme Court described it as follows:

> The starting point of every fee award, once it is recognized that the court's role in equity is to provide just compensation for the attorney, must be a calculation of the attorney's services in terms of the time he has expended on the case. Anchoring the analysis to this concept is the only way of approaching the problem that can claim objectivity, a claim which is obviously vital to the prestige of the bar and the courts.

Serrano, 20 Cal. 3d at 48, n. 23.

According to the United States Supreme Court, the Court should include in any fee award all hours which were "reasonably expended." *See Hensley,* 461 U.S. at 433. Concurrently filed herewith is the sworn declaration from Class Counsel, Hunter Pyle, attesting to (1) the experience and qualifications of the attorneys and paralegals who worked on this case, (2) those attorneys' and paralegals' customary billing rates during this case, and (3) the hours reasonably expended by those attorneys and paralegals in prosecuting this case. *See* Pyle Fee Decl., ¶ 34, and Exhibit A attached thereto.

Here, Class Counsel will have incurred at least 427 hours of attorney and paralegal time on this case through final approval, reflecting a lodestar of $217,575.50. Pyle Fee Decl., ¶ 35. "Where the lodestar method is used as a cross-check to the percentage method, it can be performed with a less exhaustive cataloguing and review of counsel's hours." *Barbosa*, 297 F.R.D. at 451. Although the lodestar cross-check can be performed with a less exhaustive cataloguing and review of counsel's hours, Class Counsel has nonetheless prepared attorney and paralegal task-based time reports reflecting all hours spent to date working on this case. *See* Pyle Fee Decl. at 36; Exhibit A.

The hours worked on this case are reasonable because, at the point in time when the work was performed, Class Counsel believed it to be reasonably expended in pursuit of success. Pyle Fee Decl., ¶ 37. A different standard for determining "reasonableness" would put

Class Counsel in the precarious position of constantly second-guessing litigation strategy in a statutory fee case, even though it would clearly be reasonable and in the best interests of the client for counsel to pursue the same litigation strategy for a fee-paying client. *See Moreno* v. *City of Sacramento*, 534 F.3d 1106, 1112 (9th Cir. 2008) ("[L]awyers are not likely to spend unnecessary time on contingency fee cases in the hope of inflating their fees. The payoff is too uncertain, as to both the result and the amount of the fee…the court should defer to the winning lawyer's professional judgment [regarding hours]; after all, he won, and might not have, had he been more of a slacker.").

b. The requested hourly rates are reasonable

A reasonable hourly rate is the prevailing rate charged by attorneys of similar skill and experience in the relevant community. *PLCM Group, Inc. v. Drexler*, 22 Cal. 4th 1084, 1095 (2000). The Court may consider other factors when determining a reasonable hourly rate, including the attorney's skill and experience, the nature of the work performed, the relevant area of expertise and the attorney's customary billing rates. *Flannery v. California Highway Patrol*, 61 Cal. App. 4th 629, 632 (1998).

While there is a scarcity of hourly-fee paying plaintiffs in class action litigation, a California court provided some guidance in 1993 when it approved an hourly rate of $450 for wage and hour class litigation in the absence of an agreement by the client to pay fees on an hourly basis. *See Bihun v. AT&T Information Systems, Inc.*, 13 Cal. App. 4th 976 (1993), overruled on other grounds in *Lakin v. Watkins Assoc. Indus.*, 6 Cal. 4th 644, 664 (1993). Similarly, in 2007, the Northern District of California found $650 per hour to be a reasonable hourly rate for an attorney who was admitted to the bar in June 1992, and had achieved success in multi-plaintiff employment law cases. *Aguilar v. Zep Inc.*, No. 13-CV-00563-WHO, 2014 WL 4063144 (N.D. Cal., Aug. 15, 2014).

