Bobby Saadian (SBN 250377)
bobby@wilshirelawfirm.com
Justin F. Marquez (SBN 262417)
justin@wilshirelawfirm.com
Nicol E. Hajjar (SBN 303102)
nicol@wilshirelawfirm.com
Thiago M. Coelho (SBN 324715)
thiago@wilshirelawfirm.com
WILSHIRE LAW FIRM, PLC
3055 Wilshire Blvd., 12th Floor
Los Angeles, California 90010
Telephone: (213) 381-9988
Facsimile: (213) 381-9989

Attorneys for Plaintiffs

[*Additional counsel listed on following page*]

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

IRMA FRAUSTO, individually, and on behalf of all others similarly situated,

Plaintiff,

v.

BANK OF AMERICA, NATIONAL ASSOCIATION, a business entity, form unknown; and DOES 1 through 10, inclusive,

Defendants

ARIANNA SUAREZ, individually and on behalf of all others similarly situated,

Plaintiff,

v.

BANK OF AMERICA, N.A. and DOES 1 through 100, inclusive,

Defendants

Case No. 3:18-cv-01983-LB (*Frausto*)
Case No. 3:18-cv-01202-LB (*Suarez*)

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR ATTORNEYS' FEES AND COSTS

Date: January 11, 2024
Time: 9:30 a.m.
Courtroom: B – 15th Floor (Videoconference)
Judge: Hon. Laurel Beeler

WILSHIRE LAW FIRM, PLC
3055 Wilshire Blvd, 12th Floor
Los Angeles, CA 90010-1137

ILG LEGAL OFFICE, P.C.
Stephen Noel Ilg (SBN 275599)
Email: silg@ilglegal.com
George L. Lin (SBN 287873)
Email: glin@ilglegal.com
156 S. Spruce Ave., Unit 206A
South San Francisco, CA 94080
Telephone: 415.580.2574
Facsimile: 415.735.3454

Attorneys for Plaintiffs

WILSHIRE LAW FIRM, PLC
3055 Wilshire Blvd, 12th Floor
Los Angeles, CA 90010-1137

WILSHIRE LAW FIRM, PLC
3055 Wilshire Blvd, 12th Floor
Los Angeles, CA 90010-1137

NOTICE OF MOTION AND MOTION

TO THE COURT AND ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that, on January 11, 2024, at 9:30 a.m., in Courtroom B, 15th Floor of the United States District Court for the Northern District of California, located at 450 Golden Gate Avenue, San Francisco, California 94102, Plaintiffs Irma Frausto and Arianna Suarez will move this Court for entry of an Order awarding attorneys' fees and costs to compensate them in achieving a $1,890,000.00 non-reversionary settlement of the wage-and-hour class action on behalf of Irma Frausto and Arianna Suarez ("Frausto" and "Suarez" respectively, collectively, "Plaintiffs") and the putative class with Defendant Bank of America, N.A. ("The Bank", and together with Plaintiffs, the "Parties"). The settlement brings substantial relief to approximately 16,577 Settlement Class Members, but did not come without substantial effort, skill, delay, and risk. At the same time, the fees Plaintiffs seek on behalf of themselves and the putative class – one third of the common fund – would result in a *negative* multiplier of their lodestar. The out-of-pocket costs are also documented and reasonably incurred in litigation in this case. Both the fees and costs sought are reasonable and warranted under the facts of the case and applicable law.

The case presented many challenges and uncertainties, including a vigorous and skilled defense by Defendant, as well as potential factual disputes as to policies and practices by Defendant that could amount to significant hurdles to the certification of wage-and-hour class. Even if Plaintiffs had prevailed at class certification, there was no guarantee as to the amount of damages that the class could recover at trial. Against this precarious backdrop, Class Counsel took the risk of litigating this case.

For the reasons discussed below, Class Counsel request for attorneys' fees and costs is appropriate under both the percentage of the fund and lodestar-multiplier approaches. Accordingly, Plaintiffs respectfully request that the Court grant the motion.

RELIEF SOUGHT

Plaintiffs (as defined below) respectfully request that the Court:

1. Grant the Motion Awarding Attorneys' Fees and Costs.

Respectfully submitted,

Dated: November 20, 2023

WILSHIRE LAW FIRM, PLC

By: /s/ Justin F. Marquez

Bobby Saadian
Justin F. Marquez
Nicol E. Hajjar
Thiago M. Coelho

ILG LEGAL OFFICE, P.C.

Stephen Noel Ilg
George L. Lin

Attorneys for Plaintiffs

WILSHIRE LAW FIRM, PLC
3055 Wilshire Blvd, 12th Floor
Los Angeles, CA 90010-1137

WILSHIRE LAW FIRM, PLC
3055 Wilshire Blvd, 12th Floor
Los Angeles, CA 90010-1137

TABLE OF CONTENTS

NOTICE OF MOTION AND MOTION 1
RELIEF SOUGHT 1
MEMORANDUM OF POINTS AND AUTHORITIES 1
I. INTRODUCTION 1
II. SUMMARY OF THE LITIGATION AND SETTLEMENT 1
A. Procedural History 1
B. Discovery and Investigation 3
C. Settlement Negotiations 4
D. Preliminary Approval and Overwhelming Support for the Settlement 5
E. Class Counsel Has Expended Substantial Amount of Work 6
III. ARGUMENT 6
A. Plaintiff Is Entitled to Attorneys' Fees Under California Law 6
B. Counsel Request an Award of Fees Based on the "Common Fund" Method 7
1. The Standard Fee Award in Class Actions Has Resolved Itself as One-Third of the Recovery in Common Fund Cases 9
2. This Matter Involves A "Fee-Shifting" Provision of The Labor Code 10
C. The Lodestar Method Also Supports Class Counsel's Fee Request 11
1. Class Counsel's Hours Are Reasonable 12
2. Class Counsel's Hourly Rates Are Reasonable 13
D. Plaintiffs' Request for Attorneys' Fees in the Amount of One-Third of the Common Fund Is Reasonable Under Ninth Circuit Precedent 14
E. Other Factors Support Plaintiffs' Fee Request 17
1. The Results of the Litigation Support the Requested Fees 17
2. The Substantial Contingent Risk, Including the Risk of Further Litigation, Supports the Requested Fees 18
3. The Skill of Counsel and Work Performed Support the Requested Fees 20
F. Class Counsel's Costs Are Reasonable 20

IV. CONCLUSION 21

WILSHIRE LAW FIRM, PLC
3055 Wilshire Blvd, 12th Floor
Los Angeles, CA 90010-1137

WILSHIRE LAW FIRM, PLC
3055 Wilshire Blvd, 12th Floor
Los Angeles, CA 90010-1137

TABLE OF AUTHORITIES

STATE CASES

ABM Industries Overtime Cases,
19 Cal.App.5th 277 (2017) 13

Chavez v. Netflix, Inc.,
162 Cal.App.4th 43 (2008) 9

Children's Hosp. and Med. Ctr. v. Bonta,
97 Cal.App.4th 740 (2002) 13

City and County of San Francisco v. Sweet,
12 Cal.4th 105 (1995) 8

D'Amico v. Board of Medical Examiners,
11 Cal.3d 1 (1974) 7

Dunk v. Ford Motor,
48 Cal.App.4th 1794 (1996) 12

Ferra v. Loews Hollywood Hotel, LLC,
11 Cal.5th 858 (2021) 4

Graham v. DaimlerChrysler Corp.,
34 Cal.4th 553 (2004) 10, 12

Ketchum v. Moses,
24 Cal.4th 1122 (2001) 14

Laffitte v. Robert Half Int'l Inc.,
1 Cal.5th 480 (2016) 8

Lealao v. Beneficial California, Inc.,
82 Cal. App 4th 19 (2000) 8

Murphy v. Kenneth Cole Productions, Inc.,
40 Cal.4th 1094 (2007) 11

Nightengale v. Hyundai Motors America,
31 Cal.App.4th 99 (1994) 12

Press v. Lucky Stores,
34 Cal.3d 311 (1983) 10
Quinn v. State of California,
15 Cal.3d 162 (1995) 8
Ramos v. Countrywide Home Loans, Inc.,
82 Cal.App.4th 615 (2000) 12
Robertson v. Fleetwood Travel Trailers,
144 Cal.App.4th 785 (2006) 13
Ryan v. California Interscholastic Federation,
94 Cal.App.4th 1033 (2001) 11
Sav-on Drug Stores, Inc. v. Super. Ct.,
34 Cal.4th 319 (2004) 11
Serrano v. Priest,
20 Cal.3d 25 (1977) 7, 12, 14
Wershba v. Apple Computer, Inc.,
91 Cal.App.4th 224 (2001) 7, 12

