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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ALAMEDA

RENEE PORTER and JOSHUA TOLIN, individually and on behalf of all others similarly situated,

Plaintiffs,

vs.

EQUINOX HOLDINGS, INC., a Delaware corporation; and DOES 1-50, inclusive,

Defendants,

CASE NO.: RG19009052

Hon. Paul D. Herbert
Dept. 302

Complaint Filed: March 1, 2019
Trial Date: April 12, 2021

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR FINAL APPROVAL OF CLASS ACTION AND PAGA SETTLEMENT AND REQUEST FOR ATTORNEY'S FEES AND COSTS

Hearing
Date: September 8, 2023
Time: 3:00 p.m.
Dept. 302

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I. INTRODUCTION

Plaintiffs and Class Representatives Renee Porter, Joshua Tolin, Frank J. Fodera, Jr., Michael M. Bonella, and Genevieve Billson seek final approval of a non-reversionary class and representative action settlement ("Settlement") resolving wage and hour claims on behalf of 15,433 individuals who were employed by Defendant Equinox Holdings, Inc. ("Equinox" or "Defendant") as hourly non-exempt employees in California during the class period of April 3, 2015 through December 31, 2022. The proposed $36,000,000 total settlement provides about $21,380,000 in cash payments to the Settlement Class, plus additional amounts payable under PAGA. The remaining balance will cover service awards to the named plaintiffs, settlement administration costs, civil penalties to the state, and preliminarily approved attorney's fees and costs. The parties and their counsel finalized the Settlement after nearly four years of adversarial litigation in two separate fora, and extensive and difficult arms-length negotiations overseen by two experienced and highly-regarded mediators. The Court conditionally certified the Class and preliminarily approved the Settlement on March 9, 2023. Since then, the Court-approved class notice form was mailed to the Class Members on May 24, 2023, and Class Counsel believes they reacted very favorably to the Settlement. A mere three Class Members, out of over 15,000, requested exclusion, and there are no objections.

Class Counsel believes it secured an excellent Settlement with Defendant after extensive investigation, litigation, and settlement negotiation and administration, all without any compensation for services rendered or costs expended. The Class Notice duly informed the Class Members that Class Counsel would request attorney's fees not to exceed 1/3 of the Gross Settlement Fund, or $11,500.000.00, along with reimbursement of no more than $400,000 for actual costs incurred litigating this matter. As of the filing of this motion, *not one Class Member objected* to the proposed fee award. Consistent with the Settlement and Class Notice, Plaintiffs now respectfully request the Court award Class Counsel's fees in the amount of $11,500,000 and actual costs in the amount of $392,349.47, as described in the Declaration of Samuel D. Almon ("Almon Decl.") filed herewith. The requested attorney's fees are well within the range of reasonableness,

especially considering the complex and risky nature of this litigation, the contingent risk assumed, the nearly four year delay in payment and, when subjected to a lodestar crosscheck, result in a lodestar modifier of 2.53, which is not only in line with California precedent but thoroughly justified given the volume of work performed, and the exceptional final result.

Accordingly, on behalf of themselves and the Settlement Class, Plaintiffs respectfully request the Court grant this motion, give full and final approval to the Settlement, grant Class Counsel's request for attorney's fees and costs, and enter judgment accordingly.

II. BACKGROUND

The details of the procedural and factual background of this matter were outlined in the Plaintiffs' Motion for Preliminary Approval of Class Action Settlement (filed on or about February 3, 2023). To re-familiarize the Court with this litigation, Equinox owns and operates luxury health clubs around the country and, during the relevant time period, Equinox operated approximately 32 clubs throughout California. Plaintiffs Renee Porter, Joshua Tolin, Frank J. Fodera, Jr., Michael M. Bonella, and Genevieve Billson all worked for Equinox as non-exempt employees in California at various times during the Class Period. [Almon Decl., ¶ 2.]

As the Court will recall, the Settlement Class Consists of "Fitness Instructors" ("FIs") and "Non-Fitness Instructors." Fitness Instructors' duties generally include performing personal training sessions, teaching group fitness classes, assisting members during "floor shifts," preparing client exercise programs, communicating with clients, and attending mandatory meetings and training classes. They are paid by a hybrid hourly/piece rate system that compensates some job tasks by the hour and some by the piece. The Non-Fitness Instructors include non-exempt employees other than Fitness Instructors such as maintenance personnel, administrative personnel, front desk personnel, retail shop personnel, spa therapists/aestheticians, membership/sales personnel, and childcare center attendants. The job duties for these positions all are fairly self-explanatory, and the compensation structures of the Non-Fitness Instructors are largely based on hourly pay (with some commissions/piece rate pay for the spa therapist/aesthetician and membership/sales positions). [Almon Decl., ¶ 3.]

With respect to all job positions, Plaintiffs allege Equinox violated California's wage and hour laws in multiple ways. First, Plaintiffs claim the piece rate pay system for the Fitness Instructor compensated Class Members only for actually teaching a fitness class, and resulted in Fitness Instructors working "off the clock" while performing a variety of other job tasks referred to as "session-related activities" or "class-related activities" without additional compensation. Plaintiffs also allege Fitness Instructors had to perform other job tasks off the clock, without pay, such as contacting "leads," or prospective clients, manually scheduling work-related meetings, and communicating with supervisors and clients while away from the club and off the clock. Plaintiffs also contend de facto policies resulted in Other Employees working off the clock due to the press of business, particularly during the month-end period when the clubs were under pressure to meet monthly sales goals. [Almon Decl., ¶ 4.]

On the rest break claim, Plaintiffs allege a number of California-wide policies prevented FIs and other employees from receiving all required rest periods and resulted in "de facto" violations. For example, Plaintiffs allege that Equinox policies allowed FIs to schedule and work multiple sessions or classes consecutively, on the clock, with no gaps between sessions, which resulted in FIs being denied rest breaks. Plaintiffs contend the Non-Fitness Instructors similarly missed rest breaks, or received non-compliant breaks, on a de facto basis due to the press of business and need to provide immediate and exacting service to Equinox's upscale clientele. [Almon Decl., ¶ 5.]

Plaintiffs next allege Equinox's policies result in meal break violations as well. For instance, Plaintiffs allege FIs were frequently scheduled with exactly 30 minutes between sessions, which Plaintiffs contend did not permit enough time to get a full uninterrupted 30 minute meal period, as FIs would cut their lunch break short, meet with the client to get the training session started, and then run back to the break room and clock in. Plaintiffs allege that Equinox's "start meal" button, which keeps employees locked out of the time clock for 30 minutes, created instances where 30 minutes essentially was "auto-deducted" even where the individual did not receive a full 30 minute meal period because of business needs and likewise had to return to work early and clock out later. Plaintiffs also allege all non-exempt employees suffered meal break violations due to Equinox's written policy that allowed employees to clock in up to five minutes before their scheduled start

time, and up to five minutes after their shift ended. Thus, Plaintiffs allege, when an employee was scheduled for five hours of work, and clocked in prior to the scheduled start time, or clocked out after the scheduled end time, they would work more than five hours before receiving a meal break. Further, while Equinox did pay some meal premiums for documented violations for all job positions, Plaintiffs allege Equinox failed to pay those premiums at the "regular rate of compensation," as required under the California Supreme Court decision in Ferra v. Loews Hollywood Hotel, LLC (2021) 11 Cal.5th 858. [Almon Decl., ¶¶ 6-8.]