Here, Class Counsel respectfully request that the following hourly rates be applied against the hours worked: $675 for attorney Hunter Pyle, $475 for attorney Chad Saunders, and $410 for attorney Vincent Chen. Pyle Fee Decl., ¶ 34. Class Counsel has had similar hourly

rates approved by courts in similar cases. *Id.*

Class Counsel's skill and experience also justify the requested rate. Class Counsel have experience in employment law actions, particularly wage and hour class actions. Class Counsel's practices are primarily devoted to litigating employment law violations, and many of Class Counsel's cases are wage and hour class actions. Class Counsel have represented employees in numerous class action lawsuits involving wage and hour violations and have obtained favorable settlements for employees. Class Counsel's experience in litigating employment wage and hour matters was integral in evaluating the strengths and weaknesses of the case against Foodliner and negotiating a fair and reasonable settlement. Pyle Fee Decl., ¶ 39.

c. The lodestar multiplier is also reasonable

"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." *Fischel v. Equitable Life Assur. Society of U.S.*, 307 F.3d 997, 1008 (9th Cir. 2002) (quoting *In re Washington Public Power Supply System Securities Litigation*, 19 F.3d 1291, 1299 (9th Cir. 1994)). Based on Class Counsel's hours and requested hourly rates, Class Counsel's lodestar is approximately $217,575.50. Pyle Fee Decl., ¶ 35. Therefore, the requested 25% fee yields a multiplier of 1.38, which Class Counsel submits is reasonable given that lodestar multipliers range from 1.0 to 4.0. *See, e.g., Vizcaino*, 290 F.3d at 1051, fn. 6 (finding that multipliers ranging from 1.0 to 4.0 are frequently awarded in common fund cases, with over half of the cases surveyed awarding multipliers in the 1.5-3.0 range); *Fernandez*, 2008 WL 8150856 at * 16 (awarding 34% of the common fund as attorneys' fees, which represented a 1.82 multiplier to the lodestar amount: "Both of these increases appropriately award class counsel for their risk in taking this case on a contingency basis and litigating the case with diligence and skill."); *McKenzie* v. *Federal Exp. Corp.*, Case No. CV 10-02420 GAF (PLAx), 2012 WL 2930201 (C.D. Cal. July 2, 2012) (awarding multiplier of 3.2 in class action settlement where plaintiff alleged violations of Labor Code section 226); *Odrick v.*

UnionBancal Corp., Case No. C 10-5565 SBA, 2012 WL 6019495 at *6 (N.D. Cal. December 3, 2012) (approving multiplier of approximately 1.95 of the lodestar); *Franco* v. *Ruiz Food Products, Inc.*, Case No. 1:10-cv-02354-SKO, 2012 WL 5941801 at *22 (E.D. Cal. November 27, 2012) ("Based on the overall success, the absence of opposition, and Class Counsel's well-documented hours worked in this action, Plaintiffs request for a multiplier of 1.31 of its lodestar is reasonable."); *Garcia* v. *Gordon Trucking, Inc.*, Case No.1 :10-CV-0324 AWl SKO, 2012 WL 5364575 at *10 (E.D. Cal. October 31, 2012) ("Based on the overall success, the skill with which the case was prosecuted, the substantial legal risks associated with Plaintiffs' claims, and the financial risks borne by Class Counsel, Plaintiffs request for a multiplier of 1.28 of its lodestar is reasonable.").

V. PLAINTIFFS' LITIGATION EXPENSES ARE RECOVERABLE

Plaintiffs also seek an award of $22,221.37 for Class Counsel's out-of-pocket costs incurred in litigating this matter. As of this date, not a single class member has objected to the request to reimburse Class Counsel's actual costs. Class Counsel's out-of-pocket costs includes filing fees, messenger fees, legal research expenses, copying costs, mediation fees, postage, Federal Express charges, expert consultant fees, mileage, and travel expenses for court hearings and mediation. *See* Pyle Fee Decl., ¶ 38, Exhibit B. Class Counsel's litigation expenses were reasonably incurred, and should therefore be reimbursed.[4]

VI. THE INCENTIVE PAYMENTS SHOULD BE APPROVED

Class Counsel, on behalf of Class Representatives, requests a $10,000 incentive payment for Plaintiff Austin, and $7,500 incentive payments to Plaintiffs Corduck, Dial,

