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11 **UNITED STATES DISTRICT COURT**
12 **NORTHERN DISTRICT OF CALIFORNIA**
13

14 KEVIN KRAMER on behalf of himself, all others
15 similarly situated, and on behalf of the general
public,

16 Plaintiffs,

17 v.

18 XPO LOGISTICS, INC.; and DOES 1 – 100,

19 Defendants.

20 _____
21 HECTOR IBANEZ on behalf of himself, all others
22 similarly situated, and on behalf of the general
public

23 Plaintiffs,

24 v.

25 XPO LAST MILE, INC.; and DOES 1 – 100,

26 Defendants.
27
28

Case No. 3:16-cv-07039-WHO
Consolidated with 3:17-cv-04009-JSC

[Assigned to the Honorable William H. Orrick]

**PLAINTIFF’S NOTICE OF MOTION AND
MOTION FOR ATTORNEYS’ FEES,
COSTS, AND CLASS REPRESENTATIVE
ENHANCEMENT AWARD**

Date: April 1, 2020

Time: 2:00 p.m.

Ctrm.: 2

Action Filed: September 22, 2016
Date Removed: December 8, 2016
Trial Date: December 3, 2018

This Document Relates To:
Kramer, 3:16-cv-07039-WHO
Ibanez, 3:17-cv-04009-JSC

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

PLEASE TAKE NOTICE that on April 1, 2020, at 2:00 p.m., or as soon thereafter as the matter can be heard in Courtroom No. 2 in the above entitled courthouse located at 450 Golden Gate Avenue, San Francisco, California 94102, Plaintiff, Hector Ibanez (hereinafter "Plaintiff") will move this Court for an Order Granting Plaintiff's Motion for Attorney's Fees and Costs and Class Representative Enhancement Award:

- (1) Approval of an award of attorneys' fees to Class Counsel in the amount of \$1,375,000.00 as set forth in the Parties' Joint Stipulation and Settlement Agreement (hereinafter "Stipulation");
- (2) Approval of an award of costs to Class Counsel in the amount of \$119,812.06;
- (3) Approval of an enhancement award not to exceed \$10,000.00;

Defendant XPO Last Mile, Inc. ("XPO LM") does 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, the benefits conferred upon the Class and the State of California, and Plaintiff's efforts and assistance in this case, justify the requested enhancement award.

This Motion is based upon this notice, the accompanying Memorandum of Points and Authorities filed herewith, the accompanying Declaration of David Mara, Esq. and Declaration of Matthew Bainer, Esq. filed herewith, the Stipulation and all exhibits thereto, the filings on record in this case, and upon such further evidence, both documentary and oral, that may be presented at the hearing of this motion.

Dated: January 27, 2020

MARA LAW FIRM, PC

By: /s/ Jamie Serb
DAVID MARA
JAMIE SERB
Attorneys for Plaintiff

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TO THE HONORABLE WILLIAM H. ORRICK, DEFENDANTS, AND ALL COUNSEL OF RECORD:

Plaintiff HECTOR IBANEZ (hereinafter “Plaintiff”), a former Driver that performed delivery services for Defendant XPO Last Mile, Inc. (hereinafter “Defendant”)(collectively referred to as the “Parties”), submits this Motion for Attorneys’ Fees, Costs, and Class Representative Enhancement Award in support of final approval of class action settlement:

I. INTRODUCTION

Plaintiff respectfully requests that this Court enter an Order approving Class Counsel’s attorneys’ fees and costs, as well as the Class Representative’s enhancement award in accordance with the Parties’ Stipulation that was preliminarily approved by this Court on September 6, 2019 (See Dkt. # 95).