On the wage statement claim, Plaintiffs allege Equinox's wage statements violate Labor Code § 226 on their face whenever any of the following six pay codes appeared on the wage statement: Overtime Prem; CA rest break; Break Premium; PT Ses Cancel; CanXNo show; and Pilates No Show. Plaintiffs contend these pay codes cause an incorrect tabulation of total hours worked by the employees. Additionally, Plaintiffs claim Equinox's wage statements that reflect any overtime premium pay also fail to show all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate because the overtime hours and rate are broken down into multiple line items, none of which, according to Plaintiffs, reflect the actual, true total of overtime hours or the correct overtime rate. Plaintiffs allege these facial wage statement violations affected all non-exempt employees in California who had one of the six offending pay codes on their wage statement. Beyond that, Plaintiffs allege the unpaid wage and other violations resulted in derivative wage statement violations, further resulted in derivative violations for failure to timely pay all wages due on separation of employment, and constituted unfair competition under Bus. & Prof. Code §§ 17200, *et seq*. [Almon Decl., ¶¶ 9-10.]

Equinox has at all times denied Plaintiffs' collective allegations and maintains that its compensation and payroll policies fully compensated Class Members for all hours worked and at the correct hourly rates. For example, Equinox argues that the "session rate" compensated FIs for all hours worked related to conducting training classes, including tasks such as setting/cleaning up, scheduling, and creating client programs, as outlined in Equinox's employment agreements with Fitness Instructors and other pertinent policy documents. It argues further that FIs had no reason to perform any other work off the clock, and that they were allocated 2-6 hours per pay period, which

Equinox contends was compensated, for work separate from teaching classes. On the meal and rest break claims, Equinox argues that, at all times, its written policies and procedures fully comply with California law, and that it provides the Class Members with required meal and rest breaks, as evidenced by its time records. It argues that Equinox spends a great deal of time and monetary resources to ensure compliance, noting employees frequently were written up for meal break violations, and that it has paid thousands of dollars in break premiums during the Class Period. Equinox contends that, if an employee missed a break, it was in violation of company policy and it was due to employee choice and, to the extent it happened, Equinox remedied documented violations with the required one hour of premium pay. [Almon Decl., ¶ 11.]

Equinox also strenuously contends that neither case is suitable for treatment on a class or representative basis, arguing that to the extent class members missed meal or rest breaks, had non-compliant breaks, or engaged in off-the-clock work, those occurrences were intermittent and infrequent, and evidence would be purely anecdotal, rather than based on company policies and practices. Thus, Equinox contends class certification would be inappropriate as individual issues would predominate, and that trial of the PAGA claims would involve innumerable individualized inquires and would be unmanageable given the thousands of employees and multiple job positions at issue. [Almon Decl., ¶ 12.]

Based on the above allegations, on March 1, 2019, plaintiffs Porter and Tolin filed this action asserting claims under PAGA (the "Porter Action"). On April 3, 2019, Plaintiff Fodera filed a class action complaint against Equinox, also in this Court (the "Fodera Action"). Equinox removed the Fodera Action to federal court,[1] where it was assigned to District Judge William H. Orrick. Plaintiffs Bonella and Billson later were added to the Fodera Action after removal. [Almon Decl., ¶¶ 13-14.]

After Plaintiffs filed their complaints in the Porter Action and Fodera Action, as the Court is well aware, the Parties engaged in over three and a half years of formal discovery and motion practice. During that time, the Parties took at least 28 depositions, including 18 by Plaintiffs and 10 by Equinox. Both sides propounded written discovery and document requests, and during the course of the litigations, Defendant produced hundreds of thousands of documents and electronic files. The

[1] Equinox also removed the Porter Action to federal court, but it was remanded back to this Court.

Parties also filed several discovery dispute letters in the Fodera Action. Plaintiffs' counsel retained four experts and consultants in this litigation: an e-discovery consultant, International Litigation Services, Inc. ("ILS") to assist in analyzing the data produced by Equinox; Berger Consulting Group to analyze data produced by Equinox and create damages models; and survey and statistician experts, Laura Steiner and Teresa Fulimeni, who provided multiple expert declarations in connection with class certification and summary judgment motions in the Fodera Action. [Almon Decl. ¶¶ 15-24.]

Law and motion practice was frequent. Plaintiffs filed four motions to compel in the Porter Action, and the Parties attended several dozen discovery hearings from September 2020 through August 2022, as well as numerous conferences outside of Court with the Court-appointed ESI advisor, Philip Favro. In the Porter Action, Equinox filed a motion for summary adjudication/motion to strike, and Plaintiffs devoted time and resources to preparing an opposition before it was ultimately taken off calendar. In the Fodera Action, Defendants filed several motions to dismiss the complaint, and Plaintiffs filed several contested motions for leave to amend their complaint to add additional claims based on information learned in discovery. Plaintiffs ultimately moved for class certification, which required extensive briefing by both sides before the Fodera Court granted Plaintiffs' motion for class certification in May 2022. [Almon Decl., ¶¶ 25-32.]

Once the Parties agreed to mediate both cases in 2021, they engaged in further informal discovery to ensure both sides obtained sufficient information to make mediation worthwhile. Consequently, before mediation, Plaintiffs' counsel reviewed payroll records, personnel policies/handbooks, meal and rest break policies, compensation policies, sample wage statements, personnel files, and paystubs and time records produced by Defendant for thousands of Class Members. Defendant also provided information and data regarding the total number of current and former employees, the estimated total amount of workweeks and pay periods they worked, average hourly pay rates, and information regarding FI classes taught, among other relevant data. Plaintiffs had this information reviewed and analyzed by their consulting experts to assist evaluating the amount of time potentially lost to alleged off the clock work, meal/rest break violation rates, number of inaccurate wage statements, etc., and to prepare a damages model. [Almon Decl., ¶ 33.]

The Parties then engaged David Rotman, Esq., a highly respected mediator with extensive wage and hour class action experience, and participated in two-full day global mediations with Mr. Rotman in June and September 2021. While the Parties made some progress, the case did not settle by the end of the second day of mediation. The Parties continued to litigate, and the Fodera Plaintiffs filed their motion for class certification on January 5, 2022, which was granted on May 24, 2022. In the Fodera Action, the Parties then turned to merits discovery, worked with their experts in anticipation of the looming expert report deadline, worked out a schedule for dozens of additional depositions, and both sides filed motions for partial summary judgment. Meanwhile, the Parties continued trial preparations on the PAGA claims in the Porter Action. [Almon Decl., ¶ 34.)

