

**“EMC Chambers Copy”**

William Turley, Esq. (122408)  
David Mara, Esq. (230498)  
Jamie Serb, Esq. (289601)  
Tony Roberts, Esq. (315595)  
**THE TURLEY & MARA LAW FIRM, APLC**  
7428 Trade Street  
San Diego, California 92121  
Telephone: (619) 234-2833  
Facsimile: (619) 234-4048

Attorneys for Plaintiff NATHANIEL HELTON  
on behalf of himself and all others similarly  
situated and on behalf of the general public.

**UNITED STATES DISTRICT COURT**  
**NORTHERN DISTRICT OF CALIFORNIA**

NATHANIEL HELTON, on behalf of  
himself and all others similarly situated,  
and on behalf of the general public,

Plaintiff,

v.

PEPSI-COLA SALES AND  
DISTRIBUTION, INC.; NEW BERN  
TRANSPORT CORPORATION;  
PEPSICO, INC.; and DOES 1 through  
100, inclusive,

Defendants.

Case No. 3:17-cv-01135-EMC

*[Assigned to the Honorable Edward M. Chen]*

**PLAINTIFF’S NOTICE OF MOTION AND  
MOTION FOR ATTORNEYS’ FEES,  
COSTS, AND CLASS REPRESENTATIVE  
ENHANCEMENT/ GENERAL RELEASE  
PAYMENT**

**[PROPOSED] ORDER**

*Filed under separate cover*

**Date: January 17, 2019**

**Time: 1:30 p.m.**

**Judge: Edward M. Chen**

**Ctrm.: 5**

Action Filed: January 25, 2017  
FAC Filed: December 12, 2017  
SAC Filed: June 6, 2018  
Action Removed: March 6, 2017  
Trial Date: Not set

**ALL PARTIES HEREIN AND TO THEIR COUNSEL OF RECORD:**

PLEASE TAKE NOTICE that on January 17, 2019, at 1:30 p.m. or as soon thereafter as the matter can be heard in Courtroom 5 of the above entitled courthouse located at 450 Golden Gate Avenue, San Francisco, California 94102, Plaintiff Nathaniel Helton (hereinafter “Plaintiff”) will move this Court for an Order Granting Plaintiff’s Motion for Attorneys’ Fees and Costs and Class Representative Enhancement/General Release Payment:

1. Approval of an award of attorneys’ fees to Class Counsel in the amount of \$1,250,000 as set forth in the Parties’ Stipulation and Settlement of Class Action Claims.

2. Approval of an award of costs to Class Counsel in the amount of \$42,716.30 as set forth in the Class Action Settlement Agreement;

3. Approval of an Enhancement Award not to exceed \$7,500 as set forth in the Class Action Settlement Agreement.

Defendants Pepsi-Cola Sales and Distribution, Inc., New Bern Transportation Corporation, and PepsiCo, Inc. do not oppose this Motion.

This Motion is made pursuant to Federal Rule of Civil Procedure 23(h) and the Court’s Order granting Plaintiff’s Motion for Preliminary Approval of Class Action Settlement. The basis of Plaintiff’s Motion is that Class Counsel’s request for attorneys’ fees and costs is fair, reasonable, and in accordance with the agreement of the Parties and that Plaintiff’s agreement to a general release of claims, and his efforts and assistance in this case, justify the requested enhancement award.

///

///

///

///

///

///

///

///

1 This motion is based upon this notice, the accompanying Memorandum of Points and  
2 Authorities filed herewith, the accompanying Declaration of David Mara, Esq. filed herewith,  
3 the Court's Order Granting Plaintiff's Motion for Preliminary Approval of Class Action  
4 Settlement, the filings on record in this case, and upon such further evidence, both documentary  
5 and oral, that may be presented at the hearing of this motion.

6  
7 Dated: November 20, 2018

**THE TURLEY & MARA LAW FIRM, APLC**

8  
9  
10 By: /s/ Jamie Serb  
11 William Turley, Esq.  
12 David Mara, Esq.  
13 Jamie Serb, Esq.  
14 Tony Roberts, Esq.  
15 Attorneys for Plaintiffs  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**TABLE OF CONTENTS**