As set forth in Plaintiff’s Preliminary Approval Motion, this is a \$5,500,000.00 class action settlement achieved on behalf of 3,236 class members. The proposed Settlement Class is defined as “all individuals who did not contract with XPO LM, and (1) are “Drivers” that performed delivery services within the state of California during the Class Period for a Carrier, or (2) are “Helpers” with a California address and were/are associated with any Carrier that performed delivery services within the state of California during the Class Period.”¹ The settlement represents a fair, adequate, and reasonable resolution to this litigation, as it provides definite and significant recovery in light of the risks of further litigation, with Settlement Class Members to receive an estimated average recovery of \$1,094.15². The Parties contend the proposed settlement is reasonable in light of the strengths of Plaintiff’s case, risks of further litigation, and the estimated values of Plaintiff’s claims at trial. The value of this settlement is further increased because none of the funds will revert to Defendants.

The settlement represents a substantial recovery for the Class, and a well-crafted compromise of the Parties’ divergent positions. Further, the settlement has been reached after considerable negotiation and guided by the efforts of a highly experienced mediator through multiple mediations. Each side evaluated the strengths and weaknesses of their case and independently concluded that this settlement represents a responsible means of addressing Plaintiff’s claims and Defendants’ defenses.

This recovery represents a positive outcome for the Settlement Class Members, all of whom may

¹ This Settlement Class expressly excludes those drivers and helpers who delivered goods that were tendered to them at the Macy’s warehouse located at 1200 Whipple Road, Union City, CA 94587.

² \$3,540,687.94 NSA / 3,236 Settlement Class Members

1 normally not possess the means to individually pursue his or her own claims. The Settlement Class
 2 Members in this case have received the benefit of working with experienced and knowledgeable wage and
 3 hour attorneys who have vigorously pursued, litigated, negotiated, and eventually settled this highly
 4 contested matter and reached a successful resolution. Therefore, for all of the foregoing reasons, Class
 5 Counsel respectfully request the Court approve the requested attorneys' fees in the amount of
 6 \$1,375,000.00 (representing 25% of the settlement, which is the benchmark in common fund cases in the
 7 Ninth Circuit), costs in the amount of \$119,812.06, and Plaintiff's enhancement award in the amount of
 8 \$10,000.00.

8 **II. ATTORNEYS' FEES AND COSTS ARE REASONABLE**

9 **a. Class Counsel Have Extensive Experience Acting as Class Counsel**

10 Class Counsel's experience in complex class action matters is extensive. Class Counsel has
 11 prosecuted numerous cases on behalf of employees for California Labor Code violations and thus are
 12 experienced and qualified to evaluate the class claims and to evaluate settlement versus trial on a fully
 13 informed basis, and to evaluate the viability of the defenses. Declaration of David Mara, Esq. ("Mara
 14 Decl.") ¶¶ 1-19; Declaration of Matthew Bainer, Esq. ("Bainer Decl.") ¶¶ 4-10. Indeed, Mr. Mara was
 15 class counsel in *Hohnbaum et al. v. Brinker Restaurant Corp et al.*, which is the subject case in the
 16 landmark decision of *Brinker Restaurant Corp. v. Superior Court*, 53 Cal.4th 1004 (2012). Mara Decl. ¶
 17 4. This experience instructed Class Counsel on the risks and uncertainties of further litigation and guided
 18 their determination to endorse the proposed settlement.

19 **b. The Court Should Approve of the Requested Attorneys' Fees**

20 **i. The Attorneys' Fee Request is Reasonable Under the "Common 21 Fund/Percentage" Analysis**

22 Both California and federal courts have recognized that an appropriate method for awarding
 23 attorney's fees in class actions is to award a percentage of the "common fund" created as a result of the
 24 settlement. *Bell v. Farmers Ins. Exch.*, 115 Cal. App. 4th 715, 726, 765 (2004).³

25 **1. The Common Fund Doctrine**

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

³ 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 among all the beneficiaries so that the active beneficiary does not bear the entire burden alone.” *Vincent*,
 2 F.2d at 769. In *Quinn v. State of California*, the Court stated: “[O]ne who expends attorneys’ fees in
 3 winning a suit which creates a fund from which others derive benefits may require those passive
 4 beneficiaries to bear a fair share of the litigation costs.” *Quinn v. State of California*, 15 Cal.3d 162, 167
 5 (1995). Similarly, in *City and County of San Francisco v. Sweet*, the California Supreme Court recognized
 6 that the common fund doctrine has been applied “consistently in California when an action brought by
 7 one party creates a fund in which other persons are entitled to share.” *City and County of San Francisco*
 8 *v. Sweet*, 12 Cal.4th 105, 110 (1995).