In July 2022, the Parties agreed to attempt a third mediation, this time with Tripper Ortman, Esq., another highly regarded neutral with similarly extensive experience in wage and hour matters. The Parties met with Mr. Ortman on July 25, 2022. By the end of the day, the Parties still were unable to reach an agreement. Over the next two weeks, both sides took additional depositions and continued trial preparation. The Parties also continued to negotiate, and on August 8, 2022 finally reached an agreement in principle to resolve all claims in both cases. Thereafter, the Parties jointly drafted the Settlement Agreement setting forth the full settlement terms. [Almon Decl., ¶¶ 35-36.]

The Court granted preliminary approval to the proposed Settlement on March 9, 2023. The Settlement Administrator mailed Class Notices on May 24, 2023, with a 45-day window, to July 8, 2023, for Class Members to submit objections, requests for exclusion, or work week disputes. [Declaration of Jennifer Forst ("Forst Decl."), ¶ 7.]

III. SUMMARY OF SETTLEMENT TERMS

Under the settlement, Equinox will pay $36,000.000.00, the Maximum Settlement Amount or MSA, in three equal installments, over the course of approximately 2 years following final approval. Attorney's fees of up to $11,500,000.00 (1/3 of the Gross Settlement Fund[2]), litigation costs of up to $400,000.00 (only $392,349.47 is requested), reasonable enhancement awards to Plaintiffs of up to $20,000.00 each ($100,000.00 total), settlement administration costs of no more

[2] The Gross Settlement Fund means the Maximum Settlement Amount less the amount allocated to payment of employer-side payroll taxes.

than $125,000.00 (only $120,000 is requested), no more than $1,500,000.00 for employer-side payroll taxes on the amounts allocated to payment of wages, and $1,000,000.00 in PAGA penalties (payable 75% to the LWDA and 25% to the PAGA Members) will be paid from the MSA.[3] The remainder of approximately $21,380,000 (the "Net Settlement Amount" or "NSA")) will be allocated among the Participating Class Members based on their total weeks worked during the Class Period. The $250,000 from the PAGA Payment allocated to the PAGA Members likewise will be distributed based on their total pay periods worked during the PAGA Period. No monies will revert to Equinox. [Almon Dec., ¶¶ 37-40.]

A. Certification of the Settlement Class

The Court conditionally certified a Settlement Class defined to include all persons employed by Defendant as a non-exempt, hourly-paid employee in California at any time from April 3, 2015 through December 31, 2022. The Settlement Administrator ultimately mailed Class Notices to 15,433 individuals identified as members of the Settlement Class. [Forst Decl., ¶¶ 5-7.] Nothing has changed to require reconsideration of the Court's certification of the Settlement Class.

B. The Benefit Conferred on the Settlement Class

As noted, the settlement obligates Equinox to pay $36,000,000 to resolve the Settlement Class's claims, inclusive of attorney's fees and costs. At least $21,380,000 from the Maximum Settlement Amount will be distributed to the Participating Class Members and PAGA Members in three distributions, one after each installment payment. This is a cash settlement that does not require Participating Class Members to submit a claim form to receive their settlement share. Participating Class Members and PAGA Members will receive their settlement checks automatically via First Class U.S. Mail. Given the differences in compensation schemes and duties for the Fitness Instructors versus the Other Employees, the Settlement allocates 65% of the NSA to the Fitness Instructors and the remaining 35% to the Non-Fitness Instructors. This allocation is intended to account for the number of alleged Fitness Instructors' claims and the number of FI claims that

[3] If the employer-side payroll taxes total less than $1,500,000, the remainder will go to Participating Class members.

Plaintiffs contend were arguably stronger. If Plaintiffs' allegations were accurate, then success on the FI claims would have resulted in greater damage awards than those the Non-Fitness Instructors would obtain according to Plaintiffs' allegations. As such, the Parties allocated, and the Court preliminarily approved, greater compensation for the FIs' claims. [Almon Decl., ¶¶ 41-44.]

Twenty percent (20%) of each settlement share will be allocated to wages and the remaining eighty percent (80%) will be allocated to penalties and interest. Any amounts not claimed (because a class member does not cash his or her settlement check) from the first and second distributions will go back into the NSA for pro rata distribution with the next settlement payment. Subject to the Court's approval, any funds remaining unclaimed after the third and final distribution will be forwarded in equal shares to (1) Public Counsel (said funds to be designated for child advocacy programs) (https://publiccounsel.org); (2) Safe Place for Youth (https://www.safeplaceforyouth.org); and (3) Inclusion Matters (https://inclusionmatters.org), non-profit organizations that provide advocacy and services for children and youth, as the proposed *cy pres* beneficiaries. [Almon Decl., ¶¶ 41-44.]

Each Participating Class Member will receive a share of the Net Settlement Amount based on their total weeks worked for Equinox during the Class Period while employed in a non-exempt position. Thus, each Class Member's Individual Settlement Payment will be calculated using criteria typically used in determining appropriate amounts of unpaid wages, unpaid premium wages for missed meal and rest breaks, and potential statutory penalties. These methods are intended to ensure each Class Member receives a portion of the available settlement funds corresponding to the relative value of his or her potential claims.

For the Fitness Instructors, the average overall award currently is estimated to be approximately $900, with a maximum award of over $11,000. For the Non-Fitness Instructors, the average award will be about $484, with a maximum of about $5,666. The average award to the PAGA Group Members will be about $24. [Forst Decl., ¶ 16.]

C. <u>Settlement Administration</u>

CPT Group, Inc., as the Court-approved Settlement Administrator, mailed the Class Notice to the Settlement Class after making all reasonable effort to ascertain the best mailing

address, including running each address through the National Change of Address database and "skip-tracing" any Class Notice returned as undeliverable. [Forst Decl., ¶¶ 3-9.] The Class Notice, previously approved by the Court, duly informed the Settlement Class of the Settlement terms, including the estimated relief each Settlement Class Member will receive, the amounts to be requested for attorney's fees and costs, and the requested enhancement awards, and the right to opt out of or object to the Settlement. [Forst Decl., ¶ 4, Exh. A.] CPT mailed 15,433 Class Notices on May 24, 2023. [Forst Decl., ¶ 7.] Ultimately, 170 Class Notices were deemed undeliverable, representing a 98.9% success rate. [Linton Decl., ¶ 9.] The 45-day response window for objecting to or opting out of the Settlement expired on July 8, 2023, with the response deadline extended to July 24, 2023 for those individuals whose notice was re-mailed. [Forst Decl., ¶ 7.] As of the filing of this motion, CPT has received three (3) requests for exclusion (for a 99.98% participation rate), and zero objections to the Settlement. [Forst Decl., ¶¶ 11-12.] Four disputes were submitted regarding the information used to calculate any Participating Class Member's Individual Settlement Payment, all of which have been resolved. [Forst Decl., ¶ 13.]

