

**WAGNER, JONES, KOPFMAN
& ARTENIAN LLP**

Nicholas J.P. Wagner #109455
Andrew B. Jones #076915
Daniel M. Kopfman #192191
Lawrence M. Artenian #103367
Angela E. Martinez #297169
Laura E. Brown #306035
1111 E. Herndon, Ste. 317
Fresno, CA 93720
559/449-1800
559/449-0749 Fax

Attorneys for Plaintiffs, DANIEL ACOSTA, JOSE HERNANDEZ, DENNIS EASLEY,
ORLANDO CASTILLO

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

DANIEL ACOSTA, JOSE HERNANDEZ,
DENNIS EASLEY, and ORLANDO
CASTILLO,

Plaintiffs,
vs.

FRITO-LAY, INC.; FL TRANSPORTATION
INC.; PEPSICO, INC.; and DOES 1-100,
inclusive,

Defendants.

Case No.: 15-cv-02128-JSC

CLASS ACTION

Magistrate Judge:
Hon. Jacqueline Scott Corley

**PLAINTIFFS' MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT OF MOTION FOR
ATTORNEYS' FEES, LITIGATION
COSTS AND ENHANCEMENT AWARDS**

DATE: 5/3/2018
TIME: 11 am
CRTRM: F (15TH Floor)

**PLAINTIFFS' MEORANDUM OF POINTS & AUTHORITIES IN SUPPORT
OF MOTION FOR ATTORNEYS' FEES, COSTS, AND
ENHANCEMENT AWARDS**

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	1
II. ATTORNEY FEE AWARD	1
A. Plaintiffs' Counsel Seeks the Benchmark Reasonable Percentage of the Common Fund	3
1. Plaintiffs obtained exceptional results on behalf of the class	3
2. The novelty, difficulty and complexity of the litigation	4
3. The risks involved in the case	5
4. The length of time the case has transpired	6
5. The non-monetary benefits obtained by counsel	7
6. The percentages awarded in other class actions	7
B. Lodestar Cross-Check	8
1. Reasonable Rate	8
2. Reasonable Hours	9
3. Lodestar Calculation	10
C. Litigation Costs	11
D. Incentive Awards	12
III. CONCLUSION	13

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>Allapattah Servs., Inc. v. Exxon Corp.</i> 454 F.Supp.2d 1185,1203 (S.D. Fla.2006)	5
<i>Armenta v. Osmose</i> 135 Cal.App.4 th 314 (2005)	5
<i>Bellinghausen v. Tractor Supply Company</i> 306 F.R.D. 245, 259, 261, 262 (N.D.Cal. 2015).	1,2,3,6,7,9,10,11,12
<i>Boeing Co. v. Van Gemert</i> 444 U.S. 472, 478 (1980)	2
<i>Boyd v. Bank of America Corp.</i> 2014 U.S.Dist.LEXIS 162880 (C.D. Cal. 2014)	7
<i>Cardenas v. McLane Food Services, Inc.</i> 796 F.Supp.2d 1246, (C.D. Cal. 2011)	5
<i>Chavez v Netflix, Inc.</i> 162 Cal.App.4 th 43, 60 (2008)	11
<i>Children's Hospital and Med. Center v. Belshe</i> 97 Cal. 4 th 740, 783 (2002)	8
<i>Cotton v. City of Eureka</i> 889 F.Supp.2d 1154, 1167 (N.D.Cal. 2012)	8
<i>Cotter v. Lyft</i> 176 F. Supp. 3d 930 (N.D. Cal. 2016)	9
<i>Covillo v. Specialty's Café</i> No. C-11-00594 DMR, 2014 WL 954516, at 7 (N.D.Cal. Mar. 6, 2014)	12
<i>Fernandez v. Victoria Secrets, Inc.</i> 2008 U.S.Dist.LEXIS 123546 (C.D. Cal. 2008)	7
<i>Graham</i> , 34 Cal.4 th at 583; <i>A.D. v. California Highway Patrol</i> 2013 U.S.Dist.LEXIS 169275 (N.D. Cal. 2013)	8
<i>Hanlon v. Chrysler Corp.</i> 150 F.3d 1011 (9 th Cir. 1998)	3