9 The reasons for applying the common fund doctrine include:

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

17 The common fund approach continues to be a preferred method of awarding fees. Since *Serrano v. Priest*,
 18 20 Cal.3d 25, 48 (1977) (“*Serrano III*”), there has been a “ground swell of support for mandating the
 19 percentage-of-the-fund approach in common fund cases.” *Lealao v. Beneficial California, Inc.*, 82 Cal.
 20 App. 4th 19, 27 (2000). *Lealao* discusses at length the judicial perception of the lodestar method as unfair
 21 and arbitrary for fostering collusively low settlements for a high fee award and for placing the trial court
 22 in the unfavorable position of determining reasonable hours and billing rates. *Id.* at 29-30.

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

30 **2. The Percentage Requested is Reasonable**

31 The fees here were wholly contingent, and the case presented far more risk that the usual

1 contingent fee case. There was the prospect of the enormous cost inherent in class action litigation, as well
 2 as a long battle with Defendants, who had retained experienced, reputable legal counsel. That prospect
 3 has previously become reality, in both trial courts and the Court of Appeals, and in other wage and hour
 4 class litigation. Plaintiff's Counsel risked not only a great deal of time, but also a great deal of expense,
 5 to ensure the successful litigation of this action on behalf of all Settlement Class Members.

6 Per Newberg on Class Actions, "no general rule can be articulated on what is a reasonable
 7 percentage of a common fund. Usually 50% of the fund is the upper limit on a reasonable fee award from
 8 a common fund in order to assure that the fees do not consume a disproportionate part of the recovery
 9 obtained for the Class, although somewhat larger percentages are not unprecedented." Newberg on Class
 10 Actions, 3rd Ed., 1992, §14.03. Regarding percentage fee awards, Newberg states: "[A]chievement of a
 11 substantial recovery with modest hours expended should not be penalized but should be rewarded for
 12 considerations of time saved by superior services performed." *Id.* at § 14.01

13 **3. The Fee Requested is Within the Range of Fees Approved in 14 Comparable Cases**

15 The requested fee of \$1,375,000.00 is 25% of the Gross Settlement Amount and is in line with the
 16 federal "benchmark," which California has endorsed. *In Re Consumer Privacy Cases*, 175 Cal. App. 4th
 17 545, 556 (2009). A review of class action settlements over the past several years shows that courts have
 18 historically awarded fees in the range of 20% to 50%, depending on the circumstances of the case.⁴

19 ⁴ For example:

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

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

25 (3) *Dirienzo v. Dunbar Armored, Inc.*, USDC Southern District, Case No. CV-09-2745 DMS JMA, (Hon. Dana
 26 M. Sabraw – awarding attorneys' fees of \$500,000, 33-1/3% of \$1,500,000 settlement in a pre-certification expense
 27 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.

Plaintiff's Notice of Motion and Motion for
 Attorneys' Fees, Costs, and Enhancement Award

1 California Superior and District Court judges have adopted the percentage method for determining fee
 2 awards in the range of that requested by Class Counsel herein or even larger. As the fee requested here is
 3 less than the fees customarily awarded in California under the common fund doctrine, it is respectfully
 4 requested the Court grant this request at final approval. The reasonableness of the fee is further evidenced
 5 when cross-checked against the Lodestar Method.

