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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

IA BROWN. an individual, on behalf of herself, all others similarly situated, and the general public,

Plaintiff,

v.

AUDIOLOGY DISTRIBUTION, LLC, a Delaware limited liability company; CRAIG CAMERON, an individual; HEARX WEST, INC., A California corporation; STEVE MAHON, an individual; TINO SCHWEIGHOEFER, an individual; HEARX WEST LLC, a Delaware limited liability company; WS AUDIOLOGY (CALIFORNIA), PC, A California professional corporation; SIVANTOS, INC., a Delaware corporation; and DOES 1 to 100, inclusive,

Defendants.

Case No. 2:22-cv-04271-DMG-MRW

NOTICE OF MOTION AND MOTION FOR APPROVAL OF CLASS COUNSEL'S FEES

DATE: December 6, 2024
TIME: 10:00 AM
LOCATION: Courtroom 8C, 8th Floor

Case Filed: June 22, 2022

TO THE COURT, DEFENDANT, AND ITS COUNSEL OF RECORD, PLEASE TAKE NOTICE: on December 6, 2024 at 10:00 AM, in Courtroom 8C, 8th Floor of the United States Courthouse for the United States District Court for the Central District of California, located at 350 W. 1st St., Los Angeles, CA 90012, Plaintiff and proposed Class Representative, Ia Brown, will and hereby does move for an order approving her counsel's request for attorney's fees in connection with the proposed class and collective action settlement. This motion is filed pursuant to this Court's order of July 19, 2024 (ECF 43) and based on this notice of motion, the memorandum of points and authorities below, the declaration of Paul T. Cullen, filed concurrently herewith, the exhibits attached thereto, the pleadings and other papers filed in this action, and on any further oral or documentary evidence or argument that may be presented at the time of hearing.

Dated: September 23, 2024

THE CULLEN LAW FIRM, APC

By: 

Paul T. Cullen
Attorneys for Plaintiff IA BROWN

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff Ia Brown's motion seeks an order approving her counsel's fee award in connection with her request for final approval of this nationwide wage and hour class and collective action for overtime and related claims premised on violations of the federal Fair Labor Standards Act ("FLSA," 29 U.S.C., § 201 et seq.), the California Labor Code, and the California Unfair Competition Law. The Settlement class is comprised of 1,435 persons, including 1,029 who worked outside of California and 406 who worked in California. The Settlement is an outstanding result. Pursuant to its terms Defendants will pay participating class members $1.8 million as well as the employer's share of payroll taxes for the wage portion of the settlement payment. In an obvious response to this lawsuit, Defendants changed their pay practices for current employees, and that has resulted in substantial relief for absent class members, who are current employees of Defendants.

This is a hybrid California class and nationwide collective action under the Labor Code and the FLSA, due to Defendants' alleged violations of law in computing overtime, i.e., that Defendants failed to properly compute overtime based upon the class members' regular rate of pay. The Settlement is non-reversionary. California class and subclass members do not need to submit a claim to participate in the Settlement. In contrast, because consent to be joined in an action brought under the FLSA is jurisdictional, FLSA collective class members must execute a declaration confirming their consent to be joined in the lawsuit to participate in the Settlement. Class Counsel, Paul T. Cullen, is now requesting a fee award that constitutes one third of the $1.8 million gross settlement, or $600,000. His lodestar is $362,230.00 and with a rather modest multiplier of 1.66, Plaintiff submits that the request is both reasonable and fair. The current status of claims administration strongly supports Class Counsel's fee award. There are still two weeks left for the submission of claims,

opt outs, and/or objections, and approximately 8.87% of FLSA collective class members (approximately 81 out of 1029 FLSA collective class members) have submitted claims. This is a fairly typical claims rate in an FLSA collective action. What is more, there are zero opt outs. In short, the class' response to date has been overwhelmingly favorable, and that, along with the other factor discussed below, strongly favors granting the motion.

Before filing this motion, counsel engaged in a pre-filing conference pursuant to LR 7-3 on multiple occasions, including, but not limited to April 23, 2024.