1	<i>Hohnbaum v. Brinker Restaurant Corp.</i>	
	San Diego County Superior Ct. No. GIC834348 (Dec. 12, 2014)	7
2		
3	<i>Hopkins v. Stryker Sales Corp.</i>	
	No. 11-CV-02786-LHK, 2012 WL 496358 at 4 (N.D.Cal. 2013)	10
4		
5	<i>Moore v. Jas. H. Matthews & Co.</i>	
	682 F.2d 830, 839 (9 th Cir. 1982)	9
6		
7	<i>In re Bluetooth Headset Prod. Libal.Litigg.</i>	
	645 F.3d at 947 (9 th Cir. 2011)	3
8		
9	<i>In re High Tech Employment Antitrust Litigatio</i>	
	2015 U.S. Dist. LEXIS 118052, (N.D. Cal. 2015)	8
10		
11	<i>In re Mego Financial Corp.</i>	
	<i>Sec. Litig.</i> , 213 F.3d 454, 463 (9 th Cir. 2000)	12
12		
13	<i>In re NASDAQ Mkt.-Makers Antitrust Litig.</i>	
	187 F.R.D. 465, 475 (S.D.N.Y. 1998)	6
14		
15	<i>In re Omnivision Technologies</i>	
	559 F. Supp. 2d 1036, 1046 (N.D. Cal. 2008)	2,3,6
16		
17	<i>In Re Pacific Enter. Sec. Litig.</i>	
	47 F.3d 373, 379 (9 th Cir. 1995)	7
18		
19	<i>In re Superior Beverage/Glass Container Consol. Pretrial</i>	
	133 F.R.D. 119, 127 (N.D. Ill. 1990)	6
20		
21	<i>Ketchum v. Moses</i>	
	24 Cal. 4 th 1124, 1133 (2001)	9
22		
23	<i>Knisley v. Nework Assocs.</i>	
	312 F.3c 1123, 1126 (9 th cir. 2002)	1
24		
25	<i>Laffite v. Robert Half Co.</i>	
	1 Cal.5 th 480, 488-489 (2016)	2
26		
27	<i>Matter of Continental Illinois Securities Litigation</i>	
	962 F. 2d 566, 568 (7 th Cir. 1992)	2
28		
	<i>Morales v. City of San Rafael</i>	
	96 F.3d 359, 363 (9 th Cir. 1996)	7

1	<i>Ontiveros v. Zamora</i>	
	303 F.R.D. 356, 372 (E.D.Cal. 2014)	2,5,7,11
2		
3	<i>Quezada v. Con-Way Freight, Inc.</i>	
	2012 WL 2847609 *3-7 (N.D. Cal.)	5
4		
5	<i>Rodriquez v. West Publishing Corp.</i>	
	563 F.3d 948, 958 (9 th Cir. 2009)	12
6		
7	<i>Sandoval v. Tharaldson Employment Mangement, Inc.</i>	
	No. EDCV 08-482-VAP 2010 WL 248346, at 10 (C.D.Cal. June 15, 2010)	12
8		
9	<i>Sav-On Drug Stores, Inc. v. Superior Court</i>	
	34 Cal.4 th 319, 340 (2004)	7
10		
11	<i>Savaglio v. Wal-Mart</i>	
	Alameda County Superior Court No. C-835687-7 (Sept. 10, 2010)	7
12		
13	<i>Six (6) Mexican Workers</i>	
	904 F.2d at 1311	3
14		
15	<i>Staton, v Boeing Co.,</i>	
	327 F.3d at 952 (9 th Cir. 2003)	3
16		
17	<i>Sutter Health Uninsured Pricing Cases</i>	
	171 Cal.App.4th 495, 512 (2009)	11
18		
19	<i>Van Vranken v. Atl Richfield Co.</i>	
	901 F.Supp. 294, 299 (N.D.Cal. 1995)	12
20		
21	<i>Vizcaino v. Microsoft Corp.</i>	
	290 F.3d 1043, 1047 (9 th Cir. 2002)	2
22		
23	<i>Williams v. MGM-Pathe Communications Co.</i>	
	129 F.3d 1026, 1027 (9 th Cir. 1997)	7
24		
25	<i>Wren v. RGIS Inventory Specialists</i>	
	2011 U.S.Dist.LEXIS 38667 (N.D. Cal. 2011)	7
26		
27	<i>Wershba v. Apple Computers, Inc.</i>	
	91 Cal. App. 4th 224, 254 (2001)	10,11

Statutes

California Civil Code

Sec. 1542 13

California Labor Code

Sec. 201 1

Sec. 202 1

Sec. 203 1

Sec. 226 1

Sec. 226.2 4,5

Sec. 226.7 1

Sec. 512 1

Sec. 1194 1

Sec. 2698 *et seq.* 1

Business and Professions Code

Sec. 17200 *et seq* 1

Miscellaneous

Silver, *A Restitutionary Theory of Attorneys' Fees in Class Actions*

(1991) 76 Cornell L.Rev. 656, 702-703 2,7

Wage Order No. 9 § 12 1

I. INTRODUCTION

On February 25, 2015, Plaintiffs DANIEL ACOSTA, JOSE HERNANDEZ, DENNIS EASLEY, GREG FRY and ORLANDO CASTILLO filed a putative a class action on behalf of over-the-road truck drivers who were and/or are employed by Defendants FRITO-LAY, Inc., FL TRANSPORTATION, Inc., and PEPSICO, Inc. Plaintiffs' complaint alleged Defendants failed to pay class members minimum wages for all time worked in violation of California Labor Code 1194; failed to provide meal and rest periods in violation of Labor Code 226.7, 512; failed to pay minimum wages for rest periods taken by class members in violation of Wage Order No. 9 § 12; failed to pay all wages due and owing upon the termination of employment in violation of Labor Code 201, 202, and 203; failed to issue statutory compliant wage statements in violation of Labor Code 226; violated Business and Professions Code 17200 *et seq.* and is liable for civil penalties pursuant to Labor Code 2698 *et seq.* The class consists of long-haul or "Over-the-Road" drivers employed by Defendants in the State of California between February 25, 2011 and July 31, 2017.