FEDERAL CASES

Barjon v. Dalton,
132 F.3d 496 (9th Cir. 1997) 14
Been v. O.K. Industries, Inc.,
2011 WL 4478766 (E.D. Okla. 2011) 16
Blanchard v. Bergeron,
489 U.S. 87 (1989) 14
Brulee v. DAL Glob. Servs., LLC,
No. CV 17-6433 JVS(JCGX), 2018 WL 6616659 (C.D. Cal. Dec. 13, 2018) 17, 19
Cabrales v. County of Los Angeles,
935 F.2d 1050 (9th Cir. 1991) 1

WILSHIRE LAW FIRM, PLC
3055 Wilshire Blvd, 12th Floor
Los Angeles, CA 90010-1137

Camacho v. Bridgeport Fin., Inc.,
523 F.3d 973 (9th Cir. 2008) 14

Caudle v. Bristow Optical Co.,
224 F.3d 1014 (9th Cir. 2000) 14

Chalmers v. City of Los Angeles,
796 F.2d 1205 (9th Cir. 1986) 13

Garcia v. Gordon Trucking, Inc.,
No. 1:10–CV–0324 AWI SKO, 2012 WL 5364575 (E.D.Cal. Oct. 31, 2012) 16

Frausto v. Bank of America, N.A.,
2019 WL 5626640 (N.D. Cal. Oct. 31, 2019) ("Frausto II") 2

Frausto v. Bank of America, N.A.,
334 F.R.D. 192 (N.D. Cal. 2019) ("Frausto III") 2

Frausto v. Bank of America, N.A.,
2020 WL 1290302 (Feb. 27., 2020) ("Frausto IV") 3

Fischel v. Equitable Life Assurance Soc'y of the United States,
307 F.3d 997 (9th Cir. 2002) 15, 17

Harman v. Lyphomed, Inc.,
945 F.2d 969 (7th Cir. 1991) 17

Hensley v. Eckerhart,
461 U.S. 424 (1983) 14

In re Heritage Bond Litig.,
02-ML-1475-DT(RCx), 2005 U.S. Dist. LEXIS 13627 (C.D. Cal. June 10, 2005) 20

In re Washington Pub. Power Supply Sys. Sec. Litig.,
19 F.3d 1291 (9th Cir. 1994) 14

In re Activision Securities Litigation,
723 F.Supp. 1373 (N.D. Cal. 1989) 9

In re Bluetooth Headset Prods. Liab. Litig.,
654 F.3d 935 (9th Cir. 2011) 13

WILSHIRE LAW FIRM, PLC
3055 Wilshire Blvd, 12th Floor
Los Angeles, CA 90010-1137

In re Pacific Enterprises Securities City and County of San Francisco Litigation,
47 F.3d 373 (9th Cir. 1994) 10

In re Wash. Pub. Power Supply Sys. Litig.,
19 F.3d 1291 (9th Cir.1994) 8

Kabatoff v. Safeco Ins. Co. of America,
627 F.2d 207 (9th Cir. 1980) 7

Knisley v. Network Assocs.,
312 F.3d 1123 (9th Cir.2002) 7

Leyva v. Medline Indus.,
716 F.3d 510 (9th Cir. 2013) 17

Miller v. CEVA Logistics USA, Inc.,
2015 WL 4730176 (E.D. Cal. Aug. 10, 2015) 11

Moreno v. City of Sacramento,
534 F.3d 1106 (9th Cir. 2008) 14

Parkinson v. Hyundai Motor America,
796 F.Supp.2d 1160 (C.D. Cal. 2010) 15

Romero v. Producers Dairy Foods, Inc.,
2007 WL 3492841 (E.D. Cal. Nov. 14, 2007) 11, 16

Singh v. Roadrunner Intermodal Servs., LLC,
No. 1:15–cv–01497–DAD–BAM, 2019 WL 316814 (E.D. Cal. Jan. 24, 2019) 17

Staton v. Boeing,
327 F.3d 939 (9th Cir. 2003) 7, 19

Suarez v. Bank of America, N.A.,
2019 WL5626637 (N.D. Cal. Oct. 31, 2019) 2

Van Vranken v. Atlantic Richfield Company,
901 F. Supp. 294 (N.D. Cal. 1995) 10

Vasquez v. Coast Valley Roofing, Inc.,
266 F.R.D. 482 (E.D.Cal.2010) 11

WILSHIRE LAW FIRM, PLC
3055 Wilshire Blvd, 12th Floor
Los Angeles, CA 90010-1137

Vincent v. Hughes Air West, Inc.,
557 F.2d 759 (9th Cir. 1977) 9

Visendi v. Bank of America, N.A.,
733 F.3d 863 (9th Cir. 2013) 7

Vizcaino v. Microsoft Corp.,
290 F.3d 1043 (9th Cir. 2002), *cert. denied*, 537 U.S. 1018 (2002) 7, 8, 15, 16, 17

Yocupicio v. PAE Group, LLC,
795 F.3d 1057 (9th Cir. 2015) 15

STATE STATUTES

Cal. Code of Civ. Proc. § 1021.5 ..... 7, 11

Cal. Lab. Code § 218.5 7

TREATISES

Conte & Newberg, Newberg on Class Actions (3rd Ed.) § 14.03 10

WILSHIRE LAW FIRM, PLC
3055 Wilshire Blvd, 12th Floor
Los Angeles, CA 90010-1137

WILSHIRE LAW FIRM, PLC
3055 Wilshire Blvd, 12th Floor
Los Angeles, CA 90010-1137

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Wilshire Law Firm and Ilg Legal Office ("Class Counsel") respectfully apply for an award of attorneys' fees and costs to compensate them for their extensive work in achieving a $1,890,000 non-reversionary settlement of the wage-and-hour class action on behalf of Plaintiff Irma Frausto ("Frausto") and Arianna Suarez ("Suarez") (collectively, "Plaintiffs") and the putative class with Defendant Bank of America, N.A. ("Defendant" or "the Bank," and together with Plaintiffs, the "Parties"). The settlement brings substantial relief to approximately 16,577 Settlement Class Members, but did not come without extensive effort, skill, delay, and risk. At the same time, the fees Plaintiffs seek on behalf of themselves and the putative class—one third of the common fund—would result in a negative multiplier of less than 0.27 of their lodestar. The out-of-pocket costs are also documented and reasonably incurred in litigating this case. Both the fees and costs sought are reasonable and warranted under the facts of the case and applicable law.