<b>I. INTRODUCTION .....</b>	<b>1</b>
<b>II. ATTORNEYS’ FEES AND COSTS ARE REASONABLE .....</b>	<b>2</b>
<b>A. Class Counsel Have Extensive Experience Acting as Class Counsel .....</b>	<b>2</b>
<b>B. The Court Should Approve of the Requested Attorneys’ Fees and Costs, Class Representative Enhancement Payments, and Settlement Administration Fee .....</b>	<b>3</b>
<b>1. The Attorneys’ Fee Request is Reasonable Under the “Common Fund/Percentage” Analysis .....</b>	<b>3</b>
<b>a. The Common Fund Doctrine .....</b>	<b>3</b>
<b>b. The Percentage Requested is Reasonable .....</b>	<b>4</b>
<b>c. The Fee Requested is Within the Range of Fees Approved in Comparable Cases 5</b>	<b>5</b>
<b>2. A Lodestar Cross-Check with a Modest Multiplier Confirms the Reasonableness of the Requested Fee .....</b>	<b>6</b>
<b>a. Counsel’s Hourly Rates are Reasonable .....</b>	<b>8</b>
<b>b. Counsel’s Total Hours are Reasonable .....</b>	<b>8</b>
<b>3. The Costs of Litigation Were Reasonable .....</b>	<b>9</b>
<b>III. THE CLASS REPRESENTATIVE ENHANCEMENT PAYMENT AND GENERAL RELEASE PAYMENT IS REASONABLE .....</b>	<b>9</b>
<b>IV. CONCLUSION .....</b>	<b>11</b>

**TABLE OF AUTHORITIES**

**Cases**

*Albrecht v. Rite-Aid,*

San Diego Superior Court Case No. 729298 ..... 5

*Bell v. Farmers Ins. Exch.,*

115 Cal. App. 4th 715, 726, 765 (2004) ..... 3

*Birch v. Office Depot,*

S.D. Cal. 2007, USDC, Case No. 06 CV 1690 ..... 5

*Brinker Restaurant Corp. v. Superior Court,*

53 Cal.4th 1004 (2012) ..... 2

*Cates v. Chiang*

(2013) 213 Cal. App. 4th 791, 822 ..... 7

*City and County of San Francisco v. Sweet,*

12 Cal.4th 105 (1995) ..... 3

*Cook v. Niedert,*

142 F.3d 1004, 1015 (7th Cir. 1998) ..... 10

*Craft v. County of San Bernardino,*

624 F. Supp. 2d 1113, 1125 (C.D. Cal. 2008)..... 6

*Dirienzo v. Dunbar Armored, Inc.,*

USDC Southern District, Case No. CV-09-2745 DMS JMA..... 5

*Domino's Pizza Overtime Cases,*

Orange County Superior Court Case No. JCCP 4498 ..... 5

*Dunn v. The Kroger Company, et al.,*

Los Angeles Superior Court, Case No. BC 323252..... 5

*Early v. Superior Court,*

79 Cal.App.4th 1420, 1433 (2000) ..... 9

1	<i>Flannery v. California Highway Patrol,</i>	
2	61 Cal. App. 4th 629, 632 (1998) .....	8
3	<i>Gallen v. Gambro Healthcare, Inc.,</i>	
4	Orange County Superior Court, Case No. 04 CC 00571 .....	5
5	<i>Gardner v. GC Services, LP.,</i>	
6	USDC Southern District, Case No. 10cv0997-IEG (CAB) .....	5
7	<i>Glendora Community Redevelopment Agency v. Demeter,</i>	
8	155 Cal.App.3d 465, 479-80 (1984) .....	6
9	<i>Green, et al. v. Penske Logistics, L.L.C., et al.,</i>	
10	USDC Southern District, Case No. CV-09-0069 DMS (CAB) .....	5
11	<i>In Re Consumer Privacy Cases,</i>	
12	175 Cal. App. 4th 545, 556 (2009) .....	5
13	<i>Jones v. Casual Male Retail Group, Inc.,</i>	
14	San Diego Superior Court, Case No. 37-2009-00089721.....	5
15	<i>Ketchum v. Moses,</i>	
16	Cal.4th 1122 (2001) .....	6, 7
17	<i>Koehl v. Verio, Inc.</i>	
18	142 Cal.App.4th 1313, 1328 (2006) .....	9
19	<i>Konica Minolta Wage Cases,</i>	
20	Orange County Superior Court Case No. J.C.C.P. 4527 .....	5
21	<i>Lealao v. Beneficial California, Inc.,</i>	
22	82 Cal. App. 4th 19 (2000) .....	3
23	<i>Mayville, et al. v. Kor Hotel Group, L.L.C., et al.,</i>	
24	USDC Central District, Case No.CV-04-8461 ABC (RCx) .....	5
25	<i>Millan v. Cascade Water Servs.,</i>	
26	No. 12-cv-01821, 2016 U.S. LEXIS 72198 *1, *28-*37 .....	3
27	<i>New York Gaslight Club, Inc. v. Carey,</i>	
28	447 U.S. 54, 62 (1980).....	8