Defendants, employ Over-the-Road drivers to haul Defendants' products from traffic centers to various distribution centers and retailers located primarily in California. Defendants' three California traffic centers are located in Modesto, Bakersfield, and Rancho Cucamonga. Defendants compensate over-the-road drivers with a piece-rate pay formula which utilizes separate codes to pay for the time spent performing job required activities such as "Driving", "Pickup", "Delay", "Relay", "Rollerbed", "Meals", etc. Defendants' piece-rate pay formula does not directly pay for time spent performing pre- and post-trip inspections; California rest periods, loading and unloading cardboard, or for time spent while on call.

II. ATTORNEY FEE AWARD

When a negotiated class action settlement includes an award of attorneys' fees, the fee award must be evaluated by the Court in the overall context of the settlement. *Knisley v. Network Assocs.*, 312 F.3c 1123, 1126 (9th Cir. 2002). At the same time, the court must ensure that the award is reasonable. *Bellinghausen v. Tractor Supply Company* 306 F.R.D. 245, 259 (N.D.Cal.

1 2015). Attorneys who recover a fund for the benefit of a class are “entitled to a reasonable
2 attorney’s fee from the fund as a whole.” *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980).
3 “It is well established that ‘a private plaintiff, or his attorney, whose efforts create, discover,
4 increase or preserve a fund to which others also have a claim is entitled to recover from the fund
5 the costs of his litigation, including attorneys’ fees.” *In re Omnivision Technologies*, 559 F.
6 Supp. 2d 1036, 1046 (N.D. Cal. 2008) (internal citation omitted). California follows the same
7 rule. *Laffite v. Robert Half Co.*, 1 Cal.5th 480, 488-489 (2016). The purpose of the common fund
8 doctrine is to avoid unjust enrichment by requiring the parties who benefit from litigation
9 brought by others to pay their fair share of the fees incurred. *Id.*, 1 at 489.

10 Common fund awards are intended to approximate the probable terms of contingent fee
11 contracts negotiated in comparable commercial litigation. See *Matter of Continental Illinois*
12 *Securities Litigation*, 962 F. 2d 566, 568 (7th Cir. 1992) (court’s function “is to determine what
13 the lawyer would receive if he were selling his services in the market rather than being paid by
14 court order.”); Silver, *A Restitutionary Theory of Attorneys’ Fees in Class Actions* (1991) 76
15 Cornell L.Rev. 656, 702-703 (goal “is to pay attorneys on terms they would probably accept in
16 an *ex ante* bargain, before the outcome of litigation is known”).

17 The Ninth Circuit has approved two methods of assigning attorney’s fees in common
18 fund cases: the percentage of the fund method and the lodestar method. *Vizcaino v. Microsoft*
19 *Corp.*, 290 F.3d 1043, 1047 (9th Cir. 2002). The percentage of the common fund method is
20 particularly appropriate where the benefit to the class is easily identified. *Ontiveros v. Zamora*,
21 303 F.R.D. 356, 372 (E.D.Cal. 2014). The Ninth Circuit has approved a benchmark percentage
22 of 25% of the common fund. In deciding whether to depart from the 25% benchmark, a district
23 court may take into account (1) the result achieved, the risk involved in the litigation, (2) the skill
24 required and the quality of work by counsel, (3) the contingent nature of the fee, (4) awards
25 made in similar cases, and (5) the lodestar crosscheck.” *Id.*, at 372; *Bellinghausen, supra*, at p.
26 260. Because the settlement here created a \$6,500,000.00 common fund for the Class Members’
27 benefit, the percentage method of determining an attorney fee award is appropriate.

28 ///

1 **A. Plaintiffs' Counsel Seeks the Benchmark Reasonable Percentage of the**
2 **Common Fund.**

3 The Ninth Circuit has consistently approved a benchmark common fund fee award of
4 25% of and, where the facts warrant, federal courts approve awards above the benchmark. *In re*
5 *Bluetooth Headset Prod. Liab.*, 645 F.3d 935, 947 (9th Cir. 2011); *Staton v. Boeing Co.*, 327 F.3d
6 938, 952 (9th Cir. 2003); *Hanlon v. Chrysler Corp.*, 150 F.3d 1011 (9th Cir. 1998); *Six (6)*
7 *Mexican Workers*, 904 F.2d 1301, 1311 (9th Cir. 1990); *Bellinghausen* at 261-62. Here,
8 Plaintiffs seek the benchmark attorney fee award equal to 25% of the common fund -
9 \$1,625,000.00. The benchmark award sought by the Plaintiffs is reasonable and is supported by
10 the factors the court may consider when making such an award.