6 **ii. A Lodestar Cross-Check with a Modest Multiplier Confirms the
 Reasonableness of the Requested Fee**

7 Class Counsel's fee request is also reasonable when calculated using the lodestar method. Under
 8 the lodestar method, a base fee amount is calculated from a compilation of time reasonably spent on the
 9 case and the reasonable hourly compensation of the attorney. *Serrano III*, 20 Cal.3d at 48. The court then
 10 enhances this lodestar figure by a "multiplier" to account for a range of factors, such as the novelty and
 11 difficulty of the case, its contingent nature, and the degree of success achieved.⁵ To date, Class Counsel
 12 has worked 1,999.3 hours on this case. Applying Class Counsel's hourly rates to the total hours worked
 13 results in a lodestar fee of \$1,264,525. Mara Decl. ¶¶ 9-19; **Exhibit 1**; Bainer Decl. ¶ 11. Class Counsel
 14 respectfully request attorneys' fees in the amount of \$1,375,000.00 (25% of the GSA), which would
 15 require a modest 1.09 lodestar multiplier. All of the work and tasks performed by Class Counsel were
 16 reasonable and necessary to the prosecution of this case. Mara Decl. ¶¶ 9-19; Bainer Decl. ¶¶ 2-3, 11.

17 Courts "routinely enhance[] the lodestar to reflect the risk of non-payment in common fund cases."
 18 *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1051 (9th Cir. 2002); *Graham v. DaimlerChrysler Corp.*, 34

19 *Velasquez*—awarding attorneys' fees of 33% of \$6,000,000 settlement in pre-certification expense reimbursement class
 20 action);

21 (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
 22 action);

23 (10) *Gardner v. GC Services, LP.*, USDC Southern District, Case No. 10cv0997-IEG (CAB) – (Chief Justice
 24 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);

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

27 (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).

⁵ *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").

1 Cal.4th 553, 579 (2004) (“One of the most common fee enhancers [...] is for contingency risk.”) Such an
 2 enhancement “mirrors the established practice in the private legal market of rewarding attorneys’ fees for
 3 taking the risk of nonpayment by paying them a premium over their normal hourly rates for winning
 4 contingency cases.” *Vizcaino*, 220 F.3d at 1051. Courts routinely enhance lodestar amounts based on
 5 multipliers that “range from 2 to 4 or even higher.”⁶ A risk multiplier also serves to bring the financial
 6 incentives for enforcing important rights “into line with incentives [attorneys] have to undertake claims
 7 for which they are paid on a fee-for-service basis.” *Ketchum*, 24 Cal.4th at 1132. In determining whether
 8 or not to enhance or reduce the lodestar, California courts take into account multiple factors, including:
 9 the time and labor required; the skill requisite to perform the legal services properly; the preclusion of
 10 other employment by the attorney due to the acceptance of the case; the contingent nature of the fee; the
 11 amount involved and results obtained; the experience, reputation, and ability of the attorney; and awards
 12 in similar cases. *Cates v. Chiang* (2013) 213 Cal. App. 4th 791, 822.

13 This was a highly-contested matter which required a significant amount of time and labor. The
 14 proposed Settlement was only possible after considerable investigation. In sum, Class Counsel took the
 15 depositions of multiple managers from locations throughout California, three Rule 30(b)(6) witnesses (two
 16 of whom were located in Atlanta, Georgia), and several contract carriers, as well as analyzed thousands
 17 of documents, contracts, and emails. Additionally, Class Counsel further had to interpret and analyze
 18 thousands of lines of data code, prepare for, travel to, and attend two mediations (located in Toronto,
 19 Canada and San Francisco). The litigation also required a considerable amount of time interviewing
 20 putative class members about their experiences. Mara Decl. ¶ 9-19.

21 In addition, Plaintiff had to marshal the evidence in a manner in which it could be adjudicated on
 22 a class-wide basis, an endeavor which cannot be underscored. So often, lawyers unskilled in the class
 23 action aspect of wage and hour cases do not pay attention to or put the work into how the evidence must
 24 be presented for class-wide adjudication. Strong class-wide cases can be lost in the hands of inexperienced

25
 26 ⁶ *Wershba v. Apple Computer, Inc.*, 91 Cal.App.4th 224, 255 (2001); *see, e.g., Vizcaino*, 290 F.3d at 1051 (approving multiplier
 27 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) (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).