1	<i>PLCM Group, Inc. v. Drexler,</i>	
2	22 Cal.4th 1084 (2000).....	6, 8
3	<i>Quinn v. State of California,</i>	
4	15 Cal.3d 162, 167 (1995). ....	3
5	<i>Roberts v. Texaco,</i>	
6	979 F. Supp. 185 (S.D.N.Y. 1997) .....	10
7	<i>Serrano v. Priest, (“Serrano III”)</i>	
8	20 Cal.3d 25, 48 (1977) .....	3, 6
9	<i>Serrano v. Priest, (“Serrano IV”)</i>	
10	32 Cal.3d 621, 639 (1982). ....	8
11	<i>Staton v. Boeing,</i>	
12	327 F.3d 938, 977 (9th Cir. 2003) .....	10
13	<i>Thayer v. Wells Fargo Bank,</i>	
14	92 Cal. App. 4th 819 (2001) .....	6
15	<i>Thornton v. East Texas Motor Freight,</i>	
16	497 F.2d 416, 420 (6th Cir. 1974) .....	10
17	<i>Vincent v. Hughes Air West, Inc.</i>	
18	(9th Cir. 1977) 557 F.2d 759 .....	3
19	<i>Vizcaino v. Microsoft Corp.,</i>	
20	290 F.3d 1043, 1051 (9th Cir. 2002) .....	6, 7
21	<i>Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.,</i>	
22	396 F.3d 96, 123 (2d Cir. 2005).....	6
23	<i>Watson v. Raytheon Company,</i>	
24	USDC Southern District, Case No. CV-10-cv-00634 LAB RBB .....	5
25	<i>Wershba v. Apple Computer, Inc.,</i>	
26	91 Cal.App.4th 224, 255 (2001) .....	6
27	<i>Whiteway v. Fedex Kinkos Office &amp; Print Services, Inc.,</i>	
28	2007 U.S. Dist. LEXIS 95398 (N.D. Cal. 2007) .....	10

*Wilcox v Albertsons*,

San Diego Superior Court Case No. GIC833922 ..... 5

**Other Authorities**

Newberg on Class Actions,

3rd Ed., 1992, §14.03 ..... 4



1 **TO THE HONORABLE EDWARD M. CHEN, DEFENDANTS, AND ALL**  
 2 **COUNSEL OF RECORD:**

3 Plaintiff NATHANIEL HELTON (hereinafter referred to as “Plaintiff” or “Mr. Helton”),  
 4 a former driver for Defendant NEW BERN TRANSPORT CORPORATION (Defendants  
 5 PEPSI-COLA SALES AND DISTRIBUTION, INC.; NEW BERN TRANSPORT  
 6 CORPORATION; and PEPSICO, INC will hereinafter collectively referred to as “New Bern” or  
 7 “Defendants”)(collectively referred to as the “Parties”), submits this Motion for Attorneys’ Fees,  
 8 Costs, and Class Representative Enhancement/General Release Payment in support of final  
 9 approval of class action settlement:

### 10 **I. INTRODUCTION**

11 Plaintiff respectfully requests that this Court enter an Order Approving Class Counsel’s  
 12 attorneys’ fees and costs as well as the class representative enhancement/general release payment  
 13 in accordance with the Parties’ Stipulation and Settlement of Class Action Claims that was  
 14 preliminary approved by this Court on August 29, 2018.

15 As set forth in Plaintiff’s Preliminary Approval Motion, this is a \$5,000,000 class action  
 16 settlement achieved on behalf of a class of 1,437 drivers.<sup>1</sup> The settlement represents a fair,  
 17 adequate, and reasonable resolution to this litigation, as it provides definite and significant  
 18 recovery in light of the risks of further litigation, with class members estimated to receive an  
 19 average recovery of \$1,993.04.<sup>2</sup> The Parties contend the proposed settlement is reasonable in  
 20 light of the strengths of Plaintiff’s case, risks of further litigation, and the estimated values of  
 21 Plaintiff’s claims at trial. The value of this settlement is further increased because none of the  
 22 funds will revert to Defendants.

23 The settlement represents a substantial recovery for the Class, and a well-crafted  
 24 compromise of the divergent positions of the Parties. Further, the settlement has been reached  
 25 after considerable negotiation and guided by the efforts of a highly experienced mediator through  
 26 three separate mediations. Each side evaluated the strengths and weaknesses of their case and

27 <sup>1</sup> Declaration of Melissa Yang on behalf of CPT Group, Inc. (“CPT”) with Respect to Notification and  
 28 Administration (“Yang Decl.”) ¶ 4.