D. Release of Claims

All Participating Class Members will release Equinox from all claims alleged in the Operative Complaint, or that could have been brought based on the factual allegations in the operative complaint, in the Porter Action and Fodera Action, including PAGA claims, during the Class Period. The release is limited to the claims that were actually pleaded or could have been pleaded based on the alleged facts in the operative complaint in the Porter Action and Fodera Action, which are incorporated in the Second Amended Complaint ("SAC") in this action. [Almon Decl, ¶¶ 45-46.]

E. PAGA and Notice to the LWDA

As noted, the Parties allocated $1,000,000 from the MSA to resolution of Plaintiffs' claims under PAGA, and it is respectfully requested that the Court approve that amount. The proposed PAGA period is from December 26, 2017 to December 31, 2022, and there are 10,359 PAGA Members eligible for a payment under PAGA. [Forst Decl., ¶ 16.] As required by Labor Code

section 2699(*l*)(2), Plaintiffs gave notice of the settlement and the final approval hearing to the LWDA via its online portal. [Almon Decl., ¶ 47; Exh. 1.]

IV. NAMED PLAINTIFF AWARDS

Pursuant to the terms of the settlement, the five named plaintiffs seek incentive awards of $20,000 each for their service in bringing these claims on behalf of the Settlement Class. These requests are reasonable given the risks they undertook on behalf of the Settlement Class. By contacting and retaining counsel to pursue these claims, Plaintiffs helped make this settlement possible for the absent Settlement Class Members, while shouldering the risk of being liable for Defendant's litigation costs. Plaintiffs also exposed themselves to unwanted notoriety related to filing a public lawsuit (discoverable even through a simple google search) for the benefit of other employees, placing themselves at risk of discrimination by future prospective employers. As set forth in more detail in their respective declarations submitted herewith, among taking many other actions assisting in the successful litigation of this case, each Plaintiff provided substantial factual information and documents to counsel, attended numerous meetings/phone conferences with counsel to discuss the case, kept abreast of all significant developments, and submitted to lengthy depositions. [Declaration of Renee Porter, ¶¶ 2-10; [Declaration of Joshua Tolin, ¶¶ 2-10; [Declaration of Frank J. Fodera, Jr., ¶¶ 2-11; [Declaration of Michael M. Bonella, ¶¶ 2-11; [Declaration of Genevieve Billson, ¶¶ 2-11; Almon Decl., ¶¶ 48-49.] Finally, there are no Settlement Class Member objections submitted with respect to the amounts Plaintiffs propose to receive. [Forst Decl., ¶ 11.]

Accordingly, the requested enhancements to Plaintiffs are appropriate and justified as part of the settlement. *Staton v. Boeing* (9th Cir. 2003) 327 F.3d 938, 977 (collecting cases awarding class representatives service and incentive payments ranging from $2,000 to $25,000); *Beaver v. Tarsadia Hotels, Corp.* (S.D. Cal. Sep. 28, 2017) 2017 WL 4310707, at *9 (confirming $50,000 enhancements to each of 7 class representatives where they "spent over six years assisting the litigation of this case by reviewing the complaint, responding to written discovery and producing documents, being deposed by defense counsel, and reviewing and approving the settlement.").

V. SETTLEMENT ADMINISTRATION COSTS

The Settlement provides for a payment to CPT for its services as the Settlement Administrator in an amount not to exceed $125,000. As set forth in the Declaration of Jennifer Forst, filed herewith, CPT has performed and will continue to perform its required duties through final distribution of the settlement funds and incurred $120,000 in fees and expenses. [Forst Decl., ¶ 17] Accordingly, Plaintiffs respectfully request the Court approve payment of $120,000 to CPT from the GSF. [Almon Decl., ¶ 50.]

VI. ARGUMENT

The law favors settlement, particularly in class actions where substantial resources can be conserved by avoiding the time, cost, and rigors of formal litigation. H. Newberg & A. Conte, *4 Newberg on Class Actions* (4th ed. 2002), § 11.41; *Class Plaintiffs v. City of Seattle* (9th Cir. 1992) 955 F.2d 1268, 1276, *cert. denied*, 506 U.S. 953; *Van Bronkhorst v. Safeco Corp.* (9th Cir. 1976) 529 F.2d 943,950; *Potter v. Pacific Coast Lumber Co.* (1951) 37 Cal.2d 592, 602. Nevertheless, to make certain the rights of absent parties are not unjustly compromised, the settlement of a class action requires court approval. Cal. Rule of Court 3.769; *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1801; *Wershba v. Apple Computer* (2001) 91 Cal.App.4th 224, 245. That judicial review serves to protect against fraud or collusion, and to ensure fairness to absent class members. *Dunk,* 48 Cal.App.4th at 1800-01; Newberg, at §§ 11.22, *et seq.* Review is accomplished through a two-step process intended to determine whether, under the totality of circumstances, the settlement is fair, reasonable and adequate. *Dunk,* 48 Cal.App.4th at 1801; *Wershba,* 91 Cal.App.4th at 245.

On a motion for final approval, the trial court is charged with determining whether, in light of the total circumstances of the action and the response of the class members to the proposed settlement, the settlement is fair, reasonable, and adequate. Dunk, 48 Cal.App.4th at 1801-02; *Wershba*, 91 Cal.App.4th at 244-45. The court has broad discretion in making that determination and may consider a number of relevant factors, including: the strength of plaintiff's case; the likelihood of potential recovery; the risk, expense and likely duration of further litigation; the amount offered in settlement; the extent of discovery and stage of the

proceedings; the experience and opinion of counsel; and the reaction of class members to the settlement. *Id.* In light of the strong judicial policy favoring the settlement of class actions, courts generally apply a presumption of fairness to a proposed class action settlement when: (1) the settlement is reached through arm's-length bargaining; (2) investigation and discovery are sufficient to allow counsel and the court to act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of objectors is small. *Dunk,* 48 Cal.App.4th at 1802; *Wershba,* 91 Cal.App.4th at 245.

A. The Settlement Merits Final Approval

The Settlement of this action warrants final approval under the standards summarized above. The Settlement is fair, reasonable and adequate, and represents a favorable resolution of highly disputed claims. Further, the Settlement was overwhelmingly approved by the Settlement Class, as there were no objections and only 3 individuals out of over 15,000 class members requested exclusion, for a 99.98% participation rate.

1. The Settlement Is the Product of Arm's-Length, Informed Negotiations

The Settlement is not the result of fraud or collusion. Rather, the proposed Settlement was reached following arm's-length negotiations presided over by two highly regarded mediators, David Rotman, Esq. and Tripper Ortman, Esq., over the course of three full-day mediation sessions, follow up negotiations, and a mediator's proposal. [Almon Decl., ¶¶ 33-35.] Moreover, Plaintiffs and their counsel were well-informed about the facts and the law, and counsel Ronald Makarem and Samuel Almon have years of litigation experience, including litigating wage and hour class actions. Plaintiffs' counsel are well-qualified to evaluate the risks and benefits of pursuing further litigation or settling the matter. [Almon Decl., ¶¶ 70-72.] Defendant likewise was represented by highly-qualified and experienced defense counsel. Both sides advocated vigorously for their clients and nothing was "left on the table."