II. LEGAL ARGUMENT

As for the legal basis for attorney's fees and costs, a trial court has broad discretion to award attorney's fees based on either a lodestar/multiplier calculation or on the percentage of recovery method. *Hanlon v. Chrysler Corp.* (9th Cir. 1998) 150 F.3d 1011, 1029; *In re Bluetooth Headset Products Liability Litigation* (9th Cir. 2011) 654 F.3d 935, 942. Here, there is a common fund of $1.8 million. "It is well settled in the Ninth Circuit that: 'In a common fund case, the district court has discretion to apply either the loadstar method or the percentage-of-the-fund method in calculating a fee award. [Citation.]'" *In re Heritage Bond Litigation* (C.D. Cal., June 10, 2005, No. 02-ML-1475 DT) 2005 WL 1594403, at *18. This Court has previously concluded that awarding fees based on a percentage of a common fund is both typical and appropriate in cases like this. For example, in *Aichele v. City of Los Angeles* (C.D. Cal., Sept. 9, 2015, No. CV1210863DMGFFMX) 2015 WL 5286028, this Court observed, "While most circuits leave the method used to the discretion of the trial court, '[m]ost federal courts use the percentage of the fund approach in awarding attorneys' fees in common fund classes.' [Citing] *In re Enron Corp. Securities, Derivative & ERISA Litigation*, 586 F. Supp. 2d 732, 748 (S.D.Tex. 2008)." *Aichele v. City of Los Angeles* (C.D. Cal., Sept. 9, 2015, No. CV1210863DMGFFMX) 2015 WL 5286028, at *4. Expanding on that subject, this Court stated as follows:

Many courts and commentators have recognized that the percentage of the available fund analysis is the preferred approach in class action fee requests because it more closely aligns the interests of the counsel and the class, i.e., class counsel directly benefit from increasing the size of the class fund and working in the most efficient manner. *See, e.g., Vizcaino [v. Microsoft Corp.* (2002)*]* 290 F.3d at 1050 ("lodestar method is merely a cross-check on the reasonableness of a percentage figure, and it is widely recognized that the lodestar method creates incentives for counsel to expend more hours than may be necessary on litigating a case so as to recover a reasonable fee, since the lodestar method does not reward early settlement."); *Swedish Hosp. Corp. v. Shalala,* 1 F.3d 1261, 1266-67 & n.3, 1271 (D.C.Cir.1993) (noting that the lodestar approach "encourages significant elements of inefficiency" by giving attorneys an "incentive to spend as many hours as possible" and "a strong incentive against early settlement"; the percentage approach "more accurately reflects the economics of litigation practice"; "the monetary amount of the victory is often the true measure of success, and therefore it is most efficient that it influence the fee award"; accordingly, "we join the Third Circuit Task Force and the Eleventh Circuit, among others, in concluding that a percentage-of-the-fund method is the appropriate mechanism for determining the attorney fees award in common fund cases"); Silber and Goodrich, *Common Funds and Common Problems: Fee Objections and Class Counsel's Response*, 17 RevLitig 525, 534 (1998) (the percentage approach avoids numerous drawbacks of the lodestar approach and is preferable because "the attorneys will receive the best fee when the attorneys obtain the best recovery for the class. Hence, under the percentage approach, the class members and the

> class counsel have the same interest—maximizing the recovery of the class.").

Aichele, *supra*, 2015 WL at p. at *5. The court went on to note that,

> "A lodestar cross-check is not required in this circuit and, in a case such as this, may not be a useful reference point. *See, e.g., Glass v. UBS Financial Services, Inc*., 2007 WL 221862, 16 (N.D. Cal. 2007) (no lodestar cross-check required where an early settlement resulted in exceptional results for the class even though some class members and the New York attorney general objected to the 25% of the fund request as excessive).

Aichele, *supra*, 2015 WL at p. at *6. Here, Plaintiff seeks a fee award that is a typical percentage found in contingent fee contracts. One third is not excessive, and it is substantially less than the 40% by attorneys representing individual plaintiffs in employment matters. (See Cullen Decl., ¶ 16.)