11 **1. Plaintiffs obtained exceptional results on behalf of the class.**

12 “The overall result and benefit to the class from the litigation is the most critical factor in
13 granting a fee award.” *Omnivision, supra*, at 1046. Here, the Plaintiffs obtained an exceptional
14 result for the class. After more than 3 full years of litigation on behalf of 254 Class Members, the
15 Plaintiffs obtained a common fund settlement totaling \$6,500,000.00 plus the employer’s share
16 of payroll taxes. In order to obtain the settlement, Plaintiffs retained the services of expert
17 economist, Edward T. Garcia to evaluate the Defendants’ activity and pay data bases and to
18 prepare a model of the Defendants’ maximum potential exposure. While the damage model
19 reflected approximately \$22,607,847 in potential damages, approximately \$16,000,000 of the
20 estimated damages was due to penalties, interest and claims derivative of the Plaintiffs’
21 minimum wage claims. The remainder totaling \$6,591,942.00 of the Defendant’s estimate
22 exposure was due to the Plaintiffs’ minimum wage claims plus the statutory interest at 10%.
23 Therefore, while the \$6,500,000.00 settlement represents 28.7% of the total potential damages; it
24 represents 98.6% of the minimum wage plus statutory interest damages calculated by Mr. Garcia.
25 The recovery of more than 98% of the minimum wage damages plus interest ensures that the
26 class wide recovery is *not* based on the number of Class Members alone but on the size of their
27 individual lost wage damage estimates; ensuring every Class member will have the right to
28 recover almost 100% of his or her minimum wage damages.

1 The settlement is estimated to pay to Class Members a combined State and Federal law
2 award of approximately \$100 per work week.¹ The class list provided by the Defendants
3 includes a total of 254 class members. The minimum number of Class Member work weeks is 2
4 while the maximum number of work weeks is 333. Therefore, Class Member awards range from
5 approximately \$200 on the lowest end to a maximum award of approximately \$33,000. The
6 discrepancy in the awards is simply due to the amount of time Class Members worked as an
7 over-the-road truck driver during the class period. More specifically, the class list includes
8 approximately 84 individuals who are allocated 300 or more work weeks (i.e., more than
9 \$30,000 each); 36 individuals who are allocated between 200 and 299 work weeks (i.e., between
10 \$20,000 and \$29,999 each); and 50 individuals who are allocated between 100 and 199 work
11 weeks (i.e., between \$10,000 and \$19,999 each). The remaining 84 individuals are allocated less
12 than 100 work weeks. Accordingly, approximately 170 of the 254 Class Members are entitled,
13 under the terms of the settlement, to a combined State and Federal law award of more than
14 \$10,000.00 and the average award is approximately \$24,388.82. Kopfman Decl. ¶ 47. Therefore,
15 the \$6,500,000.00 common fund settlement obtained by Plaintiffs' is an exceptional result by any
16 standard.

17

18 2. The novelty, difficulty and complexity of the litigation.

19 This was not a cookie-cutter or tag along class action. Nor was it based upon a prior
20 governmental finding or action. Instead, it was hard-fought against highly competent team of
21 attorneys involving novel and difficult legal and factual issues. The Plaintiffs faced significant
22 legal difficulties throughout the pendency of this action. As an example, Labor Code 226.2
23 became effective January 1, 2016; approximately 7 months after the Defendants answered the
24 Plaintiffs' Complaint. As promulgated, Labor Code 226.2 included an affirmative defense
25

26 ¹ The amount per work week could increase for the following reasons. First, the mount of costs
27 sought by the Plaintiffs is less than the amount allocated under the settlement agreement.
28 Second, the entire amount of money allocated to pay Federal law awards, pursuant to the
settlement agreement will be distributed to those Class Members who return their FLSA Consent
Forms.

1 available to employers who compensated employees on a piece-rate-pay basis. See Labor Code
2 226.2(b) effective January 1, 2016. The promulgation of Labor Code 226.2 injected uncertainty
3 into whether the Defendants would avail themselves of the affirmative defense provision of
4 Labor Code 226.2.

5 Additionally, the threatened Denham type amendment to the Federal Aviation
6 Authorization Administration Act added additional legal difficulties. The proposed amendment
7 had the potential to adversely impact the Plaintiffs minimum wage claims in this action and
8 caused Counsel for the parties to stipulate to a 90 day stay of litigation in November 2015. See
9 Dkt. Nos. 25 and 26.

10 Furthermore, the use of averaging as a method of satisfying minimum wage laws has
11 been hotly litigated in this district. California Federal trial courts have applied the holding in
12 *Armenta v. Osmose*, 135 Cal.App.4th 314 (2005) to piece-rate workers. See e.g., *Ontiveros v.*
13 *Zamora*, 2009 WL 425962 (E.D. Cal. 2009); *Cardenas v. McLane Food Services, Inc.*, 796
14 F.Supp.2d 1246, (C.D. Cal. 2011); *Quezada v. Con-Way Freight, Inc.*, 2012 WL 2847609 *3-7
15 (N.D. Cal.). Of note, the California Supreme Court was not the source of the decision in
16 *Armenta* which is the case underlying the reasoning in *Ontiveros*, *Cardenas*, and *Quezada* cases.
17 While I believe the California Supreme Court would endorse the position taken by the *Armenta*
18 court, the risk of a change in law is inherently a part of this case.