2. The Class Reacted Favorably to the Settlement

The Settlement was well-received by the Settlement Class. As of the filing of this motion, no objections have been filed, and a mere 3 out of 15,433 Class Members requested exclusion. [Forst Decl., ¶¶ 11-12.] As many courts recognize, class member reaction to the settlement is one

of the most important factors to consider in determining if final approval should be granted. *Mandujano v. Basic Vegetable Prods., Inc.*, 541 F.2d 832, 837 (9th Cir. 1976); see also In re: *American Bank Note Holographics*, 127 F.Supp.2d 418, 425 (S.D.N.Y. 2001) ("It is well-settled that the reaction of the class to the settlement is perhaps the most significant factor to be weighed in considering its adequacy") (internal quotation marks omitted).

3. The Settlement Is Fair and Reasonable Considering the Benefits Conferred, the Case Value, and Significant Litigation Risks

The Settlement involves a substantial sum of money that, when distributed, will confer meaningful monetary benefits on the Settlement Class. As described above, each individual award will be based on an allocation consistent with the nature of the claims asserted and will fairly and equitably allocate the available funds in relation to the degree of alleged damage each Settlement Class Member incurred. While Settlement Class Members who worked for only a short period of time will receive relatively small sums, those with longer tenures and who worked more hours and shifts during the Class Period will receive appropriately larger awards.

Prior to reaching agreement on the proposed settlement terms, the Parties engaged in multiple sets of written discovery, 28 depositions plus additional informal discovery to facilitate settlement discussions, as described in detail above. Plaintiffs' counsel are confident they obtained sufficient information to understand the law and facts of this case and make an informed decision regarding the proposed settlement and whether it is fair and reasonable.

Using that data and with the assistance of two sets of consulting experts, Plaintiffs estimated Equinox's likely maximum exposure on the class claims at approximately $142 million, exclusive of interest, including approximately $71 million on the unpaid wage/off the clock issue, $10 million in unpaid meal period premiums, $19 million in unpaid rest period premiums, $16 million in statutory penalties for wage statement violations, and about $25 million in waiting time penalties. Plaintiffs and counsel ultimately discounted the value of these claims, however, in light of the multiple and considerable risks posed by proceeding with the litigation, as Defendant raised numerous defenses and vigorously defended against these claims. [Almon Decl., ¶¶ 51-56.]

Of course, reaching these numbers would require Plaintiffs to shoot the moon and win liability and outside damages on all wage and non-PAGA penalty claims, but those outcomes were

unlikely and carried significant, tangible risks, as addressed at length on preliminary approval. Defendant raised multiple procedural and merits defenses to each of Plaintiffs' claims, any one of which, if successful, could have derailed Plaintiffs' case. Accordingly, Plaintiffs faced risky issues going forward with this litigation, and given the need to maintain class certification in the Fodera Action, overcome a manageability defense in the Porter Action, try and win both cases, and deal with post-trial appeals, it would have taken years to realize any recovery in this action beyond the four years the two cases already have been pending. Finally, the financial impact of COVID on the fitness industry, including Equinox's financial position and the attendant uncertainty associated with collecting on a judgment factored into the equation as well. Plaintiffs and counsel discounted the value of the claims consistent with the risks discussed above, and carefully weighed the likelihood of the class receiving substantially greater benefit if the litigation continued. Plaintiffs and their counsel concluded – in light of these very real and substantial risks – that settlement on the proposed terms and without further prolonged and costly litigation was in the best interests of the Settlement Class. [Almon Decl., ¶¶ 51-61.]

As far as potential PAGA liability, the theoretical penalties totaled over $72 million if Plaintiffs should prevail on all claims and establish violations of the multiple Labor Code sections at issue for every single eligible pay period. [Almon Decl., ¶ 62.] As with the class claims, Plaintiffs discounted the potential PAGA penalties for the multi-layered defenses proffered by Defendant on the merits, and further discounted these claims since the Court possesses wide discretion to reduce such penalties to as little as nothing even if Plaintiffs ultimately prevailed. Lab. Code § 2699(e)(2); *Fleming v. Covidien* (C.D. Cal. 2011) 2011 U.S. Dist. LEXlS 154590, *8-9 (court reduced the potential penalties by over 82% after a bench trial); *Carrington v. Starbucks Corp.* (2018) 30 Cal.App.5th 504 (after a bench trial, the trial court awarded penalties of just $5 per pay period, a 90% reduction, which decision was upheld on appeal); *In re Taco Bell Wage and Hour Actions* (E.D. Cal. Apr. 8, 2016) 2016 U.S. Dist. Lexis 48557 (PAGA penalties denied after trial). Accordingly, the Parties allocated $1,000,000 to PAGA penalties, which amount is reasonable and in line with comparable settlements in other class actions in California. *Van Kempen v. Matheson Tri-Gas, Inc.* (N.D. Cal. Aug. 25, 2017) 2017 U.S. Dist. LEXIS 137182

(granting final approval of $5,000 PAGA penalty from $370,000 settlement, or 1.4 percent of total settlement); *Slavkov v. First Water Heater Partners I* (N.D. Cal. July 25, 2017) 2017 U.S. Dist. LEXIS 116303 (finding a $7,500 PAGA payment reasonable when measured against the overall settlement of $345,000 and the possible weaknesses in plaintiffs' case, or 2.2 percent of total settlement). Additionally, the LWDA has been informed of the terms of the PAGA portion of the settlement and will be able to weigh in as necessary. *Jennings v. Open Door Mktg. Inc.* (N.D. Cal. Oct. 3, 2018) 2018 U.S. Dist. LEXIS 171356, at *27 (approving settlement with PAGA penalties of 0.6% where "[p]laintiffs [have] submitted the settlement agreement to the LWDA, and the LWDA has not objected to the settlement").

The overall recovery represents approximately 50-percent of Defendant's potential penalty exposure and, given the risks addressed above, a total recovery for the Settlement Class of $36,000,000, which will result in average awards of some $900 per Fitness Instructor, and $484 per Non-Fitness Instructor, plus additional amounts under PAGA, is a result well within the range of reasonableness considering all potential outcomes, and will provide direct monetary awards to all Participating Class Members within a reasonable time frame. [Almon Decl., ¶¶ 63-66.]