A. The Comparison of the Benchmark with Counsel's Lodestar

At the hearing on the motion for preliminary approval, the Court indicated that, in the motion for attorney's fees, the Court wanted Class Counsel to provide a lodestar analysis as a crosscheck on the percentage fee award requested. A lodestar is the reasonable number of hours expended for the services provided, multiplied by the reasonable hourly rate, calculated at prevailing market rates for the same or similar services. *Hensley v. Eckerhart* (1983) 461 U.S. 424, 433; *Camacho v. Bridgeport Financial, Inc.* (9th Cir. 2008) 523 F.3d 973, 978. The lodestar figure may be adjusted based on several factors, to fix the fee award at the fair market value for the legal services provided in a contingent fee case. These factors include the novelty and difficulty of the questions presented; time and labor required; skill of the attorneys; preclusion of other employment; contingent risk of the action; awards in similar cases, and results achieved. *Wright v. Linkus Enterprises, Inc.* (E.D. Cal. 2009) 259 F.R.D. 468, 476. However, this is not a strict formula, and the court need not discuss each

factor. *Doran v. Corte Madera Inn Best Western* (N.D. Cal. 2005) 360 F.Supp.2d 1057, 1060–61. These factors are addressed below. Courts often compare an attorney's lodestar with a fee request made under the percentage of the fund method as a "cross-check" on the reasonableness of the requested fee. *See Vizcaino*, *supra*, 290 F.3d at p. 1050.

1. The Lodestar

Here, Class Counsel's lodestar is $362,230.00. Plaintiff's lodestar based on 329.3 hours that will have been spent on this case calculated as follows: **$1,100/hr. x 329.3 hrs. = $362,230.00.** Class Counsel has already spent 299.3 hours to achieve the Settlement that is before the Court. Class Counsel will undoubtedly spend dozens more hours (conservatively estimated at approximately 30 hours) in the briefing of final approval and in the further administration of this case. Evidence that the hours Class Counsel has devoted to this case are reasonable is found in **Exhibit 1** to the concurrently filed Declaration of Paul T. Cullen. **Exhibit 1** is a spreadsheet containing Class Counsel's time entries, which were created at the time the tasks were performed, and which record time worked to the closest one-tenth of an hour or six minutes. The time entries contained detailed activity descriptions and utilize ABA approved billing codes from its litigation billing code set. They reflect activities directly and reasonably related to the advancement of the class' claims herein.

2. The Rate:

Class Counsel's rate is $1,100/hour. To determine whether attorney rates are reasonable, courts look to prevailing market rates in the community in which the court sits. *Schwarz v. Secretary of Health & Human Services* (9th Cir. 1995) 73 F.3d 895, 906; *Camacho*, *supra*, 523 F.3d at p. 979. Attorney declarations constitute satisfactory evidence of prevailing market rates. *Welch v. Metropolitan Life Ins. Co.* (9th Cir. 2007) 480 F.3d 942, 947. Class Counsel's rate is reasonable considering his concurrently filed declaration, in which he attests to his skills, employment litigation experience, reputation, and fee awards to other attorneys of similar experience in California. Cullen Decl., ¶ 17-30.

Class Counsel has been awarded fees at similar rates over the past few years. Cullen Decl., ¶ 22.

Class Counsel's requested rate is also supported by case law, which has adopted the *Laffey* Matrix as a proper metric for measuring billing rates, along with adjustments to make it appropriate for Los Angeles based attorneys, like Plaintiff's counsel. *See Pasternack v. McCullough* (2021) 65 Cal.App.5th 1050, 1057 ("The *Laffey* Matrix is a United States Department of Justice billing matrix that provides billing rates for attorneys at various experience levels in the Washington, D.C., area and can be adjusted to establish comparable billing rates in other areas using data from the United States Bureau of Labor Statistics. [Citations.]") A copy of the current Laffey matrix is attached to the Cullen Decl. as **Exhibit 2.** California courts have relied upon the *Laffey* Matrix when determining awards of attorneys' fees. *See, e.g., Pasternack*, *supra*, 65 Cal.App.5th at p. 1056–57; *Syers Properties III, Inc. v. Rankin* (2014) 226 Cal.App.4th 691, 702–703. Because the *Laffey* Matrix measures rates in the Washington, D.C. area, courts applying the Matrix in California have found that local rates are higher than in the Matrix. *See Park v. Carlyle/Galaxy San Pedro, L.P.* (C.D. Cal., Oct. 8, 2009, No. CV 09-00793 MMM (AJWX)) 2009 WL 10669742, at *16 ("where use of the *Laffey* matrix has been disapproved, it has been because it produced a rate that the court determined was too low"); *In re Chiron Corp. Securities Litigation* (N.D. Cal., Nov. 30, 2007, No. C-04-4293 VRW) 2007 WL 4249902, at *6 (Chief Judge Vaughn R. Walker found that the *Laffey* rates must be increased by 4.6% to account for locality pay differential in Los Angeles).