<sup>2</sup> Yang Decl. ¶ 15.

1 independently concluded that this settlement represents a responsible means of addressing the  
 2 Plaintiff's claims and the Defendants' defenses.

3 This recovery represents a positive outcome for the class members, all of whom may  
 4 normally not possess the means to individually pursue his or her own claims. The class members  
 5 in this case have received the benefit of working with experienced and knowledgeable wage and  
 6 hour attorneys who have vigorously pursued, litigated, negotiated, and eventually settled this  
 7 highly contested matter and reach a successful resolution. Therefore, for all the of the foregoing  
 8 reasons, Class Counsel respectfully requests that it be awarded attorneys' fees in the amount of  
 9 \$1,250,000, representing 25% of the settlement, a percentage that has been established as the  
 10 benchmark in common fund cases in the Ninth Circuit, and costs in the amount of \$42,716.30  
 11 (originally estimated not to exceed \$65,000).<sup>3</sup>

## 12 **II. ATTORNEYS' FEES AND COSTS ARE REASONABLE**

### 13 **A. Class Counsel Have Extensive Experience Acting as Class Counsel**

14 Class counsel's experience in complex class action matters is extensive. Declaration of  
 15 David Mara, Esq. ("Mara Decl." ¶¶ 2-3, 6, 11). Indeed, Class Counsel were class counsel in  
 16 *Hohnbaum et al. v. Brinker Restaurant Corp et al.*, which is the subject case in the landmark  
 17 decision of *Brinker Restaurant Corp. v. Superior Court*, 53 Cal.4th 1004 (2012). Mara Decl. ¶ 3.

18 Plaintiff's counsel has prosecuted numerous cases on behalf of employees for California  
 19 Labor Code violations and thus are experienced and qualified to evaluate the class claims and to  
 20 evaluate settlement versus trial on a fully informed basis, and to evaluate the viability of the  
 21 defenses. Mara Decl. ¶ 15. This experience instructed Plaintiff's counsel on the risks and  
 22 uncertainties of further litigation and guided their determination to endorse the proposed  
 23 settlement.

24 ///

25 ///

26 ///

27 ///

28 <sup>3</sup> The history and facts of this matter will be set forth in Plaintiff's Motion for Final Approval.

**B. The Court Should Approve of the Requested Attorneys' Fees and Costs, Class Representative Enhancement Payments, and Settlement Administration Fee**

**1. The Attorneys' Fee Request is Reasonable Under the "Common Fund/Percentage" Analysis**

Both California and federal courts have recognized that an appropriate method for awarding attorney's fees in class actions is to award a percentage of the "common fund" created as a result of the settlement. *Bell v. Farmers Ins. Exch.*, 115 Cal. App. 4th 715, 726, 765 (2004)<sup>4</sup>

*a. The Common Fund Doctrine*

The purpose of the common fund/percentage approach is to "spread litigation costs proportionally among all the beneficiaries so that the active beneficiary does not bear the entire burden alone." *Vincent v. Hughes Air West, Inc.* (9th Cir. 1977) 557 F.2d 759. In *Quinn v. State of California*, the 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." *Quinn v. State of California*, 15 Cal.3d 162, 167 (1995). Similarly, in *City and County of San Francisco v. Sweet*, 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." *City and County of San Francisco v. Sweet*, 12 Cal.4th 105, 110 (1995).

The reasons for applying the common fund doctrine include:

...fairness to the successful litigant, who might otherwise receive no benefit because his recovery might be consumed by the expenses; correlative prevention of an unfair advantage to the others who are entitled to share in the fund and who should bear their share of the burden of its recovery; encouragement of the attorney for the successful litigant, who will be more willing to undertake and diligently prosecute proper litigation for the protection or recovery of the fund if he is assured that he will be properly and directly compensated should his efforts be successful. *Id.*

The common fund approach continues to be a preferred method of awarding fees. Since *Serrano v. Priest*, 20 Cal.3d 25, 48 (1977) ("*Serrano III*"), there has been a "ground swell of

<sup>4</sup> In addition, section 216(b) provides that a court shall "in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action." 29 U.S.C. § 216(b). Courts in hybrid class and collective actions may utilize standards set forth for class actions. *See Millan v. Cascade Water Servs.*, No. 12-cv-01821, 2016 U.S. LEXIS 72198 \*1, \*28-\*37 (E.D. Cal. June 2, 2016) (Analyzing attorneys' fees in hybrid class and collective action under standards set forth class actions.).