Importantly, the mere fact that a settlement does not provide the same recovery as might be achieved at trial is not a proper indicator of whether the settlement is fair, reasonable, and adequate. *Wershba,* 91 Cal.App.4th at 246, 250 ("Compromise is inherent and necessary in the settlement process…even if the relief afforded by the proposed settlement is substantially narrower than it would be if the suits were to be successfully litigated, this is no bar to a class settlement because the public interest may indeed be served by a voluntary settlement in which each side gives ground in the interest of avoiding litigation"); *Lane v. Facebook, Inc.* (9th Cir. 2012) 696 F.3d 811, 819 ("[T]he question whether a settlement is fundamentally fair . . . is different from the question whether the settlement is perfect in the estimation of the reviewing court"); *7-Eleven Owners for Fair Franchising v. Southland Corp.* (2000) 85 Cal.App.4th 1135, 1150 ("The fact that a proposed settlement may amount to only a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved"); *White v. Experian Information Solutions, Inc.* (C.D. Cal. 2011) 803 F.Supp.2d

1086, 1098 (rejecting contention settlement was not fair and reasonable even though it represented 99% discount off the maximum value of the claims). Importantly as well, the proposed settlement is non-reversionary and will provide timely benefits to the Class Members without a claims process. *White*, 803 F.Supp.2d at 1098; c.f., Federal Judicial Center, *Managing Class Action Litigation: A Pocket Guide for Judges* (3d ed. 2010) at 20, available at (reversionary provisions and/or cumbersome claims process may indicate lack of fairness).

Plaintiffs and their counsel submit the settlement is within the "range of reasonableness," and is fair and adequate for the Class.

VII. ATTORNEY'S FEES AND COSTS

A. The Attorney's Fees Requested Are Fair and Reasonable and Should Be Approved

This Court has discretion over the amount of attorneys' fees awarded and court approval is required for Class Counsel's fees. Cal. Rule of Court 3.769; *Levy v. Toyota Motor Sales, U.S.A.* (1992) 4 Cal.App.4th 807, 813; *Lealao v. Beneficial Cal., Inc.* (2000) 82 Cal.App.4th 19. In defining a reasonable fee, the Court should attempt to mimic the marketplace for cases involving significant contingent risk, such as this one. *Deposit Guaranty Nat'l Bank, Jackson, Miss. v. Roper* (1980) 445 U.S. 326, 338, rehg. den. 446 U.S. 947*; Lealao,* 82 Cal.App.4th at 49-50 (court should attempt "to award the fee that informed private bargaining, if it were truly possible, might have reached" in determining a reasonable fee, and a fee award should approximate a "range of fees freely negotiated in comparable litigation"). Here, Class Counsel's request for attorney's fees and costs is reasonable and justified by the volume and quality of work performed, the benefits obtained, and the contingent risk assumed.

As addressed in detail above, at the time the parties reached the tentative settlement success for Plaintiffs and the putative Settlement Class was far from certain. Plaintiffs faced a real risk that some or all the claims in the Fodera Action could be de-certified for class treatment, as Defendant had strong arguments that their compensation policies were legal and properly compensated the Settlement Class. Even if Plaintiff maintained certification on some

or all of the claims through trial and ultimately prevailed on the merits in both cases, it undoubtedly would have taken several years to realize any recovery as the Parties contested trial and any appeals. [Almon Decl., ¶¶ 16-21.]

Nonetheless, Plaintiffs succeeded and obtained the relief they set out to obtain over four years ago, and the Settlement provides substantial cash payments to all Participating Class Members, with an average award of about $900 for the Fitness Instructors and $484 for the Non-Fitness Instructors, and with a maximum award of over $11,000. Importantly as well, the Settlement Class has been overwhelmingly supportive of the Settlement – as there are no present objections to the settlement and only 3 opt outs from 15,433 Class Members. [Forst Decl., ¶¶ 12-13.]

B. The Requested Fee Award Is Reasonable and Appropriate

The United States Supreme Court has ruled the parties to a class action properly may negotiate not only the settlement of the action itself but also the payment of attorneys' fees. *Evans v. Jeff D.* (1986) 475 U.S. 717, 734-35, 738, fn. 30.) In *Hensley v. Eckerhart* (1983) 461 U.S. 424, 437, the Supreme Court explained that negotiated, agreed-upon attorneys' fee provisions are the ideal towards which the parties should strive: "A request for attorney's fees should not result in a second major litigation. Ideally, of course, litigants will settle the amount of a fee." The United States Supreme Court has reemphasized this policy and further stressed trial courts have "a responsibility to encourage agreement" on fees. *Blum v. Stenson* (1984) 465 U.S. 886, 902 n.19.

As part of the settlement, Defendant agreed not to object to an award of no more than 1/3 of the GSF for attorney's fees, or $11,500,000.00, and up to $400,000 in reimbursement for actual litigation costs and expenses. Such a fee is commensurate with what the market would provide for similar services and the Court therefore can most certainly enforce the agreement. As California's Court of Appeal has instructed:

> Given the unique reliance of our legal system on private litigants to enforce substantive provisions of law through class and derivative actions, attorneys providing the essential enforcement services must be provided incentives roughly comparable to those negotiated in the private bargaining that takes place in the legal marketplace, as it will otherwise be economic for defendants to increase injurious behavior.

Lealao, 82 Cal.App.4th at 47.

Here, the parties did not negotiate the inclusion of attorney's fees until after relief to the Settlement Class was bargained for after three days of mediation and several post-mediation discussions. [Almon Decl., ¶ 67] The requested fee and cost award was a product of these arms-length negotiations and fairly reflects the marketplace value of the services rendered by Class Counsel in this case. As a result, the fee agreed to by the parties should be approved.

C. Class Counsel's Fees are Justified When Calculated as a Percentage of the Common Fund

In approving fee applications, courts typically apply either a percentage-of-recovery method or the lodestar method. *Laffitte v. Robert Half Int'l., Inc.* (2016) 1 Cal.5th 480, 489*; Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 254, *disapproved on other grounds*, *Hernandez v. Restoration Hardware, Inc.* (2018) 4 Cal.5th 260. The California Supreme Court recognized the advantages and equities of calculating attorney's fees using the percentage-of-the-common-fund method in another wage-and-hour case:

> 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.

Laffitte, 1 Cal.5th at 503 (citations omitted).

Indeed, both California and federal courts have long recognized an appropriate method for determining the award of attorney's fees is based on a percentage of the total value of benefits afforded to class members by the settlement. *Serrano v. Priest* (1977) 20 Cal.3d 25, 34*; Boeing Co. v. Van Gernert* (1980) 444 U.S. 472, 478; *Vincent v. Hughes Air West, Inc.* (9th Cir. 1977) 557 F.2d 759, 769. Awarding a fee based on a percentage of the common fund recovered operates to "spread litigation costs proportionately among all the beneficiaries so that the active beneficiary does not bear the entire burden alone." *Vincent,* 557 F.2d at 769.