The *Laffey* Matrix provides that attorneys in Washington, D.C. with 20+ years of practice bill at an average of $1,057 per hour. *See* Cullen Decl., ¶ 28 and **Exhibit 2.** Increasing this figure as Judge Walker did in *In re Chiron Corp.* by 4.6 percent, to account for the Los Angeles locality pay differential, results in a rate of $1,105.62 for Los Angeles attorneys with 20+ years of practice. Given that the requested rate here,

i.e., $1,100 per hour, Mr. Cullen, who is in his 28th year of practice, has a rate that is slightly lower than the rate in the *Laffey* Matrix as adjusted for Los Angeles.

3. The Multiplier:

Here, the requested multiplier is 1.66. Typically, when a lodestar is lower than the percentage of the fund sought, courts apply a multiplier to augment the lodestar to arrive at a fair market rate for attorney services. *Greene v. Dillingham Construction, N.A., Inc.* (2002) 101 Cal.App.4th 418, 427. The California Supreme Court confirmed this approach:

> The reasonable hourly rate is that prevailing in the community for similar work. The lodestar figure may then be adjusted, based on consideration of factors specific to the case, in order to fix the fee at the fair market value for the legal services provided.

PLCM Group v. Drexler (2000) 22 Cal.4th 1084, 1095, *as modified (June 2, 2000)* (internal quotations omitted). To determine if a lodestar multiplier is reasonable, courts consider many of the same factors they review to decide if the percentage of the fund recovery is reasonable. *Schiller v. David's Bridal, Inc.* (E.D. Cal., June 11, 2012, No. 1:10-CV-00616-AWI) 2012 WL 2117001, at *16, *report and recommendation adopted* (E.D. Cal., June 28, 2012, No. 1:10-CV-616-AWI-SKO) 2012 WL 13040405. Considering the analysis of these factors set forth below, the Court should approve the modest multiplier Class Counsel seeks.

What are typical multipliers approved by courts? "Multipliers can range from 2 to 4, or even higher." *Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 255 *disapproved of on other grounds by Hernandez v. Restoration Hardware, Inc.* (2018) 4 Cal.5th 260. "The customary range for multipliers is between 1.0 and 4.0." *Kim v. Space Pencil, Inc.* (N.D. Cal., Nov. 28, 2012, No. C 11-03796 LB) 2012 WL 5948951, at *7 (citing *Vizcaino*, *supra*, 290 F.3d at p. 1051 n. 6). In *Vizcaino*, *supra*, 290 F.3d 1043, the court approved a multiplier of 3.65, and in an appendix to the opinion, determined

that a range of multipliers in common fund cases is generally between 0.6 and 19.6, with most cases having multipliers between 1.0 and 4.0, and a bare majority between 1.5 and 3.0. *Id.* at p. 1052. Other courts agree: *Steiner v. American Broadcasting Co., Inc.* (9th Cir. 2007) 248 Fed.Appx. 780, 783 (affirming award with multiplier of 6.85); *Craft v. County of San Bernardino* (C.D. Cal. 2008) 624 F.Supp.2d 1113, 1123, 1125 (applying a 5.2 multiplier and collecting cases with cross-check multipliers ranging from 4.5 to 19.6); *Buccellato v. AT & T Operations, Inc.* (N.D. Cal., June 30, 2011, No. C10-00463-LHK) 2011 WL 3348055, at *2 (approving 4.3 multiplier and collecting cases with multipliers ranging from 4.4 to 9.3); *Keith v. Volpe*, 501 F.Supp.403, 414 (C.D. Cal. 1980) (multiplier of 3.5); *Sutter Health Uninsured Pricing Cases* (2009) 171 Cal.App.4th 495, 512 (multiplier of 2.52 found "fair and reasonable"); *Chavez v. Netflix, Inc.* (2008) 162 Cal.App.4th 43, 66 (multiplier of 2.5 was not "out of line with prevailing case law."); *Boyd v. Bank of America Corp.* (C.D. Cal., Nov. 18, 2014, No. SACV 13-0561-DOC) 2014 WL 6473804, at *11–12 (awarding 33% of the common fund, based on a multiplier of 2.58, in a wage and hour class action settlement); *Vandervort v. Balboa Capital Corp.* (C.D. Cal. 2014) 8 F.Supp.3d 1200, 1210 (awarding 33% of the common fund, based on a multiplier of 2.52 as "well within the range of acceptable multipliers in a common fund case.") Here, the multiplier is rather modest, and well within the range of the multipliers frequently approved by California courts.