[4] *See Harris* v. *Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994) (counsel should recover "those out-of-pocket expenses that would normally be charged to a fee paying client."); *Ashker v. Sayre*, Case No. 05-03759 CW, 2011 WL 825713 at * 3 (N.D. Cal. March 7,2011) (Costs of reproducing pleadings, motions and exhibits are reimbursable); *Trustees of Const. Industry & Laborers Health and Welfare Trust v. Redland Ins. Co.*, 460 F.3d 1253, 1258-1259 (9th Cir. 2006) (legal research costs reimbursable); *In re Immune Response Securities Litigation*, 497 F. Supp. 2d 1166, 1177-1178 (S.D. Cal. May 31, 2007) (mediation expenses, consultant and expert fees, legal research, copies, postage, filing fees, messenger and federal express costs reimbursable); *In re Media Vision Technology Securities Litigation*, 913 F. Supp. 1362, 1371 (N.D. Cal. January 23, 1996) ("A filing or serving fee is ... a necessary expense of ... litigation").

Gibson, and Smith. As of this date, not a single class member has objected to this request. Pyle Fee Decl., ¶ 40. In *Mitchell* v. *Robert DeMario Jewelry, Inc.*, the Supreme Court acknowledged that an employer's current employees are unlikely to seek legal redress, stating, "fear of economic retaliation might often operate to induce aggrieved employees ... to accept substandard conditions." 361 U.S. 288, 292 (1960); *see also Kasten v. Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1 (2011). Indeed, it is the intent of the Legislature in section 1194 that minimum wage and overtime laws be enforced as part of private actions brought by aggrieved employees. *See Bell* v. *Farmers Ins. Exchange*, 115 Cal. App. 4th 715, 746 (2004) (former chief counsel of DLSE indicating that without private enforcement through class actions, the department's resources would be overtaxed).

Here, Plaintiffs filed this class action lawsuit to privately enforce California wage and hour laws. Pyle Fee Decl., ¶ 42. Plaintiff assisted Class Counsel in prosecuting this case. Their efforts included gathering documents for use in this lawsuit, assisting Class Counsel and being available to answer questions about their employment by Defendant, preparing for a deposition, travelling to, attending, and assisting with a day-long mediation, and communicating with Class Counsel about case strategy. Pyle Fee Decl., ¶¶ 43-45. Plaintiffs also bore the financial and reputational risks associated with wage and hour class action litigation, and executed a general release of all claims. Pyle Fee Decl., ¶¶ 46-49. Consequently, the Court may award incentive payments to Plaintiffs to "to compensate them for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action, and ... to recognize their willingness to act as a private attorney general." *Rodriguez v. West Publishing Corp.*, 563 F.3d 948, 958-959 (9th Cir. 2009); *see also Schiller*, 2012 WL 2117001 at *23-24.

Moreover, the requested incentive payments are not excessive; they constitute 3.33% of the $1,200,000 GSA. *See Singer v. Becton Dickinson and Co.*, Case No. 08-CV-821-IEG (BLM), 2009 WL 4809646 (S.D. Cal. December 9, 2009) (approving incentive payment of 2.5% of gross settlement fund); *Thieriot, supra*, 2011 WL 1522385 (approving incentive

payment of 1.8% of gross settlement fund). For these reasons, Class Counsel respectfully requests that the Court grant the requested incentive payments for Plaintiffs.

VII. CONCLUSION

Based on the excellent results achieved, the substantial work performed by counsel on a contingency basis for two years and the reaction of the Class to date, Class Counsel respectfully requests that the Court grant the amounts of $300,000 for attorneys' fees, $22,221.37 for costs, and $10,000 for Plaintiff Austin and $7,500 for each other Plaintiff's incentive awards.

Dated: November 6, 2018

HUNTER PYLE LAW

By: */s/ Hunter Pyle*
Hunter Pyle

Attorneys for Plaintiffs and the Putative Class