The case presented many challenges and uncertainties, including a vigorous and skilled defense by Defendant, as well as potential factual disputes as to the policies and practices by Defendant that could amount to significant hurdles to the certification of a wage-and-hour class. Indeed, this Court granted class certification at one point, and then later denied class certification after Defendant exhausted review through Rule 23(f). Even if Plaintiff had prevailed at class certification, there was no guarantee as to the amount of damages that the class could recover at trial. Against this precarious backdrop, Class Counsel took the risk of litigating this case.

For the reasons discussed below, Class Counsel's request for attorney's fees and costs is appropriate under both the percentage of the fund and lodestar-multiplier approaches. Accordingly, Plaintiffs respectfully request that the Court grant the motion.

II. SUMMARY OF THE LITIGATION AND SETTLEMENT

A. Procedural History

The *Suarez* and *Frausto* actions started in 2018. Suarez originally filed a putative class action in the Superior Court of the State of California for the County of Alameda, Case No. RG18890674, which the Bank subsequently removed to the Northern District of California on February 23, 2018.

Frausto originally filed a putative class action in the Superior Court of the State of California for the County of Alameda, Case No. RG 18894308, which the Bank subsequently removed to the Northern District of California on March 30, 2018. Plaintiffs alleged that the Bank violated California's Labor Code and Unfair Competition Laws. Marquez Decl., ¶ 3. Plaintiffs also seek civil penalties under Private Attorneys General Act ("PAGA") for the aforementioned Labor Code violations. *Id*.

The Bank moved to dismiss Frausto's complaint, and on August 2, 2018, the Court granted in part and denied in part the Bank's motion. The Court granted the motion as to the claims for meal and rest break violations to the extent they were predicated on a failure to pay premiums at the recalculated rate used to compute overtime wages and dismissed the claims on those grounds without leave to amend. *Frausto v. Bank of America, National Association*, 2018 WL 3659251, *5 (N.D. Cal. Aug. 2, 2018) ("there is no legally tenable argument that section 226.7 payments should be paid at the 'regular rate' used for overtime purposes.") ("Frausto I"). Marquez Decl., ¶ 4.

The Bank then moved for summary judgment in both actions. *Frausto v. Bank of America, N.A.*, 2019 WL 5626640 (N.D. Cal. Oct. 31, 2019) ("*Frausto II*"); *Suarez v. Bank of America, N.A.*, 2019 WL5626637 (N.D. Cal. Oct. 31, 2019) In *Frauso II*, the Court held that there are triable issues of fact as to Plaintiffs' Labor Code claims, including her derivative penalty claims. In doing so, the Court also rejected the Bank's argument that meal and rest period premium payments do not qualify as wages for purposes of Labor Code §§ 203 and 226 penalties. *Id.* At *9, *12. This was a sharply contested issue that the California Supreme Court later resolved in favor of plaintiff in *Naranjo v. Spectrum Sec. Servs., Inc.,* 13 Cal.5th 93 (2022). Marquez Decl., ¶ 5.

On June 14, 2019, Frausto and Suarez moved together for class certification, seeking to certify a class of "[a]ll persons who worked for [the Bank] in California as a non-exempt employee" and combining all their remaining claims in that class. (Frausto, Dkt. No. 90.) Marquez Decl., ¶ 6.

In December 2019, the Court granted in part and denied in part Plaintiff's motion for class certification. *Frausto v. Bank of America, N.A.,* 334 F.R.D. 192 (N.D. Cal. 2019) ("*Frausto III*"). The Court then ordered the Parties to meet and confer and propose revised class definitions consistent with the Court's class certification order. (Frausto, Dkt. No. 128.) However, the Parties were unable to agree upon a class definition. Marquez Decl., ¶ 7.

WILSHIRE LAW FIRM, PLC
3055 Wilshire Blvd, 12th Floor
Los Angeles, CA 90010-1137

The Bank appealed the Court's class certification order, and the Ninth Circuit denied the Bank's petition for permission to appeal. *Frausto v. Bank of America, N.A.,* 2020 WL 1290302 (Feb. 27., 2020) ("*Frausto IV*"). Marquez Decl., ¶ 8.

On April 1, 2021, the Bank filed a motion for reconsideration of the Court's class certification decision. On April 8, 2021, Frausto, along with Suarez, filed a motion for leave to file a motion for reconsideration of the Court's class certification order, requesting that the Court reinstate its original class definition. Marquez Decl., ¶ 9.

On June 17, 2021, the Court granted the Bank's motion, denied Frausto's motion, and issued an order denying class certification. Frausto v. Bank of America, N.A., 2021 WL 2476902 (Jun. 17, 2021) ("Frausto V"). In so ruling, the Court found that it was unable to certify a class because there was no evidence of a de facto policy that prevented putative class members from taking meal breaks. Marquez Decl., ¶ 10.

On July 1, 2021, Frausto filed a petition for permission to appeal the Court's class certification denial and denial of her request for reconsideration. The Ninth Circuit denied Frausto's permission to appeal on November 8, 2021. Marquez Decl., ¶ 11.

B. Discovery and Investigation

The Parties engaged in a significant amount of investigation, class-wide discovery, and analysis prior to reaching the proposed settlement. Defendant responded to Plaintiffs' written discovery, provided extensive information on the company's wage and hour policies and practices, provided the contact information for a random sample of Settlement Class Members, produced thousands of pages of relevant documents, and provided three witnesses for depositions. There was significant motion and appellate work, including a motion to dismiss, motions for summary judgment, and a contested motion for class certification. It was only after the exchange of a substantial amount of data and information that the parties participated in four full-day mediation sessions and ultimately reached this proposed settlement. Marquez Decl., ¶ 12.

///

///

WILSHIRE LAW FIRM, PLC
3055 Wilshire Blvd, 12th Floor
Los Angeles, CA 90010-1137

WILSHIRE LAW FIRM, PLC
3055 Wilshire Blvd, 12th Floor
Los Angeles, CA 90010-1137

C. Settlement Negotiations

There have been four mediations in the *Frausto* action. The first mediation occurred on April 23, 2019, with the Hon. Ronald M. Sabraw (Ret.) of JAMS. The second mediation occurred on July 30, 2019, with the Hon. Jaime Jacobs May (Ret.) of JAMS and counsel for Frausto and Suarez. The third mediation occurred on July 23, 2020 with David Rottman, Esq. The fourth mediation occurred on August 2, 2022 with Jeffrey Krivis, Esq. Marquez Decl., ¶ 13.

After extensive litigation, negotiations and discussions regarding the strengths and weaknesses of Plaintiffs' claims and Defendant's defenses, the Parties were able to reach an agreement at the fourth mediation regarding the key terms and provisions of the proposed settlement. Class Counsel believes that the proposed settlement is fair, reasonable and adequate and is in the best interest of the Settlement Class Members in light of all known facts and circumstances, the risk of significant delay, the defenses that could be asserted by Defendant both to certification and on the merits, trial risk and appellate risk. Marquez Decl., ¶ 14.

Discovery and investigation revealed that prior to May 2019, the Bank paid meal and rest break premiums at the employee's hourly rate of pay (thereafter it paid meal and rest break premiums at the employee's regular rate of pay). (*Id.* at ¶ 15.) Frausto has always alleged that the Bank should have paid meal period premium wages at the regular rate of pay, not the straight time rate. (*See, e.g.,* Frausto, Dkt. 1-1, p. 10, ¶ 16 [original Complaint]; Frausto, Dkt. 24, ¶ 18 [First Amended Complaint].) In 2019, this Court dismissed this claim, holding that "there is no legally tenable argument that section 226.7 payments should be paid at the 'regular rate' used for overtime purposes." *Frausto I*, 2018 WL 3659251 at *5. The California Supreme Court later provided clarification on this exact point in *Ferra v. Loews Hollywood Hotel, LLC*, 11 Cal.5th 858 (2021), and held that "the 'regular rate of compensation' in section 226.7(c) has the same meaning as 'regular rate of pay' in section 510(a) and encompasses not only hourly wages but all nondiscretionary payments for work performed by the employee." *Id.* at 878. The *Ferra* holding applies retroactively. *Id.* at 880. In light of *Ferra*, Plaintiffs contend that they have viable reasons to continue classwide litigation based on the Bank's former practice under *Ferra*.