19 20 **3. The risks involved in the case.**

21 This was an “all or nothing” case for the Plaintiffs. Class Counsel, having worked on this
22 case since 1992, faced a potential catastrophic risk in the event the case was lost at trial or,
23 thereafter, at each level of review. Given the length of this case, and the significant risks inherent
24 in the litigation, I conclude that the most appropriate way to establish a bench mark is by
25 reference to the market rate for a contingent fee in private commercial cases tried to judgment
26 and reviewed on appeal. See, e.g., *Allapattah Services, Inc. v. Exxon Corp.* 454 F.Supp.2d 1185,
27 1203 (S.D. Fla. 2006).
28

1 “The importance of assuring adequate representation for persons who could not
2 otherwise afford competent attorneys justifies providing those attorneys who do accept matters
3 on a contingent-fee basis a larger fee than if they were billing by the hour or on a flat fee.”
4 *Omnivision, supra*, at 1047. Risk also is measured by whether the defendant’s liability would be
5 easy or difficult to establish. *Id.*, Class actions are notoriously “unpredictable.” *In re NASDAQ*
6 *Mkt.-Makers Antitrust Litig.*, 187 F.R.D. 465, 475 (S.D.N.Y. 1998). “The ‘best’ case can be lost
7 and the ‘worst’ case can be won, and juries may find liability but no damages. None of these
8 risks should be underestimated.” *In re Superior Beverage/Glass Container Consol. Pretrial*, 133
9 F.R.D. 119, 127 (N.D. Ill. 1990). These principles squarely apply here.

10 Plaintiffs’ Counsel accepted the responsibility to prosecute the action on behalf of the
11 Plaintiffs and the Class Members on a contingency fee basis; including advancing cost of
12 litigation. Plaintiffs’ Counsel has risked more than 1,100 hours and more than \$36,800.00 of
13 their own out of pocket costs, none of which would have been recoverable if this case had been
14 lost. This case also has lasted longer than three (3) years, with no attorney compensation at any
15 point along the way. Over this long period, Class Counsel has had to bear the entire financial
16 burden, Courts recognize contingent fee litigation represents a significant risk and tend to find
17 above-market-fee-awards appropriate in this context. *Bellinghausen, supra* at 261. Additionally,
18 Plaintiffs’ Counsel was exposed to the risk that if this case did not settle, they would face the
19 uncertainty and significant expense of bringing a class certification motion, opposing motions to
20 decertify, retaining trial experts and preparing them to testify, a trial of this matter, and a lengthy
21 appeal process. Kopfman Decl. ¶¶ 29, 30, 39, 52, 53.

22
23 **4. The length of time the case has transpired.**

24 This lawsuit was initiated on February 25, 2015 when the Plaintiffs filed their complaint
25 and has therefore been pending for more than 3 years. “When counsel takes cases on a
26 contingency fee basis, and litigation is protracted, the risk of non-payment after years of
27 litigation justified a significant fee award.” *Bellinghausen, supra*, at 261.

1 **5. The non-monetary benefits obtained by counsel.**

2 Classwide litigation provided Plaintiffs and their Counsel with the platform to enforce
3 and uphold California's public policies supporting the prompt payment of employee wages. In
4 addition, the Defendants have changed the methods used to compensate its over-the-road truck
5 drivers from a straight piece-rate pay plan to a hybrid hourly and component-based pay system.
6 Therefore, it is unlikely that the currently employed class members and future over-the-road
7 truck drivers working for the Defendants will be required to perform work without payment of at
8 least minimum wages. Furthermore, all Californians benefit when its labor laws are enforced.
9 See *Sav-On Drug Stores, Inc. v. Superior Court*, 34 Cal.4th 319, 340 (2004).

10
11 **6. The percentages awarded in other class actions.**

12 Plaintiffs' requested attorney fee award also comports closely with the fees negotiated in
13 the private marketplace for comparable litigation, *i.e.*, with negotiated percentages arrived at
14 through arms-length bargaining among large sophisticated clients. See *Silver, A Restitutionary*
15 *Theory of Attorneys' Fees in Class Actions*, *supra*, at 702-703. Plaintiffs' Counsel has litigated
16 wage and hour class actions from the beginning of 2001 to the present and in the approximately
17 18 of the settled class actions Plaintiffs' Counsel has handled they have been awarded between
18 25% and 33.33% of the settlement fund as attorney fees. See also *Bellinghausen, supra*, 25%;
19 *Ontiveros, supra*, 25%. Additionally, a long line of California federal and state cases find fee
20 awards of 33.3% reasonable. See, *e.g.*, *In Re Pacific Enter. Sec. Litig.*, 47 F.3d 373, 379
21 (9th Cir. 1995) (33 percent fee award); *Williams v. MGM-Pathe Communications Co.*, 129 F.3d
22 1026, 1027 (9th Cir. 1997) (same). Wage and hour class actions are in the same range. See, *e.g.*,
23 *Boyd v. Bank of America Corp.*, 2014 U.S.Dist.LEXIS 162880 (C.D. Cal. 2014) (33.3% of
24 fund); *Wren v. RGIS Inventory Specialists*, 2011 U.S.Dist.LEXIS 38667 (N.D. Cal. 2011) (42%
25 of fund); *Hohnbaum v. Brinker Restaurant Corp.*, San Diego County Superior Ct. No.
26 GIC834348 (Dec. 12, 2014) (41.8% of fund); *Savaglio v. Wal-Mart*, Alameda County Superior
27 Court No. C-835687-7 (Sept. 10, 2010) (\$52.5 million fee - 35% of fund); *Fernandez v. Victoria*
28 *Secrets, Inc.*, 2008 U.S.Dist.LEXIS 123546 (C.D. Cal. 2008) (34% of fund).