1 support for mandating the percentage-of-the-fund approach in common fund cases.” *Lealao v.*  
 2 *Beneficial California, Inc.*, 82 Cal. App. 4th 19, 27 (2000). *Lealao* discusses at length the judicial  
 3 perception of the lodestar method as unfair and arbitrary for fostering collusively low settlements  
 4 for a high fee award and for placing the trial court in the unfavorable position of determining  
 5 reasonable hours and billing rates. *Id.* at 29-30.

6 Class Counsel has undertaken representation at their own expense, with compensation  
 7 contingent on providing a benefit to the class. Class Members and Settlement Class Members  
 8 will substantially benefit by the terms of the Settlement. Because there is a defined and clearly  
 9 traceable monetary benefit to the class and collective, the Court can base an award of attorneys’  
 10 fees on the class members’ benefit, using a common fund approach. Class Counsel’s request for  
 11 25% of the common fund is fair compensation for obtaining an excellent result for the Class  
 12 Members and Settlement Class Members and, in doing so, undertaking complex, risky,  
 13 expensive, and time-consuming litigation purely on a contingent basis.

14 *b. The Percentage Requested is Reasonable*

15 The fees here were wholly contingent, and the case presented far more risk than the usual  
 16 contingent fee case. There was the prospect of the enormous cost inherent in class action  
 17 litigation, as well as a long battle with New Bern who had retained experienced, reputable legal  
 18 counsel. That prospect has previously become reality, in both trial courts and the Court of  
 19 Appeals, and in other wage and hour class litigation. Class Counsel risked not only a great deal  
 20 of time, but also a great deal of expense, to ensure the successful litigation of this action on  
 21 behalf of all Class and Settlement Class Members.

22 Per Newberg on Class Actions, “no general rule can be articulated on what is a  
 23 reasonable percentage of a common fund. Usually 50% of the fund is the upper limit on a  
 24 reasonable fee award from a common fund in order to assure that the fees do not consume a  
 25 disproportionate part of the recovery obtained for the Class, although somewhat larger  
 26 percentages are not unprecedented.” Newberg on Class Actions, 3rd Ed., 1992, §14.03.  
 27 Regarding percentage fee awards, Newberg states: “[A]chievement of a substantial recovery with  
 28 modest hours expended should not be penalized but should be rewarded for considerations of

time saved by superior services performed.” *Id.* at § 14.01.

*c. The Fee Requested is Within the Range of Fees Approved in Comparable Cases*

The requested fee of \$1,250,000 is 25% of the Settlement Fund and is in line with the federal “benchmark,” which California has endorsed. *In Re Consumer Privacy Cases*, 175 Cal. App. 4th 545, 556 (2009). A review of class action settlements over the past several years shows that courts have historically awarded fees in the range of 20% to 50%, depending on the circumstances of the case.<sup>5</sup> California Superior and District Court judges have adopted the percentage method for determining fee awards in the range of that requested by Class Counsel

---

<sup>5</sup> For example:

(1) *Birch v. Office Depot*, S.D. Cal. 2007, USDC, Case No. 06 CV 1690 (Hon. Dana M. Sabraw--awarding attorney's fees of 40% of \$16,000,000 settlement in pre-certification meal/rest period class action);

(2) *Watson v. Raytheon Company*, USDC Southern District, Case No. CV-10-cv-00634 LAB RBB (Hon. Larry B. Burns -- awarding attorneys' fees of \$666,666.67, 33-1/3% of a \$2,000,000 settlement in a certified misclassification class action);

(3) *Dirienzo v. Dunbar Armored, Inc.*, USDC Southern District, Case No. CV-09-2745 DMS JMA, (Hon. Dana M. Sabraw -- awarding attorneys' fees of \$500,000, 33-1/3% of \$1,500,000 settlement in a pre-certification expense reimbursement, rest and meal period class action);

(4) *Mayville, et al. v. Kor Hotel Group, L.L.C., et al.*, USDC Central District, Case No. CV-04-8461 ABC (RCx) (Hon. Audrey B. Collins -- awarding attorneys' fees of \$480,000, 30% of \$1,600,000 settlement in pre-certification meal and rest period class action);

(5) *Albrecht v. Rite-Aid*, San Diego Superior Court Case No. 729298 (Hon. J. Richard Haden -- awarding attorney's fees of 33% of \$25,000,000 settlement in certified overtime class action);

(6) *Domino's Pizza Overtime Cases*, Orange County Superior Court Case No. JCCP 4498 (Hon. Gail A. Andler -- awarding attorneys' fees of \$1,500,000, 30% of \$5,000,000 settlement in pre-certification meal and rest period class action);