This settlement resolves the risk attendant with continued litigation. Class Counsel

believes that the settlement amount is reasonable in light of the Bank's realistic range of exposure. Marquez Decl., ¶ 15. This is a good result for the Class, particularly in light of the Court's denial of class certification. Because of the proposed Settlement, Settlement Class Members will be able to receive timely, guaranteed relief and will avoid the risk of an unfavorable judgment.

Under the Settlement Agreement, Defendants initially agreed to pay $1,500,000.00 to resolve this litigation, subject to an escalator clause that triggers if the number of pay periods affected by the settlement is larger than expected. The Escalator Clause states that if the total number of Unreleased Individual Pay Periods for all Settlement Class Members is greater than 335,003 then the Gross Settlement Fund will be increased by each full percentage point above 335,003. The Total Class Pay Periods for this case is 423,107, which is 88,104 or 26% higher than the estimated 335,003. Therefore, with the Escalator Clause, Defendants will pay $1,890,000.00. Marquez Decl., ¶ 16. Plaintiffs allege that Defendant violated California's Labor Code and Unfair Competition Laws, and the complaints as amended allege the following claims for relief: (1) Failure to Pay Minimum Wages (Cal. Lab. Code §§ 204, 1194, 1194.2, and 1197); (2) Failure to Pay Overtime Compensation (Cal. Lab. Code §§ 1194 and 1198); (3) Failure to Provide Meal Periods (Cal. Lab. Code §§ 226.7, 512); (4) Failure to Authorize and Permit Rest Periods (Cal. Lab. Code §§ 226.7); (5) Failure to Timely Pay Final Wages at Termination (Cal. Lab. Code §§ 201-203); (6) Failure to Provide Accurate Itemized Wage Statements (Cal. Lab. Code § 226); (7) Unfair Business Practices (Cal. Bus. & Prof. Code §§ 17200, *et seq.*); and (8) Civil Penalties Under PAGA (Cal. Lab. Code § 2698, *et seq.*). (Marquez Decl. at ¶ 16.)

The Class Notice provided Settlement Class Members with the revised settlement amount of $1,890,000.00, and it also stated that Class Counsel will seek attorney's fees in an amount up to $630,000. Marquez Decl., ¶ 17.

D. Preliminary Approval and Overwhelming Support for the Settlement

The Court granted Plaintiff's Motion for Preliminary Approval of the Settlement on September 8, 2023. ECF 138. In the Order granting Plaintiff's Motion for Preliminary Approval, The Court stated that the Court will address the issue of attorneys' fees at the final fairness hearing

WILSHIRE LAW FIRM, PLC
3055 Wilshire Blvd, 12th Floor
Los Angeles, CA 90010-1137

scheduled for January 11, 2024. *Id.* Notice went out to 16,577 Settlement Class Members on October 13, 2023. The deadline for Settlement Class Members to opt out or object is November 30, 2023. Marquez Decl., ¶ 19.

The reaction of the Class to the settlement has been overwhelmingly positive. Indeed, so far, only four Settlement Class Members have opted out of the settlement, and no Settlement Class Members have objected to the settlement. Marquez Decl., ¶ 20.

E. Class Counsel Has Expended Substantial Amount of Work

Class Counsel request a fee award as a percentage of the total fund; however, class counsel's fee requested is also supported, or "cross-checked," by a lodestar with a negative multiplier of less than 0.27. Class Counsel worked more than 1,900 hours on this case. Marquez Decl., ¶ 39, Ex. 3 (1,842.4 hours); Ilg Decl., ¶ 4, Ex. A (94.3 hours).

Class Counsel has submitted detailed time records kept contemporaneously. As Class Counsel's declarations make clear, the time reported was devoted to necessary and worthwhile tasks and was calculated at counsel's reasonable billing rates. These figures do not include any time spent after filing this motion, such as any follow up work related to administering the settlement. Marquez Decl., ¶¶ 37-40. Class Counsel also seek reimbursement of costs in the amount of $203,430.31. Marquez Decl., ¶ 41, Ex. 4 ($194,971.64 in costs); Ilg Decl., ¶ 3, Ex. A ($8,458.67 in costs).

III. ARGUMENT

A. Plaintiff Is Entitled to Attorneys' Fees Under California Law

Pursuant to Federal Rules of Civil Procedure 23(h), the Court may award reasonable attorneys' fees and nontaxable costs "authorized by law and by agreement of the parties." If a negotiated class action settlement includes an award of attorney's fees, that fee award must be evaluated in the overall context of the settlement. *Knisley v. Network Assocs.,* 312 F.3d 1123, 1126 (9th Cir.2002). A district court must therefore "carefully assess the reasonableness of a fee amount spelled out in a class action settlement agreement." *Staton v. Boeing,* 327 F.3d 939, 963 (9th Cir. 2003).

"In a diversity action, the question of attorney's fees is governed by state law." *Kabatoff v. Safeco Ins. Co. of America,* 627 F.2d 207, 210 (9th Cir. 1980); *Vizcaino v. Microsoft Corp.*,

WILSHIRE LAW FIRM, PLC
3055 Wilshire Blvd, 12th Floor
Los Angeles, CA 90010-1137

290 F.3d 1043, 1047 (9th Cir. 2002), *cert. denied*, 537 U.S. 1018 (2002) (same). This is a diversity action because Defendant removed this case under CAFA. ECF 1; *see also Visendi v. Bank of America, N.A.*, 733 F.3d 863, 867 (9th Cir. 2013) (noting that CAFA amended the diversity jurisdiction statute). Thus, California law governs the attorneys' fee award here because Plaintiff's claims arise under California law. Plaintiff is entitled to an award of reasonable attorneys' fees and costs under California law. *See* Cal. Lab. Code §§ 218.5; 1194; Cal. Code of Civ. Proc. § 1021.5.

Under California law, the court is empowered to award reasonable attorneys' fees and costs when a litigant proceeding in a representative capacity has achieved a "substantial benefit" for a class of persons. *Serrano v. Priest*, 20 Cal.3d 25, 38 (1977) ("*Serrano III*"). There are two methods of calculating attorneys' fees in civil class actions: (1) the lodestar/multiplier method, and (2) the percentage of recovery method. *Wershba v. Apple Computer, Inc.*, 91 Cal.App.4th 224, 254 (2001); *see also Vizcaino,* 290 F.3d at 1047 (citing *In re Wash. Pub. Power Supply Sys. Litig.,* 19 F.3d 1291, 1295–96 (9th Cir.1994)). The district court has discretion in common fund cases to choose either method. *Vizcaino*, 290 F.3d at 1047.

Class Counsel's fee request is justified under either method. Class Counsel obtained an excellent result for the Class after thorough investigation, litigation, mediation, and finally, negotiation of a settlement. Class Counsel has also expended a substantial amount of work in the case. The positive reaction of the Class further demonstrates that Class Counsel's fee request is reasonable in light of the results achieved.

B. Counsel Request an Award of Fees Based on the "Common Fund" Method

California courts have long awarded attorneys' fees as a percentage of the benefit created by counsel in pursuing claims on behalf of a class. The California Supreme Court held that "when a number of persons are entitled in common to a specific fund, and an action brought by a plaintiff or plaintiffs for the benefit of all results in the creation or preservation of that fund, such plaintiff or plaintiffs may be awarded attorneys' fees out of the fund." *Serrano III*, 20 Cal.3d at 34.