1 **B. Lodestar Cross-Check.**

2 Class Counsel's percentage-based fee is also reasonable when cross-checked against the
3 lodestar-multiplier method. The lodestar is calculated by multiplying the number of hours
4 reasonably expended on the litigation by the reasonable hourly rates. *Morales v. City of San*
5 *Rafael*, 96 F.3d 359, 363 (9th Cir. 1996). Given a \$838,270.07 lodestar, the 25% benchmark fee
6 requested by Plaintiffs would require a modest multiplier of 1.94. Kopfman Decl. ¶ 72.

7
8 **1. Reasonable Rate.**

9 Under California law, hourly rates are reasonable if they are within the range of rates
10 charged by attorneys of comparable experience, reputation, and ability for reasonably similar
11 litigation. *Children's Hospital and Med. Center v. Belshe*, 97 Cal. 4th 740, 783 (2002). Under
12 both California and federal law, attorney rates generally are compensated at current rates. See
13 *Graham*, 34 Cal.4th at 583; *A.D. v. California Highway Patrol*, 2013 U.S. Dist. LEXIS 169275
14 (N.D. Cal. 2013), at *16. Class Counsel's hourly rates requested here are well within the range of
15 rates charged and awarded in this District. Their backgrounds and experience, in wage and hour
16 class actions, specifically, are set forth in their respective declarations. See Jones Decl.;
17 Kopfman Decl; Artenian Decl; and Wagner Decl. The declarations demonstrate that Class
18 Counsel has extensive experience in both handling wage and hour class actions; including taking
19 such cases to trial. Kopfman Decl. ¶¶ 32 – 40, 61 – 65; Jones Decl. Wagner Decl. and Artenian
20 Decl.

21 In addition to the Plaintiffs' Counsels' declarations, evidence of the prevailing market
22 rates may include affidavits from other area attorneys or examples of rates awarded to Counsel in
23 previous cases. *Cotton v. City of Eureka*, 889 F.Supp.2d 1154, 1167 (N.D. Cal. 2012). Here, as
24 evidence of the rates prevailing in the market place, Plaintiffs' Counsel request judicial notice of
25 the Declaration of Richard M. Pearl in Support of the Plaintiffs' Motion for Attorney Fees filed
26 in the *Ridgeway et al., v. Wal-Mart Stores, et al.*, class action. Additionally, the rates Plaintiffs'
27 Counsel seek here are the same as the rates awarded by Hon. Susan Illston in the *Ridgeway et al.*,

1 v. *Wal-Mart Stores, et al.*, class action for work performed primarily before 2017. Kopfman
2 Decl. ¶¶ 67, 68.

3 Class Counsel's hourly rates also are squarely in line with the rates found reasonable in
4 comparably difficult and complex litigation. In *Cotter v. Lyft Inc.*, 176 F.Supp.3d 930 (N.D.Cal.
5 2016), for example, the court approved a fee based on an \$800 hourly rate for a 21-year attorney.
6 Likewise, in *In re High Tech Employment Antitrust Litigation*, 2015 U.S. Dist. LEXIS 118052,
7 (N.D. Cal. 2015), the court found reasonable partner rates ranging from \$490 to \$975 per hour,
8 associate rates ranging from \$310 to \$800 per hour, and non-attorney rates ranging from \$190-
9 430 per hour. *See also* Pearl Decl., ¶ 34 (listing numerous other rate awards). These
10 determinations are strong evidence that counsel's rates here are reasonable. Finally,
11 approximately 3 years ago, this court recognized that rates ranging from \$250 to \$700 are
12 appropriate in wage-and-hour class actions for attorneys with between 4 to 16 years of
13 experience. *Bellinghausen, supra*, at 262, 263-64.

14 15 2. Reasonable Hours.