(7) *Wilcox v Albertsons*, San Diego Superior Court Case No. GIC833922 (Hon. Linda B. Quinn -- awarding attorneys' fees of 33% of \$22,500,000 settlement in certified rest and meal class action);

(8) *Konica Minolta Wage Cases*, Orange County Superior Court Case No. J.C.C.P. 4527 (Hon. David C. Velasquez—awarding attorneys' fees of 33% of \$6,000,000 settlement in pre-certification expense reimbursement class action);

(9) *Green, et al. v. Penske Logistics, L.L.C., et al.*, USDC Southern District, Case No. CV-09-0069 DMS (CAB) (Hon. Dana M. Sabraw -- awarding attorneys' fees of 33% of a \$500,000 settlement in a pre-certification vacation policy class action);

(10) *Gardner v. GC Services, LP.*, USDC Southern District, Case No. 10cv0997-IEG (CAB) -- (Chief Justice Irma E. Gonzalez -- awarding attorneys' fees of 30% of a \$975,000 settlement in a pre-certification failure to pay straight and overtime wages class action);

(11) *Gallen v. Gambro Healthcare, Inc.*, Orange County Superior Court, Case No. 04 CC 00571 (Hon. Nancy Wieben Stock -- approving award of attorneys' fees 30% of a \$17,500,000 settlement in a pre-certification overtime wages class action);

(12) *Dunn v. The Kroger Company, et al.*, Los Angeles Superior Court, Case No. BC 323252 (Hon. Elihu M. Berle -- approving attorneys' fees of 30% of a \$19,500,000 in a pre-certification meal and rest break class action); and

(13) *Jones v. Casual Male Retail Group, Inc.*, San Diego Superior Court, Case No. 37-2009-00089721 (Hon. Kevin A. Enright -- approving attorneys' fees of 33% of a \$299,500 in a pre-certification misclassification class action).

herein or even larger. As the fee requested here is less than the fees customarily awarded in California under the common fund doctrine, it is respectfully requested the Court grant this request at final approval. The reasonableness of the fee is further evidenced when cross-checked against the Lodestar Method.

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

Class Counsel's fee request is also reasonable when calculated using the lodestar method. Under the lodestar method, a base fee amount is calculated from a compilation of time reasonably spent on the case and the reasonable hourly compensation of the attorney. *Serrano III*, 20 Cal.3d at 48. The court then enhances this lodestar figure by a "multiplier" to account for a range of factors, such as the novelty and difficulty of the case, its contingent nature, and the degree of success achieved.<sup>6</sup> To date, Class Counsel has worked 946 hours on this case. Applying Class Counsel's hourly rates to the total hours worked results in a lodestar fee of \$581,250. Mara Decl. ¶ 4-13, 16; **Exhibit 1**. Class Counsel respectfully request attorneys' fees in the amount of \$1,250,000 (25% of the settlement), which would require a modest 2.15 lodestar multiplier. All of the work and tasks performed by Class Counsel were reasonable and necessary to the prosecution of this case. Mara Decl. ¶¶ 4-13, 16.

Courts "routinely enhance[] the lodestar to reflect the risk of non-payment in common fund cases." *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1051 (9th Cir. 2002); *Graham v. DaimlerChrysler Corp.*, 34 Cal.4th 553, 579 (2004) ("One of the most common fee enhancers [...] is for contingency risk.") Such an enhancement "mirrors the established practice in the private legal market of rewarding attorneys' fees for taking the risk of nonpayment by paying them a premium over their normal hourly rates for winning contingency cases." *Vizcaino*, 290 F.3d at 1051. Courts routinely enhance lodestar amounts based on multipliers that "range from 2 to 4 or even higher."<sup>7</sup> A risk multiplier also serves to bring the financial incentives for enforcing

<sup>6</sup> *Id.* at 49; see also *Ketchum v. Moses*, Cal.4th 1122, 1132-36 (2001); *PLCM Group, Inc. v. Drexler*, 22 Cal.4th 1084 (2000); *Thayer v. Wells Fargo Bank*, 92 Cal. App. 4th 819, 834 (2001), ("[t] there is no ... rule limiting the factors that may justify an exercise of judicial discretion to [adjust the] lodestar").