The purpose of the common fund doctrine/percentage approach is to "spread litigation

WILSHIRE LAW FIRM, PLC
3055 Wilshire Blvd, 12th Floor
Los Angeles, CA 90010-1137

costs proportionally among all the beneficiaries so that the active beneficiary does not bear the entire burden alone." *Vincent v. Hughes Air West, Inc.* 557 F.2d 759, 769 (9th Cir. 1977). In *Quinn v. State of California*, 15 Cal.3d 162, 167 (1995), the California Supreme Court stated: "[O]ne who expends attorneys' fees in winning a suit which creates a fund from which others derive benefits may require those passive beneficiaries to bear a fair share of the litigation costs." Similarly, in *City and County of San Francisco v. Sweet*, 12 Cal.4th 105, 110 (1995), the California Supreme Court recognized that the common fund doctrine has been applied "consistently in California when an action brought by one party creates a fund in which other persons are entitled to share."

The California Supreme Court recently affirmed in *Laffitte v. Robert Half Int'l Inc*., 1 Cal.5th 480 (2016) that, "when class action litigation establishes a monetary fund for the benefit of the class members, and the trial court in its equitable powers awards class counsel a fee out of that fund, the court may determine the amount of a reasonable fee by choosing an appropriate percentage of the fund created." *Id*. at 503. The court explained: "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—convince us the percentage method is a valuable tool that should not be denied our trial courts." *Id*. (internal citations omitted).

A number of other courts have recognized the advantages of awarding fees as a percentage of the common fund over the alternative lodestar approach, which usually involves wading through voluminous and often indecipherable time records. *See*, *e.g.*, *In re Activision Securities Litigation,* 723 F.Supp. 1373, 1375 (N.D. Cal. 1989); *see also Lealao v. Beneficial California, Inc.,* 82 Cal. App 4th 19, 28 (2000) (discussing findings of task force commissioned by the Third Circuit, which concluded that the percentage method is superior). The Ninth Circuit now routinely uses the percentage of the common fund approach to determine the award of attorney's fees. *See*, *e.g.*, *In re Pacific Enterprises Securities City and County of San Francisco Litigation*, 47 F.3d 373, 378-79 (9th Cir. 1994) (approving attorney's fee of 33 1/3%).

WILSHIRE LAW FIRM, PLC
3055 Wilshire Blvd, 12th Floor
Los Angeles, CA 90010-1137

Class Counsel seeks an award of $630,000.00 in attorneys' fees, equivalent to 33 1/3% of the $1.89 million non-reversionary settlement, on the "percentage of recovery/ common fund" theory. That figure is reasonable because it falls within the range that California district courts usually award in wage and hour class actions, and this settlement provided substantial benefits to Settlement Class Members and advanced the public interest.

1. The Standard Fee Award in Class Actions Has Resolved Itself as One-Third of the Recovery in Common Fund Cases

According to a leading treatise on class actions, "No general rule can be articulated on what is a reasonable percentage of a common fund. Usually 50% of the fund is the upper limit on a reasonable fee award from a common fund in order to assure that the fees do not consume a disproportionate part of the recovery obtained for the class, although somewhat larger percentages are not unprecedented." *See* Conte & Newberg, Newberg on Class Actions (3rd Ed.) § 14.03. Attorneys' fees that are fifty percent of the fund are typically considered the upper limit, with ***thirty to forty percent commonly awarded in cases where the settlement is relatively small***. *See id*; *see also Van Vranken v. Atlantic Richfield Company*, 901 F. Supp. 294 (N.D. Cal. 1995) (stating that most cases where 30-50 percent was awarded involved "smaller" settlement funds of under $10 million).

The settled-for 33 1/3% fee award is consistent with the average fee award in similar class actions. Indeed, the custom and practice in class actions is to award approximately one-third of a fund as a fee award. *See 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 of the recovery."). "California district courts usually award attorneys' fees in the range of 30–40% in wage and hour class actions that result in the recovery of a common fund under $10 million." *Miller v. CEVA Logistics USA, Inc.,* 2015 WL 4730176, at * 8 (E.D. Cal. Aug. 10, 2015). In *Vasquez v. Coast Valley Roofing, Inc.*, 266 F.R.D. 482, 491–92 (E.D. Cal. 2010), the court cited to five recent wage and hour cases where federal judges approved fee awards ranging from 30% to 33% and approved a percentage of the fund award of 33% to class counsel. Likewise, in *Singer v. Becton*

WILSHIRE LAW FIRM, PLC
3055 Wilshire Blvd, 12th Floor
Los Angeles, CA 90010-1137

Dickinson and Co., 2010 WL 2196104 (S.D. Cal. 2010), the court approved attorneys' fees of 33.33% of the common fund and held this award is similar to awards in three other wage and hour class actions where fees ranged between 33.3% and 40%. In *Romero v. Producers Dairy Foods, Inc.,* 2007 WL 3492841, at *1–4 (E.D. Cal. Nov. 14, 2007), the court approved an award of 33% of the common fund.

Thus, Class Counsel's fee request is in line with the prevailing guidelines established in California case law and academic literature and is consistent with awards in California. Accordingly, Plaintiffs respectfully request that the Court approve the attorneys' fees as negotiated by the parties and requested here.

2. This Matter Involves A "Fee-Shifting" Provision of The Labor Code

As this litigation culminated in a settlement that provided for a recovery of unpaid wages, including unpaid overtime compensation, Plaintiff is entitled to recover reasonable attorneys' fees and costs under the California Labor Code. California Labor Code § 1194 provides, in part:

> [A]ny employee receiving less than the legal minimum wage or the legal overtime compensation applicable to the employee is entitled to recover in a civil action the unpaid balance of the full amount of this minimum wage or overtime compensation, including interest thereon, reasonable attorney's fees, and costs of suit.

Cal. Lab. Code § 1194.

Class Counsel is also entitled to a fee award under California's private attorney general statute, California Code of Civil Procedure § 1021.5. "The award of attorneys fees is proper under Section 1021.5 if '(1) plaintiff's action has resulted in the enforcement of an important right affecting the public interest,' (2) 'a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons' and (3) 'the necessity and financial burden of private enforcement are such as to make the award appropriate.'" *Press v. Lucky Stores*, 34 Cal.3d 311, 317-318 (1983). The fundamental objective of the statute is "to encourage suits enforcing public policies by providing substantial attorneys' fees to successful litigants in such cases." *Graham v. DaimlerChrysler Corp*., 34 Cal.4th 553, 565 (2004).

WILSHIRE LAW FIRM, PLC
3055 Wilshire Blvd, 12th Floor
Los Angeles, CA 90010-1137

This action resulted in the enforcement of an important right affecting the public interest, as Plaintiffs sought to enforce Class Members' rights to recover statutory wages arising from Defendant's alleged failure to pay overtime compensation, alleged failure to provide meal and rest breaks, and alleged failure to calculate overtime and meal and rest break premiums properly. *See Murphy v. Kenneth Cole Productions, Inc.*, 40 Cal.4th 1094, 1113 (2007) (noting that "health and safety concerns" are what motivated the Industrial Wage Commission to adopt mandatory meal and rest periods). Indeed, the California Supreme Court stated that "Labor Code section 1194 confirms "a clear public policy ... that is specifically directed at the enforcement of California's minimum wage and overtime laws for the benefit of workers." [citation omitted]." *Sav-on Drug Stores, Inc. v. Super. Ct.*, 34 Cal.4th 319, 340 (2004).