16 Class Counsel's hours also are reasonable. Under California law, every hour reasonably
17 spent to advance the Plaintiffs' case is compensable: "Absent special circumstances rendering
18 the award unjust, an attorney fee award should ordinarily include compensation for *all* the hours
19 *reasonably spent*, including those relating solely to the fee." *Ketchum v. Moses*, 24 Cal. 4th
20 1124, 1133 (2001) (emphasis the Court's). Hours are reasonable if "at the time rendered, [they]
21 would have been undertaken by a reasonable and prudent lawyer to advance or protect his
22 client's interest." *Moore v. Jas. H. Matthews & Co.*, 682 F.2d 830, 839 (9th Cir. 1982). Over the
23 more than 3 years this action was pending Class Counsel's time records here show that Class
24 Counsel and their staff spent more than 1,100 hours in the prosecution of this action. See
25 Kopfman Decl., Exhibits "B" – "I". These time records are *prima facie* evidence that counsel's
26 hours were reasonable. *See Horsford v. Bd. of Trustees*, 132 Cal.App.4th 359, 396 (2005) ("the
27 verified time statements of the attorneys, as officers of the court, are entitled to credence in the
28 absence of a clear indication the records are erroneous").

1 Furthermore, Class Counsel has spent significant time investigating through both formal
 2 and informal discovery processes; amended the complaint three times; engaged an expert
 3 economist to prepare models estimating the Defendants maximum exposure; attended two
 4 mediations and spoke directly and over the telephone with a significant number of Class
 5 Members for the purpose of ensure as many Class Members as possible would participate in the
 6 Federal Law Award by returning their FLSA Consent Forms to Simpluris, Inc.. Kopfman Decl.
 7 ¶ 57. All of the time expended by Counsel as reflected in their time records was reasonable and
 8 necessary for the benefit of the class.

10 3. Lodestar Calculation.

11 Here, applying the reasonable hourly rates recently awarded by the Hon. Susan Illston of
 12 the Northern District to the number of hours reasonably billed, Class Counsels' lodestar
 13 calculation is as follows:

14 Name	Position	Admission	Years	Rate/Hr	Hours	Fees
15 Andrew Jones	Partner	1977	41 yrs	\$890	99.5	\$ 88,555.00
16 Lawrence Artenian	Partner	1981	36 yrs	\$850	68.9	\$ 58,565.00
17 Nicholas Wagner	Partner	1983	34 yrs	\$830	208	\$174,720.00
18 Daniel Kopfman	Partner	1997	21 yrs	\$730	609.6	\$445,008.00
19 Angela Martinez	Associate	2014	4 yrs	\$410	72.9	\$ 29,889.00
20 Laura Brown	Associate	2015	3 yrs	\$330	47.2	\$ 16,528.07
21 Michelle Vasquez	Law Clerk			\$225	11.25	\$ 2,531.25
22 Jennifer Davis	Paralegal			\$195	115.25	\$ 22,473.75

23 To determine the lodestar multiplier, the Court divides the common fund percentage fee
 24 by the total lodestar fee. *Hopkins v. Stryker Sales Corp.*, No. 11-CV-02786-LHK, 2012 WL
 25 496358 at 4 (N.D.Cal. 2013). Courts apply a multiplier to the lodestar to account for the risk
 26 Class Counsel accepts when they take on a contingent-fee case. "If the multiplier falls within an
 27 acceptable range, it further supports the conclusion that the fees sought are, in fact, reasonable."
 28 *Id.*; *Bellinghausen, supra*, at 265. "Multipliers can range from 2 to 4 or even higher." *Wershba*

1 *v. Apple Computers, Inc.*, 91 Cal. App. 4th 224, 254 (2001) (emphasis added). See, e.g., *Sutter*
2 *Health Uninsured Pricing Cases*, 171 Cal.App.4th 495, 512 (2009)(consumer class action
3 challenging unfair billing practices; 2.52 multiplier upheld); *Chavez v Netflix, Inc.*, 162
4 Cal.App.4th 43, 60 (2008) (consumer class action; 2.5 multiplier upheld); *Vizcano, supra*, at
5 1051 n.6 finding that, in approximately 83 percent of the cases surveyed by the court, the
6 multiplier was between 1.0 and 4.0 with a bare majority of 54% in the 1.5 to the .3.0 range.

7 Here, dividing the percentage fee award \$1,625,000.00 by the lodestar amount,
8 \$838,270.07, results in a multiplier of 1.94. Kopfman Decl. ¶ 72. In light of the fact that the
9 settlement of this class action confers a significant benefit to Class Members equal to just over
10 98% of their minimum wage damages plus statutory interest, the contingent nature of Class
11 Counsel's fee, the skill required in conducting the litigation properly and succeeding at securing
12 a robust settlement, a 1.94 multiplier supports the reasonableness of the Plaintiffs' fee petition.
13 This especially true given that the fee award is the presumptively reasonable benchmark amount
14 of 25% of the common fund. Accordingly, the Plaintiffs Motion for Attorney Fees should be
15 granted.

16 17 **C. Litigation Costs.**

18 The Plaintiffs request reimbursement of litigation costs in the amount of \$36,845.74 plus
19 any additional costs incurred in finalizing the lawsuit, including traveling to and attending the
20 hearing on the Plaintiffs' Motion for Final Approval of Settlement. Generally, attorneys who
21 create a common fund for the benefit of a class is entitled to reimbursement of reasonable
22 litigation expenses from the fund. *Ontiveros, supra*, at 356, 375. Courts regularly award
23 litigation costs and expenses in wage-and-hour class action. *Bellinghausen, supra*, at 245, 265.