1 counsel because the case has not been worked up to succeed at certification. Here, Class Counsel have
 2 considerable experience in class litigation and have pursued the evidence with a sharp focus on class-wide
 3 proof needed for the matter to get certified. Throughout the matter, as evidence was being gathered through
 4 documents and data, witness interviews, and deposition testimony, Plaintiff was reducing the data to a
 5 living class certification motion. This filtering of voluminous evidence into class-wide proof while
 6 keeping an eye on the merits of the litigation resulted in a considerable amount of attorney time and skill.
 7 Mara Decl. ¶¶ 9-19; Bainer Decl. ¶¶ 2-3, 11.

8 Most importantly, all services were performed by Class Counsel on a contingent basis. Mara Decl.
 9 ¶ 26. Both California and federal courts recognize that attorneys should be compensated for taking on
 10 such contingent risks and provided with financial incentives to enforce important rights and protections
 11 like those at issue in this case. *See, e.g., Vizcaino*, 290 F.3d at 1051; *Ketchum*, 24 Cal.4th at 1132-33.
 12 Here, Class Counsel bore the risk that, in spite of all of their efforts and skill employed, there may be no
 13 recovery. Thus, a risk multiplier is appropriate and will be requested in the forthcoming fees motion.

14 **iii. Counsel's Hourly Rates are Reasonable**

15 Class Counsel's hourly rates are between \$400 and \$800 and are in line with rates approved for
 16 wage and hour class action attorneys in this jurisdiction. A reasonable hourly rate is the prevailing rate
 17 charged by attorneys of similar skill and experience in the relevant community. *PLCM Group, Inc. v.*
 18 *Drexler*, 22 Cal.4th 1084, 1095 (2000). When determining a reasonable hourly rate, courts may consider
 19 factors such as the attorney's skill and experience, the nature of the work performed, the relevant area of
 20 expertise, and the attorney's customary billing rates. *Flannery v. California Highway Patrol*, 61 Cal. App.
 21 4th 629, 632 (1998).

22 Class Counsel's skill and experience support their hourly rates. Furthermore, other wage and hour
 23 attorneys working as class counsel before California courts charge comparable, if not higher, rates. *See*
 24 **Exhibit 3** to Mara Decl. (copy of Westlaw Court Express's Legal Billing Report, Volume 14, Number 3,
 25 California Region for December 2012); **Exhibit 4** (2012 National Law Journal survey of hourly billing
 26 rates for Partners and Associates); **Exhibit 5** to the Mara Decl. (2012 Richard Pearl Declaration in
 27 *Hohnbaum v. Brinker Restaurant Corp.*, SDSC No. GIC834348).

28 **iv. Counsel's Total Hours are Reasonable**

1 In determining a lodestar, reasonable hours include, in addition to time spent during litigation, the
 2 time spent before the action is filed, including time spent interviewing the clients, investigating the facts
 3 and the law, and preparing the initial pleadings. *See New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54,
 4 62 (1980). Further, the fee award should include fees incurred to establish and defend the attorneys' fee
 5 claim. *Serrano v. Priest*, 32 Cal.3d 621, 639 (1982) ("*Serrano IV*").

6 To date, Class Counsel has worked a total of 1,999.3 hours on this case. Mara Decl. ¶ 9-19, **Exhibit**
 7 **1**; Bainer Decl. ¶ 11. The work performed by Class Counsel in order to achieve a Settlement that will
 8 provide valuable consideration to the Settlement Class Members will also be discussed in Plaintiff's Final
 9 Approval Motion.

10 **c. The Court Should Approve the Requested Litigation Costs**

11 The Settlement Agreement originally allotted only \$100,000.00 for litigation expenses. Thereafter,
 12 the Parties stipulated to amend the Settlement Agreement to allot \$130,000.00 for litigation expenses to
 13 cover the increased costs to perform a TLOxp search to find Settlement Class Members' updated
 14 addresses. The Court granted this stipulation on November 19, 2019 (See Dkt. #98). Class Counsel seek
 15 reimbursement of their actual litigation costs and expenses in the sum of \$119,812.06. These costs were
 16 all reasonable and necessary to the prosecution of this case, and are fair and reasonable. Mara Decl. ¶ 20,
 17 **Exhibit 1** (Summary of Time and Costs); Bainer Decl. ¶ 12.