Here, Class Counsel's lodestar, paired with the modest multiplier, strongly supports the reasonableness of the requested fee award of $600,000.00, or exactly 1/3 of the gross settlement amount.

B. Factors Supporting the Fee Award

This Settlement provides substantial relief to all class members without the delay and risks associated with certification, trial, appeal, and collection. Plaintiff's Counsel has 26 years of experience successfully prosecuting class actions (and 28 years in practice total), and he has been certified as class counsel in dozens of cases, several of

which certified in contested hearings. (*See* Cullen Decl. i.s.o. Preliminary Approval, i.e., ECF 37-1, at ¶ 79-96.) As such, he was able to assess the propriety of the proposed Settlement herein. His skill, experience, and efficiency ensured that this case was properly prosecuted from the outset, yielding a prompt and exceptional result for the Classes and Subclasses. As was explained in Class Counsel's declaration in support of preliminary approval, this settlement represents 102% of the projected value of the case, before adding attorney's fees and costs. At the hearing on Plaintiff's motion for Preliminary Approval, this Court acknowledged the exceptional result, and that it was obtained by the efficient, skilled, and diligent work of counsel. (Id at ¶ 41 and 44 at p. 7, 106 at p. 19.) Class Counsel has no conflicts with the Classes or Subclasses. (Id at ¶ 84 at p. 15.) Moreover, he is not a relative of the Plaintiff, and he has no financial interest in the proposed Claims Administrator. (Id at ¶ 85 at p. 15.) These basic factors favor the award requested, but there are several more.

1. Results Achieved:

Here, the exceptional results obtained through early settlement warrant an award of one third of the Settlement fund for attorney's fees. That is so, because "[t]he result achieved is a significant factor to be considered in making a fee award. [Citing] *Hensley*, *supra*, 461 U.S. at p. 436 (holding that the 'most critical factor is the degree of success obtained')." *In re Heritage Bond Litigation* (C.D. Cal., June 10, 2005, No. 02-ML-1475 DT) 2005 WL 1594403, at *19. In the *Heritage Bond Litigation* matter, Judge Tevrizian found that the recovery by the plaintiff's attorneys of approximately 36% of the class' total net loss represented an exceptional result,

> and is greater than those obtained in cases where class counsel was awarded one-third of a common fund. *See Med. X–Ray* 1998 WL661515, at *7–*8 (increasing 25% benchmark to 33.3% where counsel recovered 17% of damages); [*In re*] *Crazy Eddie* [*Securities Litigation*], 824 F.Supp.[320] at 326 (increasing 25% benchmark to 33.8% where counsel recovered 10% of damages); *In re Gen.*

> *Instruments Sec. Litig.,* 209 F.Supp.2d 423, 431, 434 (E.D.Pa.2001) (awarding one-third fee from $48 million settlement fund that was approximately 11% of the plaintiffs' estimated damages); *[In re] Corel [Corp. Inc. Securities Litigation,* (2003)*],* 293 F.Supp.2d at 489–90, 498 (permitting one-third fee award from $48 million settlement fund which represented approximately 15% of class' total net damages); *Cullen [v. Whitman Med. Corp.],* [(2000)] 197 F.R.D. at 148 (awarding one-third in fees from settlement of class consisting of defrauded vocational students that was 17% of the tuition that class members paid).

In re Heritage Bond Litigation (C.D. Cal., June 10, 2005, No. 02-ML-1475 DT) 2005 WL 1594403.

The recovery of 102% of the projected value of the case is substantially above the range of recoveries that has been approved by other district courts in California for wage and hour matters. *See, e.g., Bellinghausen v. Tractor Supply Company* (N.D. Cal. 2014) 303 F.R.D. 611, 623–24 (finding settlement amount of a wage and hour class action that equaled between 9% and 27% of the total potential liability was fair, adequate and reasonable given the uncertainty of continued litigation); *Thomas v. Cognizant Technology Solutions U.S. Corporation* (C.D. Cal., June 24, 2013, No. SACV111123JSTANX) 2013 WL 12371622, at *6 (granting final approval in wage and hour action where settlement encompassed between 4.4% and 5% of the maximum estimated liability figure); *Stovall-Gusman v. W.W. Granger, Inc.* (N.D. Cal., June 17, 2015, No. 13-CV-02540-HSG) 2015 WL 3776765, at *4 (granting final approval where total settlement amount represented approximately 10% of potential value).