This action also conferred a significant benefit on a large class of persons. Notice was sent to 16,577 Settlement Class Members. Marquez Decl., ¶ 19. The Settlement provides a significant monetary benefit, in that it permits non-exempt employees who worked for Defendant during the applicable class period to obtain compensation for alleged wage-and-hour violations. Because, so far, no Settlement Class Member has objected to the settlement and only four Settlement Class Members have opted out, the reaction is overwhelmingly positive.

Finally, the necessity and financial burden of private enforcement render an award appropriate. Without the incentive of an attorneys' fee award, Plaintiffs could not have afforded to hire counsel to pursue this case, as the cost of litigating this matter far outweighed Plaintiffs' potential recovery. *See Ryan v. California Interscholastic Federation*, 94 Cal.App.4th 1033, 1044 (2001) ("As to the necessity and financial burden of private enforcement, an award is appropriate where the cost of the legal victory transcends the claimants' personal interest; in other words, where the burden of pursuing the litigation is out of proportion to the plaintiff's individual stake in the matter.").

C. <u>The Lodestar Method Also Supports Class Counsel's Fee Request</u>

Class Counsel's fee application is also reasonable based on the lodestar method. The lodestar figure is calculated by multiplying the hours spent on the case by the reasonable hourly rates for the region and attorney experience. *In re Bluetooth Headset Prods. Liab. Litig.*, 654

WILSHIRE LAW FIRM, PLC
3055 Wilshire Blvd, 12th Floor
Los Angeles, CA 90010-1137

F.3d 935, 941-42 (9th Cir. 2011). A reasonable hourly rate is the prevailing rate charged by attorneys of similar skill and experience in the relevant community. *Chalmers v. City of Los Angeles*, 796 F.2d 1205, 1210 (9th Cir. 1986). The moving party meets its burden in this regard by submitting "declarations evidencing the reasonable hourly rate for their services and establishing the number of hours spent working on the case" as "California case law permits fee awards in the absence of detailed time sheets." *Wershba*, 91 Cal.App.4th at 254-55; *Dunk v. Ford Motor*, 48 Cal.App.4th 1794, 1810 (1996); *Nightengale v. Hyundai Motors America*, 31 Cal.App.4th 99, 103 (1994). The hours spent and the reasonable hourly compensation are computed to arrive at a "lodestar" figure which may then be augmented or diminished by the court taking into account various "multiplier" factors. *See Ramos v. Countrywide Home Loans, Inc.*, 82 Cal.App.4th 615, 622 (2000) (citing *Serrano*, 20 Cal.3d at 48-49).

Multiplying the total hours billed by Class Counsel to the litigation by their reasonable hourly rates yields a lodestar of more than $2.3 million, which is more than double the $630,000 in attorney's fees Class Counsel are requesting. This disparity is important to note because when plaintiffs seek an amount in fees that is less than what they actually billed, the requested fee amount is generally considered reasonable. *Chun-Hoon v. McKee Foods Corp.*, 716 F. Supp. 2d 848, 854 (N.D. Cal. 2010) (finding that, if the court is asked to apply a negative multiplier, it "suggests the negotiated fee award is a reasonable and fair valuation of the services rendered to the class by Plaintiff's Counsel.").

1. Class Counsel's Hours Are Reasonable

The lodestar method requires the Court to determine a "touchstone" or lodestar figure based on a compilation of time spent and reasonable hourly compensation for each attorney. *Graham*, 34 Cal.4th at, 579. Hours are reasonable if they were "reasonably expended in pursuit of the ultimate result achieved in the same manner that an attorney traditionally is compensated by a fee-paying client." *Hensley v. Eckerhart*, 461 U.S. 424, 431 (1983). The Court "should defer to the winning lawyer's professional judgment as to how much time he was required to spend on the case." *Moreno v. City of Sacramento*, 534 F.3d 1106, 1112 (9th Cir. 2008).

Here, Class Counsel expended a significant amount of time litigating the case to achieve

WILSHIRE LAW FIRM, PLC
3055 Wilshire Blvd, 12th Floor
Los Angeles, CA 90010-1137

a result that benefits the Class. To date, Class Counsel has collectively spent over 1,900 hours litigating this case. Marquez Decl., ¶ 39. In the event that Court grants final settlement approval, Class Counsel will spend additional time monitoring administration of the settlement after final approval. *Id*. at ¶ 42.

2. Class Counsel's Hourly Rates Are Reasonable

The established standard when determining a reasonable hourly rate is the "rate prevailing in the community for similar work performed by attorneys of comparable skill, experience, and reputation." *Camacho v. Bridgeport Fin., Inc.*, 523 F.3d 973, 979 (9th Cir. 2008) (quoting *Barjon v. Dalton*, 132 F.3d 496, 502 (9th Cir. 1997)). This rule applies even when, as here, the attorneys representing the named Plaintiff performed the work on a contingent fee basis. *See*, *e.g.*, *Robertson v. Fleetwood Travel Trailers*, 144 Cal.App.4th 785, 818 (2006); *Blanchard v. Bergeron*, 489 U.S. 87, 96 (1989).

Class Counsel provide declarations to support their lodestar hourly rates. These hourly rates are reasonable in light of their significant experience, expertise, and skill. Rates are reasonable if they are "within the range of reasonable rates charged by and judicially awarded comparable attorneys for comparable work." *Children's Hosp. and Med. Ctr. v. Bonta*, 97 Cal.App.4th 740, 783 (2002). The trial court may "find hourly rates reasonable based on evidence of other courts approving similar rates." *Parkinson v. Hyundai Motor America*, 796 F.Supp.2d 1160, 1172 (C.D. Cal. 2010).

Class Counsel are experienced litigators who specialize in employment law, with a substantial wage and hour class action practice. Marquez Decl., ¶¶ 27-35. For example, Class Counsel Justin F. Marquez briefed, argued, and won *Yocupicio v. PAE Group, LLC,* 795 F.3d 1057 (9th Cir. 2015), an important decision concerning CAFA jurisdiction cited in several leading treatises such as Wright & Miller's *Federal Practice & Procedure*, and *Newberg on Class Actions*, and he was the primary author of the class certification and expert briefs in *ABM Industries Overtime Cases,* 19 Cal.App.5th 277 (2017), a wage and hour class action for over 40,000 class members for off-the-clock, meal period, split shift, and reimbursement claims. Mr. Marquez has won numerous awards for his work, and he is responsible for over $70 million in

WILSHIRE LAW FIRM, PLC
3055 Wilshire Blvd, 12th Floor
Los Angeles, CA 90010-1137

settlements in 2023 alone. Marquez Decl., ¶¶ 31-34. Further, Mr. Marquez's hourly rate is what he charges and receives for legal consulting services, including on three recent occasions in October and November of 2023. *Id.* at ¶ 35(a). Given the skill and experience of Class Counsel in this case, and the result achieved for the Class, Class Counsel's hourly rates are reasonable.

The number of hours that Class Counsel devoted to this case is plainly reasonable in this hotly disputed case. *See*, *e.g.*, *Ketchum v. Moses*, 24 Cal.4th 1122, 1133 (2001) (fee award should be "fully compensatory [and] absent circumstances rendering the award unjust, an attorney fee award should ordinarily include compensation for all the hours reasonably spent.") (emphasis in original); *Serrano III*, 20 Cal. 3d at 49 (counsel are entitled to compensation for all hours reasonably expended); *Hensley*, 461 U.S. at 435-36; *Caudle v. Bristow Optical Co.*, 224 F.3d 1014, 1028 (9th Cir. 2000); *Cabrales v. County of Los Angeles*, 935 F.2d 1050, 1052-53 (9th Cir. 1991). As discussed above, Class Counsel expended considerable time and resources to investigate, litigate, and successfully settle these claims for the benefit of the Class.