18 **III. THE CLASS REPRESENTATIVE ENHANCEMENT AWARD IS REASONABLE**

19 The Settlement Agreement provides for an enhancement payment to the Class Representative, Mr.
 20 Ibanez, in the amount of \$10,000.00. The requested enhancement is appropriate and reasonable and
 21 unopposed by Defendants. Courts have regularly and routinely granted approval of settlements containing
 22 such enhancements. *See, e.g., Staton v. Boeing*, 327 F.3d 938, 977 (9th Cir. 2003). In Class Counsel's
 23 experience, the typical enhancement award in wage and hour cases ranges from \$5,000 to \$75,000,
 24 although some awards may be higher. Mara Decl. ¶ 27. Very commonly there is more than one class
 representative who receive awards in the above range.⁷ In addition, to support of his enhancement request,

25 ⁷ *See, e.g., Cook v. Niedert*, 142 F.3d 1004, 1015 (7th Cir. 1998); *Roberts v. Texaco*, 979 F. Supp. 185 (S.D.N.Y. 1997) ("present
 26 or past employee whose present position or employment credentials or recommendation may be at risk by reason of having
 27 prosecuted the suit, who therefore lends his or her name and efforts to the prosecution of litigation at some personal peril, 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 Mr. Ibanez has submitted a declaration detailing the efforts he expended on behalf of the class in order to
2 advance this case to its successful conclusion. *See, generally*, Declaration of Hector Ibanez filed in support
3 of Preliminary Approval (Dkt. # 92). There is no question that this case would not have reached the same
4 result but for Plaintiff's involvement and input at all stages of the litigation.

5 As representative for the absent class members, Mr. Ibanez risked a potential judgment taken
6 against himself for attorneys' fees and costs if this matter had not been successfully concluded. Case law
7 holds that a losing party is liable for the prevailing party's costs, *Early v. Superior Court*, 79 Cal.App.4th
8 1420, 1433 (2000), and in some wage and hour actions, such as this case, pursuant to California Labor
9 Code § 218.5, for attorneys' fees as well. Though the fee agreement provides that Class Counsel would
10 pay such costs, Mr. Ibanez would nevertheless have had a cost bill entered against him leaving him
11 ultimately liable for potentially hundreds of thousands of dollars in the unexpected possibility that Class
12 Counsel did not meet their obligation to cover those costs.

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

22 Additionally, it is common knowledge that the modern-day work force is quite mobile, with
23 employees holding several jobs in a career during their lifetime. It is also true that prospective employers
24 in this computer, high-tech age "Google" and/or do extensive background checks and have access to Court
25 databases to see if applicants have ever filed a lawsuit or have ever been sued. Here, Plaintiff litigated
26 against Defendants for a substantial sum of money by his courage to step forward to vindicate not only
27 his own rights but also, those of the similarly situated individuals, all of whom will now receive substantial
payments due to the initiation of this action. Such conduct will not be lost on a prospective employer who

1 has to choose between an applicant who has never sued an employer and one who has done so. The
2 requested enhancement far from compensates Mr. Ibanez for opportunities he may lose in the future
3 because of the exercise of a Constitutional right to Petition the Courts for redress of a grievance.

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

8 **IV. CONCLUSION**

9 Based on the foregoing, Plaintiff requests the Court find the settlement fair, reasonable, and
10 adequate and grant this motion for Class Counsel's attorneys' fees, reimburse the costs Class Counsel
11 incurred in litigating this matter, and approve Plaintiff's enhancement request.

12 Dated: January 27, 2020

MARA LAW FIRM, PC

13 /s/ Jamie Serb
14 David Mara, Esq.
15 Jamie Serb, Esq.
16 Representing Plaintiff
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