The result obtained in this case is not just a little bit better than the cases cited above, where Class Counsel have been awarded one third of a common fund as fees, it is better by a factor of at least two (2) and even more than five (5). Plaintiff submits

that this factor alone justifies the award of fees at one-third of the $1.8 million common fund.

2. Risk

> There is no doubt that class actions are inherently risky.
>
> In a Federal Judicial Center 1996 report, titled "Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules" ("FJC Report"), the Report authors studied the outcomes of four federal districts and concluded that 31.7% or less of the filed class cases resulted in successful class outcomes for Plaintiffs. This does not account for the degree of success (i.e., some cases could have resulted in minimal or partial success, and they would still be in the successful claim category). Thus, an outcome such as that obtained in this case is the exception, not the rule. The FJC Report also examined the awarded fees and concluded that "attorneys' fees were generally in the traditional range of approximately one-third of the total settlement."

Aichele, *supra*, 2015 WL at p. at *5. The risk that further litigation might result in no recovery for Plaintiffs is an important factor to consider in the award of fees. *In re Omnivision Technologies, Inc.* (N.D. Cal. 2008) 559 F.Supp.2d 1036, 1046–47; *Vizcaino*, *supra*, 290 F.3d at p. 1048. Here, at the outset, while it seemed that Plaintiff would not likely have much difficulty in establishing liability, it was unclear due to the myriad of what appeared to be defunct corporate shells that once employed Plaintiff, whether Plaintiff would be able to ultimately collect any judgment obtained for what seemed to be a relatively clear violation of law. As the court will note while inspecting the docket, early in this litigation, the parties engaged in substantial negotiation regarding which parties would be dismissed and which would remain in the litigation, due to the multiple, related entities that had employed Plaintiff, several of which seemed to have been defunct organizations at the time this case was filed.

Moreover, as will be addressed further below, this litigation was undertaken by Class Counsel on a purely contingent basis, which meant that if Plaintiff had not succeeded, Class Counsel would be out not only the costs advanced out-of-pocket, but hundreds of thousands of dollars' worth of time. Courts routinely recognize that such risks, particularly for a sole practicioner, are worth a substantial reward.

3. Efficiency, Experience, and Skill of Counsel

This case resulted in early settlement and was not the subject of contentious litigation, due to careful observation and investigation by experienced class counsel. The case was litigated on a contingent fee basis and the Settlement is the result of arm's-length negotiations, overseen by a nationally renowned mediator, Hunter Hughes, and entered into only after Plaintiffs had obtained sufficient information by way of discovery and investigation to reasonably evaluate the case for settlement purposes. Plaintiffs' counsel has been litigating class actions in Los Angeles since 1998 and has successfully obtained verdicts and settlements in cases exceeding $75 million, predominantly as a sole practitioner.

4. Efforts Expended by Counsel:

As set forth in his Declarations (i.e., both the one filed in connection with the motion for preliminary approval (ECF 37-1) and the one filed concurrently herewith), Plaintiffs' counsel has worked on this case for two and one quarter years. His hours worked are recorded in detail in **Exhibit 1** to his declaration. Those time records establish that Class Counsel performed an investigation involving direct communication with multiple class members and with Ms. Brown. He prepared a Rule 26 conference report, analyzed documents from various sources, including documents that are publicly available, regarding the Defendants and their operations. He prepared a mediation brief and engaged in a half-day mediation after multiple days of direct negotiations with Defense counsel. Class Counsel took the lead role in preparing the settlement documents herein. Even after the initial draft of the settlement documents were prepared, the terms were subject to ongoing negotiations for nearly 12 weeks.

During that time, Class Counsel persuaded Defendants to increase the proposed settlement amount from $1.6 million to $1.8 million, based upon the triggering of an escalator clause he ensured to put in the Memorandum of Understanding executed on March 11, 2024, which constituted the framework for the long-form Settlement agreement preliminarily approved by the Court. Class Counsel will continue to be occupied with a multitude of tasks related to the resolution of this case, including, but not limited to preparing a motion for final approval, working with the Claims Administrator, and working with Plaintiff and absent class members as needed.