D. Plaintiffs' Request for Attorneys' Fees in the Amount of One-Third of the Common Fund Is Reasonable Under Ninth Circuit Precedent

Although this motion is governed by California law, Plaintiffs' fee request is also reasonable under federal law. The Supreme Court has consistently recognized 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 Company v. Van Gemert*, 444 U.S. 472, 478 (1980). The purpose of this doctrine is that "those who benefit from the creation of the fund should share the wealth with the lawyers whose skill and effort helped create it." *In re Washington Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1300 (9th Cir. 1994).

The federal common fund doctrine applies when: (1) the class of beneficiaries is sufficiently identifiable; (2) the benefits can be accurately traced; and (3) the fee can be shifted with some exactitude to those benefitting. *Paul, Johnson, Alston & Hunt v. Graulty*, 886 F.2d 268, 271 (9th Cir. 1989). These criteria are "easily met" where—as here—"each [class member] has an undisputed and mathematically ascertainable claim to part of a lump-sum settlement recovered on his behalf.'" *Id.* (*citing Van Gemert*, 444 U.S. at 479).

WILSHIRE LAW FIRM, PLC
3055 Wilshire Blvd, 12th Floor
Los Angeles, CA 90010-1137

District courts presiding over common fund cases have the discretion to award attorneys' fees based on either the lodestar method (essentially a modification of hourly billing) or the percentage method proposed here. *In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d at 1296. Where, as here, fees are requested from a certain and calculable common fund, the percentage-of-the-fund method is appropriate. *See In re Bluetooth Headset Products Liab. Litig.,* 654 F.3d 935, 942 (9th Cir. 2011).

Courts recognize that the percentage method offers important advantages over the lodestar method, particularly when an ascertainable fund exists:

> [I]n class action common fund cases the better practice is to set a percentage fee and that, absent extraordinary circumstances that suggest reasons to lower or increase the percentage, the rate should be set at 30%. This will encourage plaintiffs' attorneys to move for early settlement, provide predictability for the attorneys and the class members, and reduce the time consumed by counsel and court in dealing with voluminous fee petitions.

In re Activision Sec. Litig., 723 F. Supp. 1373, 1378 (N.D. Cal. 1989). Indeed, in *Bluetooth*, the court recognized that one important advantage of the common fund method is that fees are "easily quantified," making a fee determination simpler than the "often more time-consuming task of calculating the lodestar." *In re Bluetooth*, 654 F.3d at 942; *see also Swedish Hosp. Corp. v. Shalala*, 1 F.3d 1261, 1269 (D.C. Cir. 1993) ("[A] percentage-of-the-fund approach is less demanding of judicial resources than the lodestar method.").

In non-diversity actions, the Ninth Circuit has established 25% of a common fund as a "benchmark" award for attorney fees. *Vizcaino*, 290 F.3d at 1047. However, the Ninth Circuit states that the benchmark is the "starting point for analysis" and notes that "it may be inappropriate in some cases." *Id.* at 1048. The "[s]election of the benchmark or any other rate must be supported by findings that take into account all of the circumstances of the case." *Id*. The district court's duty is to not presume benchmark percentage applies, but simply "whether in arriving at its percentage it considered all the circumstances of the case and reached a reasonable percentage." *Id*.

Thus, the "exact percentage [awarded] varies depending on the facts of the case, and **in most common fund cases, the award exceeds that benchmark**." *Vasquez v. Coast Valley Roofing, Inc.*, 266 F.R.D. 482, 491 (E.D. Cal. 2010) (emphasis added); *In re Activision Sec. Litig.*,

WILSHIRE LAW FIRM, PLC
3055 Wilshire Blvd, 12th Floor
Los Angeles, CA 90010-1137

723 F. Supp. at 1377 ("[a] review of recent reported cases discloses that nearly all common fund awards range around 30%"); *In re Omnivision Techs.*, 559 F. Supp. 2d at 1047 (in "most common fund cases, the award exceeds that benchmark"); *Pokorny v. Quixtar, Inc.*, No. C 07-0201 SC, 2013 U.S. Dist. LEXIS 100791 *4 (N.D. Cal. July 18, 2013) (the "Ninth Circuit uses a 25% baseline in common fund class actions, and in most common fund cases, the award exceeds that benchmark, with a 30% award the norm absent extraordinary circumstances that suggest reasons to lower or increase the percentage").

District courts within this circuit routinely award attorneys' fees of approximately one-third or more of the common fund, particularly for wage and hour class action settlements. *See*, *e.g.*, *Boyd v. Bank of Am. Corp.*, No. SACV 13-0561-DOC, 2014 WL 6473804, at *9 (C.D. Cal. Nov. 18, 2014) (awarding one-third in fees in a wage and hour class action); *Barbosa v. Cargill Meat Solutions Corp.*, 297 F.R.D. 431, 450-51 (E.D. Cal. July 2, 2013) (awarding one-third of the settlement fund in a wage and hour class action because there were "sufficient reasons to exceed [the benchmark] considering the risk of the litigation, the contingent nature of the work, the favorable reaction of the class, and the fee awards in other wage-and-hour cases"); *Vasquez*, 266 F.R.D. at 491-92 (awarding one-third in wage and hour class action); *Garcia v. Gordon Trucking, Inc.*, No. 1:10–CV–0324 AWI SKO, 2012 WL 5364575 (E.D.Cal. Oct. 31, 2012) (court approving attorneys' fees in the amount of 33 percent of the common fund); *Romero v. Producers Dairy Foods, Inc.*, No. 1:05–cv–0484–DLB, 2007 WL 3492841, at *4 (E.D.Cal. Nov. 14, 2007) (class-action settlement where court approved attorneys' fees in the amount of 33 percent of common fund).

A fee award representing one-third of the fund falls within the range of other comprehensive surveys of class action settlements and fee awards. *See Fitzpatrick*, *An Empirical Study of Class Action Settlements and Their Fee Award* (2010) 7 J. Empirical Leg. Stud. 811, 833 (analyzing 444 cases between 2006-2007 and concluding that "[m]ost fee awards were between 25 percent and 35 percent, with almost no awards more than 35 percent."); Eisenberg & Miller, *Attorney Fees in Class Action Settlements: An Empirical Study*: *1993-2008* (2010) 7 J. of Empirical Leg. Stud. 248, 262, fn.16 (finding a similar range of fee awards).

WILSHIRE LAW FIRM, PLC
3055 Wilshire Blvd, 12th Floor
Los Angeles, CA 90010-1137

Accordingly, Class Counsel's request for attorneys' fees in the amount of $630,000, or one-third of the $1,890,000 common fund, is consistent with established Ninth Circuit precedent.

E. Other Factors Support Plaintiffs' Fee Request

In addition to the results achieved and awards in comparable cases, courts in this Circuit have also considered additional factors when evaluating the fairness of the award. These factors include: (1) the risks of further litigation; (2) the contingent nature of the fee; (3) the skill of the attorneys; and (4) a lodestar cross-check. *Churchill Vill., L.L.C. v. Gen. Elec.*, 361 F.3d 566, 575 (9th Cir. 2004). While no single factor is determinative of reasonableness, each factor supports Class Counsel's request for attorneys' fees in the amount of one-third of the common fund.

1. The Results of the Litigation Support the Requested Fees

By filing this action alleging violations of state and federal labor laws, Plaintiffs and Class Counsel have secured a $1,890,000 settlement for 16,577 Settlement Class Members. The relief offered by the settlement is particularly valuable when viewed against the difficulties encountered by plaintiffs pursuing wage and hour cases (*see* Motion for Preliminary Approval). Indeed, the Ninth Circuit has recognized that complex litigation is often necessary to effectively enforce workplace protection legislation:

> The California Labor Code protects all workers regardless of their immigration status or financial resources. 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.