24 The settlement agreement provides that Plaintiffs' Counsel may seek reimbursement for
25 litigation costs up to \$60,000. Dkt. No. 68-3. Exhibit "A" attached to the Declaration of Daniel
26 Kopfman, filed herewith, includes an itemized list of litigation expenses which include: court
27 calls \$374.00; expert fees \$18,300.00; filing fees \$1,525.00; lodging \$3,104.75; mediator fees
28 \$8,087.50; mileage \$ 2,836.96; parking \$341.24; postage \$504.82; service of process \$556.45;

1 taxi \$13.85; Lexis Nexis Research \$922.34; Westlaw Research \$217.71. Counsel for Plaintiffs
2 estimate they will incur additional miscellaneous costs associated with traveling to and attending
3 the Motion for Final Approval hearing which is scheduled for May 3, 2018. Such costs are
4 estimated to be approximately \$3000.00.

5
6 **D. Incentive Awards.**

7 The Plaintiffs request that the Court approve an incentive payment to each of them in the
8 amount of \$20,000.00 to compensate them for their time, expenses, and service to the Class.
9 Incentive awards are typical in class action cases. *Rodriguez v. West Publishing Corp.*, 563 F.3d
10 948, 958 (9th Cir. 2000). Such awards are a matter left to the Court's discretion. *In re Mega*
11 *Financial Corp., Sec. Litig.*, 213 F.3d 454, 463 (9th Cir. 2000). Incentive awards are a means to
12 compensate class representatives for the work they perform on behalf of the class, to make up for
13 any out of pocket expenses, as compensation for financial or reputational risk they undertake in
14 bringing a lawsuit, and to recognize their willingness to act as a private attorney general under
15 California's Private Attorney General statutes. *Rodriguez v. West Publishing Corp.* 563 F.3d 958,
16 959 (9th Cir. 2009). In determining whether an incentive award is reasonable, courts generally
17 consider the following factors: (1) the risk to the class representative in commencing the suit,
18 both financial and otherwise; (2) the notoriety and personal difficulties encountered by the class
19 representative; (3) the amount of time and effort spent by the class representative; (4) the
20 duration of the litigation; and (5) the personal benefit (or lack thereof) enjoyed by the class
21 representative as a result of the litigation. *Covillo v. Specialty's Café, No. C-11-00594 DMR*,
22 2014 WL 954516, at 7 (N.D.Cal. Mar. 6, 2014) citing *Van Vranken v. Atl Richfield Co.*, 901
23 F.Supp. 294, 299 (N.D.Cal.1995). Courts will also consider whether the overall award represents
24 an unacceptable percentage of the gross settlement amount. *Sandoval v. Tharaldson*
25 *Employment Mangement, Inc.*, No. EDCV 08-482-VAP 2010 WL 248346, at 10 (C.D.Cal. June
26 15, 2010) "A class representative must justify an incentive award through "evidence
27 demonstrating the quality of the Plaintiffs' representative service," such as "substantial efforts
28 taken as a class representative to justify the discrepancy between [their] award and those of the

1 unnamed plaintiffs.” *Bellinghausen, supra*, at 245, 266.

2 While this Court has said that a \$5,000 incentive award is presumptively reasonable, it
3 has also awarded significantly more when appropriate. *Id.*, at 266-267. Here, the plaintiffs have
4 each submitted a declaration that outlines the work he has done on behalf of the Class which
5 address the factors the Court must consider in determining the reasonableness of an incentive
6 award. This case has been pending for more than three years and during that time the Plaintiffs
7 have devoted significant hours representing the interests of the Class Members. Their service to
8 the class and to Class Counsel was invaluable Kopfman Decl. ¶ 74-80. In addition, the Plaintiffs
9 have used their own time and money in acting as class representatives to attend court hearings
10 and mediations in San Francisco, host numerous open houses for the purpose of communicating
11 with Class Members about this litigation and its resolution, and meeting with Counsel for the
12 Class. Furthermore, each Plaintiff, in order to secure a robust settlement on behalf of the Class
13 Members has agreed to enter into a general release of claims, including a Civ. Code 1542 waiver.
14 Entering into a general release is no trivial matter, especially for Mr. Hernandez who has
15 suffered retaliation and adverse employment work conditions since becoming a Representative
16 Plaintiff as described in his declaration. Accordingly, the requested incentive award is
17 appropriate and reasonable here given the time and effort each of the Plaintiffs expended for the
18 benefit of the class – at times, to their own personal detriment.

19
20 **III. CONCLUSION.**

21 Respectively submitted.

22
23 Dated: March 15, 2018

WAGNER JONES KOPFMAN &
ARTENIAN LLP

24
25
26 /s/ Daniel M. Kopfman

27 DANIEL M. KOPFMAN
Attorneys for Plaintiffs &
28 Class Counsel