In determining a reasonable common fund fee award, courts should also consider the fact that fees serve as an economic incentive for lawyers to bring class action litigation to

achieve increased access to the judicial system for meritorious claims and to enhance deterrents to wrongdoing. Conte, *Attorney Fee Awards* (2d ed. 1993) § 104. Without prosecution on a contingent basis and use of the class action mechanism, the courthouse door would effectively be closed to most class members due to the relatively small size of their individual claims in relation to the time and costs associated with litigation.

Here, Class Counsel seek a fee award for their successful prosecution and resolution of this action of no more than 1/3 of the Gross Settlement Fund recovered by the Class via the lawsuit, or $11,500,000.00. The percentage requested is justified for the reasons set forth further below, and comports with other fee awards calculated on a percentage-of-the-benefit basis. Indeed, in addition to the California Supreme Court's approval of a 1/3 fee in *Lafitte*, other courts in California likewise routinely approve fees of 1/3. *Chavez v. Netflix, Inc.* (2008) 162 Cal.App.4th 43, 66 n.11 ("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"). "Under the percentage method, California has recognized that most fee awards based on either a lodestar or percentage calculation are 33 percent . . . ." *Smith v. CRST Van Expedited, Inc.* (S.D. Cal. 2013) 2013 WL 163293, at *5. *See also Bickley v. Schneider Nat'l Carriers, Inc.* (N.D. Cal. Oct. 13, 2016) 2016 WL 6910261, at *4 (awarding attorney's fees of one-third of the recovery); *Barbosa v. Cargill Meat Solutions Corp.* (E.D. Cal. 2013) 297 F.R.D. 431, 449-450 (one-third of the settlement); *Garcia v. Gordo Trucking, Inc.* (E.D. Cal. Oct. 31, 2012) 2012 WL 5364575 (approving attorney's fees of one-third of the common fund); *Vasquez v. Coast Valley Roofing* (E.D. Cal. 2010) 266 F.R.D. 482 (approving award of attorney's fees of one-third of the amount recovered by the class); *Stuart v. RadioShack Corp.* (N.D. Cal. 2010) 2010 WL 3155645 (awarding attorney's fees of recovery and noting the one-third award was "well within the range of percentages which courts have upheld as reasonable in other class action lawsuits.").

D. A Lodestar Cross-Check Also Supports Class Counsel's Fee Request

To ensure the fairness of an attorney's fee award, courts frequently conduct a lodestar cross check of counsel's fees. "A lodestar cross-check thus provides a mechanism for bringing

an objective measure of the work performed into the calculation of a reasonable attorney fee." Laffitte, l Cal.5th at 504. Here, Class Counsel spent 5,598.4 hours of time on the Fodera and Porter Actions over the course of four years of no-holds-barred litigation, resulting in a reasonable lodestar of $4,541,272.50.

As detailed more fully in the Almon Declaration, and as the Court well knows, these matters were heavily litigated, as evidenced by Class Counsel nearly 5,600 total hours of attorney time dedicated to prosecuting these actions.[4] Additionally, Class Counsel will incur additional time over the next 2-3 years following final approval to, inter alia, respond to Settlement Class Member inquiries, work with the Settlement Administrator on the distribution of settlement funds, and on future compliance hearings and amending the judgment following the final distributions. [Almon Decl., ¶¶ 15-36.]

In pursuing this matter, Class Counsel incurred total attorneys' fees of $4,541,272.50, and the lodestar is based on an eminently reasonable number of hours worked to litigate this matter to a successful conclusion over the past 4.5 years. The requested attorney hourly rates are reasonable and comport with hourly rates charged by other attorneys with similar experience in this practice area in California. [Almon Decl., ¶¶ 68-88.] On a lodestar basis, the fee request of $11,500,000 results in a multiplier of 2.53, which is an enhancement entirely in line with California law. Indeed, courts in California and elsewhere routinely approve multipliers at or even in excess of the modifier here. *Wershba,* 91 Cal.App.4th at 255 ("Multipliers can range from 2 to 4 or even higher."); *Chavez*, 162 Cal.App.4th at 66 (affirming attorney's fee award including an upward multiplier of 2.5); *In Re IDB Communication Group, Inc. Sec. Litig.* (C.D. Cal. Jan. 17, 1997) (common fund award with lodestar crosscheck and 6.2 multiplier); *Kraft v. County of San Bernardino* (C.D. Cal. 2008) 624 F.Supp.2d 1113, 1125 (common fund award with lodestar crosscheck and 5.2 multiplier in civil right litigation, and collecting cases with modifiers up to 19.6); *In re Rite Aid Corp. Sec. Litig.,* 146 F.Supp.2d 706 (E.D. Pa. 2001) (common fund award with lodestar crosscheck and a multiplier of 4.5-8.5, which the court

[4] As emphasized the California Supreme Court, trial courts may perform a lodestar crosscheck "using counsel declarations summarizing overall time spent, rather than demanding and scrutinizing daily time sheets in which the work performed was broken down by individual task." *Laffitte*, 1 Cal.5th at 505.

described as "handsome" but "unquestionably reasonable"); *In re Beverly Hills Fire Litig.* (E.D. Ky. 1986) 639 F. Supp. 915 (multiplier of 5 for lead counsel).

Class Counsel submits the requested 2.53 multiplier effectively operates to show the percentage fee request is reasonable considering the challenges presented in this contingency fee matter, and appropriately compensates Class Counsel for the contingent risk assumed, the exceptional result, and delay in payment during the time Counsel has been representing Plaintiffs and pending full payment of the settlement by Equinox. Thus, the multiplier results in a fee constituting a fair return on the contingency.

E. The Award is Supported By 1) the Results Achieved; 2) the Risk, 3) the Skill Required, 4) the Contingent Nature of the Fee and 5) Awards in Similar Cases

What has now emerged in most fee award decisions is the recognition that fee determinations in both common fund and statutory fee situations are incapable of mathematical precision because of the intangible factors that must be resolved in the court's discretion based on the circumstances of each particular case. Conte, § 207, p. 44. In determining an appropriate fee in a common fund case, a Court must decide, based on the unique posture of each case, what percentage of the common fund would most reasonably compensate Class Counsel given the nature of the litigation and the performance of counsel. *Paul, Johnson, Alston & Hunt v. Graulty* (9th Cir. 1989 886 F.2d 268, 272) (the benchmark percentage fee may be adjusted to account for the circumstances involved in a case).

Courts apply a five-part test in calculating a reasonable percentage fee in common fund cases: (1) the results achieved; (2) the risk of litigation; (3) the skill required and the quality of work; (4) the contingent nature of the fee and the financial burden carried by the plaintiffs; and (5) awards made in similar cases. *Laffitte,* l Cal.5th at 489.