Leyva v. Medline Indus., 716 F.3d 510, 515 (9th Cir. 2013).

Additionally, the public interest served by the lawsuit likewise supports the requested award of attorneys' fees. In *Lealao*, 82 Cal. App. 4th 19, the court held that in determining the appropriate award of attorneys' fees, the trial court should consider the need to encourage the private enforcement necessary to vindicate many legal rights, as well as the role that representative actions play in relieving the courts of the need to separately adjudicate numerous claims.

Given the result, this action will undoubtedly deter other similarly situated employers from taking advantage of their employees. In a related vein, unless competent attorneys are fully

WILSHIRE LAW FIRM, PLC
3055 Wilshire Blvd, 12th Floor
Los Angeles, CA 90010-1137

compensated when they take on large corporate defendants, unlawful practices at issue here will likely go unchecked.

2. The Substantial Contingent Risk, Including the Risk of Further Litigation, Supports the Requested Fees

The contingent risk that Plaintiffs' Counsel assumed in prosecuting the action supports the requested attorneys' fees and costs. Plaintiffs' Counsel took this case on a pure contingency basis, and had no guarantee that they would receive any remuneration for the many hours (over 1,900) they spent litigating the Class's claims, or for the $203,430.31 in out-of-pocket costs they reasonably incurred to date.

Large-scale litigation of this type is, by its very nature, complicated and time-consuming. Any law firm undertaking representation of a large number of employees in wage and hour actions inevitably must be prepared to make a significant investment of time, energy, and resources. Due also to the contingent nature of the customary fee arrangement, lawyers must be prepared to make this investment with the very real possibility of an unsuccessful outcome and no fee recovery of any kind. As the Ninth Circuit has recognized, "attorneys whose compensation depends on their winning the case must make up in compensation in the cases they win for the lack of compensation in the cases they lose." *Vizcaino*, 290 F.3d at 1051.

The demands and risks of this type of litigation overwhelm the resources—and deter participation—of many traditional claimants' firms. For these reasons, California courts and the Ninth Circuit recognize a need to reward plaintiffs' counsel who accept cases on a pure contingency basis. In *Ketchum v. Moses*, 24 Cal. 4th 1122 (2001), the California Supreme Court instructed courts to upwardly adjust fee compensation to ensure that the fees account for contingency risk:

> 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 paid only for the second of these functions. If he is paid no more, competent counsel will be reluctant to accept fee award cases.

Ketchum, 24 Cal. 4th at 1133.

WILSHIRE LAW FIRM, PLC
3055 Wilshire Blvd, 12th Floor
Los Angeles, CA 90010-1137

Similarly in *In re Washington Pub. Power Supply*, the Ninth Circuit underscored the importance of rewarding attorneys who take cases on a contingency basis:

> 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). 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., 19 F.3d at 1299, 1300-01 ("in the common fund *context*, attorneys whose compensation depends on their winning the case, must make up in compensation in the cases they win for the lack of compensation in the cases they lose.").

As reflected in *Ketchum* and *In re Washington*, attorneys accepting contingent fee cases should be compensated in amounts greater than those earned by attorneys who bill and receive payment by the hour, as this fact reflects the risks undertaken in a contingent practice. If a contingent-fee attorney were awarded fees at the same level as an hourly-fee attorney, it would be economically irrational for any attorney to accept a contingent-fee case because there would be absolutely no incentive to accept the risks inherent in such representation.[1]

Because attorneys pursuing claims in contingency will sometimes lose after expending hundreds of hours, and often advancing tens of thousands of dollars in expenses, an enhancement ensures that the risks do not outstrip the incentives to pursue claims on behalf of employees. The high contingent risk borne by Class Counsel thus supports the fee request.

---

[1] *See* Posner, Economic Analysis of Law (4th ed. 1992), pp. 534, 567 ("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. The implicit interest rate on such a loan is higher because the risk of default (the loss of the case, which cancels the debt of the client to the lawyer) is much higher than that of conventional loans."); Leubsdorf, *The Contingency Factor in Attorney Fee Awards* (1981) 90 Yale L.J. 473, 480 ("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 paid only for the second of these functions. If he is paid no more, competent counsel will be reluctant to accept fee award cases."); ABA Model Code Prof. Responsibility, DR 2-106(B)(8) (recognizing the contingent nature of attorney representation as an appropriate component in considering whether a fee is reasonable).

WILSHIRE LAW FIRM, PLC
3055 Wilshire Blvd, 12th Floor
Los Angeles, CA 90010-1137

3. The Skill of Counsel and Work Performed Support the Requested Fees

The skill and experience of counsel and nature of work performed, also militate in favor of Plaintiffs' fee request. *See City of Burlington v. Dague*, 505 U.S. 557, 562-563 (1992). Class Counsel are seasoned attorneys with considerable experience in wage and hour class actions. Class Counsel regularly litigate wage and hour claims through certification and on the merits, and have considerable experience settling wage and hour class actions. Marquez Decl. ¶¶ 27-35. Class Counsel thoroughly investigated Plaintiffs' claims and made skillful use of documents and data provided by Defendant to assess its potential exposure as to the claims at issue and to bring the litigation to a successful resolution.

F. Class Counsel's Costs Are Reasonable

Class Counsel seeks reimbursement of costs in the amount of $203,430.31. Marquez Decl., ¶ 43, Ex. 4; Ilg Decl., ¶ 3, Ex. A. These costs were reasonably incurred in prosecuting this action on behalf of the Class and should be approved by the Court. *Id*. Under Ninth Circuit law, counsel can recover "out-of-pocket expenses that 'would normally be charged to a fee paying client'" including costs for "service of summons and complaint, service of trial subpoenas, fee for defense expert at deposition, postage, investigator, copying costs, hotel bills, meals, messenger service and employment record reproduction." *Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994). Such costs are properly recoverable on motions for settlement approval. *See Nunez v. BAE Sys. San Diego Ship Repair Inc.*, 292 F. Supp. 3d 1018, 1057 (S.D. Cal. 2017); *Rutti v. Lojack Corp.*, No. CV 06–00350 DOC, 2012 WL 3151077, at *12 (C.D. Cal. July 31, 2012) ("Expenses such as reimbursement for travel, meals, lodging, photocopying, long-distance telephone calls, computer legal research, postage, courier service, mediation, exhibits, documents scanning, and visual equipment are typically recoverable."). Class Counsel's costs also include approximately $56,259.28 in contract attorney costs Wilshire Law Firm paid to Robert Half Legal. Marquez Decl., Ex. 3. Contract attorney work is recoverable as costs. *In re Anthem, Inc. Data Breach Litigation,* No. 15-MD-02617-LHK, 2018 WL 3960068, * 18 (N.D. Cal. Aug. 17, 2018) ("this Court commends the practice of treating contract attorney work as a cost.").

WILSHIRE LAW FIRM, PLC
3055 Wilshire Blvd, 12th Floor
Los Angeles, CA 90010-1137

IV. CONCLUSION

For the foregoing reasons, Class Counsel respectfully request that the Court enter an order awarding Class Counsel the full amount of attorneys' fees and costs requested.

Respectfully submitted,

Dated: November 20, 2023

WILSHIRE LAW FIRM, PLC

By: /s/ Justin F. Marquez
Bobby Saadian
Justin F. Marquez
Nicol E. Hajjar
Thiago M. Coelho

ILG LEGAL OFFICE, P.C.

Stephen Noel Ilg
George L. Lin

Attorneys for Plaintiffs

WILSHIRE LAW FIRM, PLC
3055 Wilshire Blvd, 12th Floor
Los Angeles, CA 90010-1137