<sup>7</sup> *Wershba v. Apple Computer, Inc.*, 91 Cal.App.4th 224, 255 (2001); see, e.g., *Vizcaino*, 290 F.3d at 1051 (approving multiplier of 3.65); *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 123 (2d Cir. 2005) (approving multiplier of 3.5); *Craft v. County of San Bernardino*, 624 F. Supp. 2d 1113, 1125 (C.D. Cal. 2008)



important rights “into line with incentives [attorneys] have to undertake claims for which they are paid on a fee-for-service basis.” *Ketchum*, 24 Cal.4th at 1132. In determining whether or not to enhance or reduce the lodestar, California courts take into account multiple factors, including: the time and labor required; the skill requisite to perform the legal services properly; the preclusion of other employment by the attorney due to the acceptance of the case; the contingent nature of the fee; the amount involved and results obtained; the experience, reputation, and ability of the attorney; and awards in similar cases. *Cates v. Chiang* (2013) 213 Cal. App. 4th 791, 822.

This was a highly-contested matter which required a significant amount of time and labor. Class Counsel had to investigate and analyze thousands of pages of documents, prepared for and deposed the Defendants’ Rule 30(b)(6) witness, and prepared for, traveled to, and attended three mediations. The litigation also required a considerable amount of time interviewing putative class members about their experiences. Mara Decl. ¶ 17.

In addition, Class Counsel had to marshal the evidence in a manner in which it could be adjudicated on a class-wide basis, an endeavor which cannot be underscored. So often, lawyers unskilled in the class action aspect of wage and hour cases do not pay attention to or put the work into how the evidence must be presented for class-wide adjudication. Strong class-wide cases can be lost in the hands of inexperienced counsel because the case has not been worked up to succeed at certification. Here, Class Counsel has considerable experience in class litigation and has pursued the evidence with a sharp focus on class-wide proof needed for the matter to get certified. Throughout the matter, as evidence was being gathered through documents, witness interviews, and deposition testimony, Class Counsel was reducing the data to a living class certification motion. This filtering of voluminous evidence into class-wide proof while keeping an eye on the merits of the litigation resulted in a considerable amount of attorney time and skill. Mara Decl. ¶¶ 2-12;18.

Most importantly, all services were performed by Class Counsel on a contingent basis.

(awarding multiplier of 5.2 and collecting cases with cross-check multipliers ranging from 4.5 to 19.6); *Glendora Community Redevelopment Agency v. Demeter*, 155 Cal.App.3d 465, 479-80 (1984) (approving fee award with multiplier of 12).

Mara Decl. ¶ 19. Both California and federal courts recognize that attorneys should be compensated for taking on such contingent risks and provided with financial incentives to enforce important rights and protections like those at issue in this case. *See, e.g., Vizcaino*, 290 F.3d at 1051; *Ketchum*, 24 Cal.4th at 1132-33. Here, Class Counsel bore the risk that, in spite of all of their efforts and skill employed, there may be no recovery. Thus, a risk multiplier is appropriate.

*a. Counsel's Hourly Rates are Reasonable*

Class Counsel's hourly rates are between \$350 and \$875 and are in line with rates approved for wage and hour class action attorneys in this jurisdiction. A reasonable hourly rate is the prevailing rate charged by attorneys of similar skill and experience in the relevant community. *PLCM Group, Inc. v. Drexler*, 22 Cal.4th 1084, 1095 (2000). When determining a reasonable hourly rate, courts may consider factors such as the attorney's skill and experience, the nature of the work performed, the relevant area of expertise, and the attorney's customary billing rates. *Flannery v. California Highway Patrol*, 61 Cal. App. 4th 629, 632 (1998).

Class Counsel's skill and experience support their hourly rates. Furthermore, other wage and hour attorneys working as class counsel before California courts charge comparable, if not higher, rates. *See Exhibit 2* to Mara Decl. (copy of Westlaw Court Express's Legal Billing Report, Volume 14, Number 3, California Region for December 2012 and 2012 National Law Journal survey of hourly billing rates for Partners and Associates); *Exhibit 3* to the Mara Decl. (2012 Richard Pearl Declaration in *Hohnbaum v. Brinker Restaurant Corp.*, SDSC No. GIC834348).

*b. Counsel's Total Hours are Reasonable*

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



To date, Class Counsel has worked a total of 946 hours on this case. Mara Decl. ¶ 16. The work performed by Class Counsel was justified in order to achieve a Settlement that will provide valuable consideration to the Class and Settlement Class Members will be detailed in Plaintiff's final approval motion.

### 3. The Costs of Litigation Were Reasonable

Class Counsel seeks reimbursement of their actual litigation costs and expenses in the sum of \$42,716.30. These costs were all reasonable and necessary to the prosecution of this case and are fair and reasonable by Defendants. Mara Decl. ¶ 21; *see also* **Exhibit 1** attached to the Declaration of David Mara.