1. The Results Achieved.

Class Counsel obtained a $36,000,000 settlement as a result of prosecuting this case for the Settlement Class. The Settlement provides real monetary benefits to the Settlement Class, and the Settlement is particularly advantageous to the Settlement Class because the proceeds will be distributed shortly as opposed to waiting additional years for a similar, or

possibly, less favorable result. Considering many individual claims would be very modest and would not be cost-effective to pursue successfully, the Settlement provides them with fair compensation for their claims. Moreover, the absence of any objection to either the Settlement or the attorney's fees request bolsters these results. Indeed, the approval of the Settlement Class is overwhelming as indicated by the fact that only 3 out of 15,433 class members opted out. Also, the settlement amounts to a substantial percentage of the maximum value of the amount the Settlement Class might have obtained if it had tried the case and recovered on all theories seeking recovery of wages and penalties. "It is well-settled law that a cash settlement amounting to only a fraction of the potential recovery does not per se render the settlement inadequate or unfair." *In re Omnivision Techs., Inc.*, 559 (N.D. Cal. 2008) F.Supp.2d 1036, 1042.

2. Class Counsel Bore Considerable Risk.

At the time of filing the initial complaints, Class Counsel recognized they would have to expend a substantial amount of time and advance significant costs to prosecute a statewide class action suit and a separate statewide PAGA representative action, all with no guarantee of compensation or reimbursement, in the hope of prevailing against a sophisticated company represented by first-rate attorneys. Despite their belief in the validity of Plaintiffs' claims, they also knew they faced substantial risks on securing class certification and the ability to prove class-wide and individual damages. In light of the highly uncertain nature of these matters, both at the time they were filed and continuing to this day, Class Counsel also bore the risk that Defendant would dig in and attempt to bury their small firm in work. Given the small size of Class Counsel's firm, not receiving any compensation for several years while simultaneously advancing thousands of hours of attorney time and hundreds of thousands in litigation costs posed considerable risk and difficulty. [Almon Decl., ¶¶ 89-90.]

3. The Skill Required and the Quality of Work.

Practice in the narrow area of wage and hour litigation requires skill, knowledge and experience. The issues presented in this case required more than just a general appreciation of

wage and hour law and class action procedure. This Settlement was possible because of counsel's diligent efforts, as discussed above. In successfully navigating those hurdles, Class Counsel displayed appropriate skill while pursuing a risky and difficult case.

4. The Contingent Nature of the Fee and Risk Assumed

There is a substantial difference between the risk assumed by attorneys being paid by the hour and attorneys working on a contingent fee basis. The attorney being paid by the hour can go to the bank with his fee. *Powers v. Eichen* (9th Cir. 2000) 229 F.3d 1249, 1256. The attorney working on a contingent basis can only log hours while working without pay towards a result that will hopefully entitle him to a market fee considering the risk and other factors of the undertaking. Id. at 1257. Otherwise, the contingent fee attorney receives nothing. Id. In this case, Class Counsel subjected themselves to this risk in this all or nothing contingent fee case where the necessity and financial burden of private enforcement makes the requested award appropriate.

Counsel retained on a contingency fee basis, whether in private matters or in class action litigation, is entitled to a premium beyond their standard, hourly, non-contingent fee schedule to compensate for both the contingent risk assumed and the delay in payment. The simple fact is that despite the most vigorous and competent of efforts, success is never guaranteed. *McKittrick v. Gardner* (4th Cir. 1967) 378 F.2d 872, 875. Indeed, if counsel is not adequately compensated for the risks inherent in difficult class actions, competent attorneys will be discouraged from prosecuting similar cases. *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1132-33; *Cazares v. Saenz* (1989) 208 Cal.App.3d 279, 287.

Here, the contingent fee practice of Plaintiffs' counsel simply does not accommodate the investment of unnecessary time in a case, and the adverse resolution of any one of several difficult issues present in this matter could have doomed the entire effort. As discussed, the attorney's fees in this case were not only contingent but quite risky, and there was always a palpable chance Plaintiffs' counsel would receive nothing for any number of reasons.

[Almon Decl., ¶¶ 89-90.] Accordingly, the contingent nature of the fee and the financial burdens on Class Counsel also support the fee requested.

5. Awards in Other Cases

As discussed, the attorney's fees requested by Class Counsel are within the range of fees awarded in comparable cases, as California courts regularly approve class action fee awards amounting to 1/3 of a common fund. Additionally, review of class action settlements over the past 10 years shows that the courts have historically awarded fees in the range of 20 to 50 percent, depending upon the circumstances of the case. *In re Warner Communications Sec. Litig.* (S.D.N.Y. 1985) 618 F.Supp. 735, 749-50 (concluding that percentage fees in common fund cases range from 20 to 50 percent); Newberg, *Newberg on Class Actions* (3d ed.) § 14.03, pp. 13-14 ("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.").

Class Counsel's requested fees equal one-third of the Gross Settlement Fund recovered on behalf of the Class and are well within the range of reasonableness under either the percentage of the recovery or the lodestar method in light of the contingent risk assumed, the delay in payment (indeed, Class Counsel will not receive the final tranche of any fee award until some 6.5 years after filing the initial complaints), the exceptional result achieved, and the overall quality of the representation.

F. Class Counsel's Costs and Expenses are Reasonable

Plaintiffs' counsel also request reimbursement of actual out-of-pocket expenses incurred to prosecute this action. These expenses were incidental and necessary to the effective representation of the Settlement Class, and Plaintiffs' counsel is permitted to recover litigation costs and expenses under the common fund doctrine and the Settlement Agreement. *Serrano*, 20 Cal.3d at 35 (common fund doctrine permits recovery of fees and costs from the fund); *Rider v. County of San Diego* (1992) 11 Cal.App.4th 1410, 1424 n.6 (costs are recoverable from the common fund "[o]f necessity, and for precisely the same reasons discussed above with respect to the recovery of

attorneys' fees by ... [Plaintiffs'] attorneys"). Plaintiffs' counsel also are entitled to recover "those out-of-pocket expenses that would normally be charged to a fee-paying client." *Harris v. Marhoefer* (9th Cir. 1994) 24 F.3d 16, 19.

As explained in the Almon Declaration, Class Counsel incurred a total of $392,349.47 in actual expenses over the past four years in connection with this litigation. These expenses include the amounts paid for court filing fees, service of process, expert witness fees for several different experts, postage/overnight delivery, deposition costs, Courtcall appearances, travel, court reporters/transcripts for court hearings, document retrieval, and mediation fees, all of which are costs normally billed to and paid by the client. These costs were reasonably incurred in the prosecution of this matter, and Plaintiffs request they be reimbursed in full. [Almon Decl., ¶¶ 91-92.]

VIII. CONCLUSION

For all the foregoing reasons, Plaintiffs respectfully request that the Court grant this motion and grant final approval of the class and representative action Settlement and approve the PAGA Payment to the State. Plaintiff further requests the Court approve payment of the Settlement Administrator's fees and expenses, approve the requested enhancements to Plaintiffs, approve the award of attorney's fees and costs as requested, and enter judgment in this action. Finally, Plaintiffs request the Court set a final compliance hearing for a date convenient for the Court in approximately September 2026.

Dated: August 16, 2023

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