### III. THE CLASS REPRESENTATIVE ENHANCEMENT PAYMENT AND GENERAL RELEASE PAYMENT IS REASONABLE

The Settlement Agreement provides for an enhancement payment to the Class Representative, Mr. Helton, in the amount of \$7,500. The requested enhancement is appropriate and reasonable and unopposed by Defendants. This payment is made, in part, in exchange for Plaintiff providing Defendants with a general release of his claims. *See* Dkt. No. 38-2 at 12:13 thru 13:27. This general release is far greater than the release signed by class members. *Id.* In addition, to support of his enhancement request, Mr. Helton has submitted a declaration detailing the efforts he expended on behalf of the class in order to advance this case to its successful conclusion. *See generally* Declaration of Nathaniel Helton. There is no question that this case would not have reached the same result but for Plaintiff's involvement and input at all stages of the litigation.

As representative for the absent class members, Mr. Helton risked a potential judgment taken against himself for attorneys' fees and costs if this matter had not been successfully concluded. Case law holds that a losing party is liable for the prevailing party's costs, *Early v. Superior Court*, 79 Cal.App.4th 1420, 1433 (2000), and in some wage and hour actions, such as this case, pursuant to California Labor Code § 218.5, for attorneys' fees as well. Though the fee agreement provides that Class Counsel would pay such costs, Mr. Helton would nevertheless have had a cost bill entered against him leaving him ultimately liable for potentially hundreds of thousands of dollars in the unexpected possibility that Class Counsel did not meet their

1 obligation to cover those costs.

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

12 Courts have regularly and routinely granted approval of settlements containing such  
 13 enhancements. *See, e.g., Staton v. Boeing*, 327 F.3d 938, 977 (9th Cir. 2003).<sup>8</sup> In Class Counsel's  
 14 experience, the typical enhancement award in wage and hour class action settlements ranges  
 15 from \$5,000 to \$75,000, although some awards may be higher. Very commonly there is more  
 16 than one class representative who receive awards in the above range. Mara Decl. ¶ 20.

17 Additionally, it is common knowledge that the modern-day work force is quite mobile,  
 18 with employees holding several jobs in a career during their lifetime. It is also true that  
 19 prospective employers in this computer, high-tech age "Google" and/or do extensive background  
 20 checks and have access to Court databases to see if applicants have ever filed a lawsuit or have  
 21 ever been sued. Here, Plaintiff litigated against Defendants' for a substantial sum of money by  
 22 his courage to step forward to vindicate not only his own rights but also, those of the similarly  
 23

---

24 <sup>8</sup> *See, e.g., Cook v. Niedert*, 142 F.3d 1004, 1015 (7th Cir. 1998); *Roberts v. Texaco*, 979 F.  
 25 Supp. 185 (S.D.N.Y. 1997) ("present or past employee whose present position or employment  
 26 credentials or recommendation may be at risk by reason of having prosecuted the suit, who  
 27 therefore lends his or her name and efforts to the prosecution of litigation at some personal peril,  
 28 a substantial enhancement award is justified"); *Thornton v. East Texas Motor Freight*, 497 F.2d  
 416, 420 (6th Cir. 1974) ("We also think there is something to be said for rewarding those  
 drivers who protect and help to bring rights to a group of employees who have been the victims  
 of discrimination.").

1 situated individuals, all of whom will now receive substantial payments due to the initiation of  
 2 this action. Such conduct will not be lost on a prospective employer who has to choose between  
 3 an applicant who has never sued an employer and one who has done so. The requested  
 4 enhancement far from compensates Mr. Helton for opportunities he may lose in the future  
 5 because of the exercise of a Constitutional right to Petition the Courts for redress of a grievance.

6 The enhancement request is modest for the work performed, risks undertaken for  
 7 payment of fees and costs if this case had not been successfully concluded, stigma on future  
 8 employment opportunities, and the benefits all members of the class as well as all current and  
 9 future class members will enjoy as a result of Mr. Helton's efforts.

#### 10 IV. CONCLUSION

11 In light of the foregoing, Plaintiff requests the Court find the Settlement fair, reasonable,  
 12 and adequate and grant this motion for Class Counsel's attorneys' fees, reimburse the costs Class  
 13 Counsel incurred in litigating this matter, and approve Mr. Helton's enhancement request.

16 Respectfully Submitted,

17 Dated: November 20, 2018

**THE TURLEY & MARA LAW FIRM, APLC**

18 /s/ Jamie Serb

19 William Turley, Esq.

20 David Mara, Esq.

21 Jamie Serb, Esq.

22 Tony Roberts, Esq.

23 Attorneys for Plaintiff