5. Contingent Nature of the Fee:

Courts recognize that the public interest is served by rewarding attorneys who assume representation on a contingent basis, with an *enhanced* fee to compensate them for the risk they might be paid nothing at all for their work. *See In re Washington Public Power Supply System Securities Litigation* (9th Cir. 1994) 19 F.3d 1291, 1299 ("Contingent fees that may far exceed the market value of the services if rendered on a non-contingent basis are accepted in the legal profession as a legitimate way of assuring competent representation for plaintiffs who could not afford to pay on an hourly basis regardless whether they win or lose."); *Vizcaino*, *supra*, 290 F.3d at p. 1051 (courts reward successful class counsel in contingency case "by paying them a premium over their normal hourly rates"). Here, Class Counsel prosecuted this case on a purely contingent basis, agreeing to advance all necessary expenses and taking a risk he would not get paid at all if there were no recovery. Class Counsel's outlay of time and money in this case has been considerable. As a sole practitioner, he has spent 299.3 hours investigating, analyzing, researching, litigating, and negotiating a favorable resolution of this case and incurred $6,319 in necessary litigation expenses. Cullen Decl., ¶ 5 and 74. Class Counsel expended these resources despite the very real risk he might never be compensated at all. Class Counsel's "substantial outlay, when there is a risk that none of it will be recovered, further supports the award of the requested fees" here. *In re*

Omnivision Technologies, Inc., *supra*, 559 F.Supp.2d at p. 1047. In sum, the contingent nature of Class Counsel's fee strongly favors granting the motion.

6. Awards in Similar Cases and Counsel's Reasonable Expectations:

District courts frequently approve attorneys' fees *exceeding* the benchmark of 25% of the settlement fund. "[I]n most common fund cases the award exceeds [the 25%] benchmark." *Knight v. Red Door Salons, Inc.* (N.D. Cal., Feb. 2, 2009, No. 08-01520 SC) 2009 WL 248367, at *6. Other case law surveys suggest that 50% is the upper limit, with 30-50% commonly being awarded in cases in which the common fund is relatively small. *See* 4 Newberg and Rubenstein on Class Actions § 14:6 (6th ed.). A review of California district court cases reveals that courts award attorneys' fees in the 30-40% range in wage and hour class actions resulting in substantial common funds: *See Vasquez v. Coast Valley Roofing, Inc.* (E.D. Cal. 2010) 266 F.R.D. 482, 491–92 (33.33% of the common fund in attorneys' fees awarded); *Linney v. Cellular Alaska Partnership* (N.D. Cal., July 18, 1997, No. C-96-3008 DLJ) 1997 WL 450064, at *7, *aff'd* (9th Cir. 1998) 151 F.3d 1234 (one-third of the common fund approved in attorneys' fees); *Carlin v. DairyAmerica, Inc.* (E.D. Cal. 2019) 380 F.Supp.3d 998, 1023 (awarding 33.3% of the fund holding that "all factors weigh in favor of an upward departure from the 25% benchmark-as allowed by Ninth Circuit and California law."); *Fernandez v. Victoria Secret Stores, LLC* (C.D. Cal., July 21, 2008, No. CV 06-04149 MMM SHX) 2008 WL 8150856, at *11 (awarding 34% of the common fund); *Singer v. Becton Dickinson and Co.* (S.D. Cal., June 1, 2010, No. 08-CV-821-IEG (BLM)) 2010 WL 2196104, at *8 (approving fee award of 33.33% of the common fund and holding that award was similar to awards in three other wage and hour class action cases where fees ranged from 30.3% to 40%); *Romero v. Producers Dairy Foods, Inc.* (E.D. Cal., Nov. 14, 2007, No. 1:05CV0484 DLB) 2007 WL 3492841, at *1, 3–4 (approving fee award of 33% of the class recovery in wage and hour class action involving allegations of unpaid wages and missed meal and rest breaks for a class of delivery

drivers). Plaintiffs' Class Counsel are frequently awarded one-third of the gross settlement in class settlements. *See Mejia v. Walgreen Co.* (E.D. Cal., Nov. 24, 2020, No. 2:19-CV-00218 WBS AC) 2020 WL 6887749, at *10 (listing "the lawyer's 'reasonable expectations'" as one of the factors considered in examining the reasonableness of the fee request). In sum, at one-third of the Settlement Amount, the fee award sought here is within the range of fees in class action cases commonly approved by California district courts, which, in turn, forms a basis for a reasonable expectation that they will be awarded here.

7. Preclusion of Other Employment

An additional factor that should be considered is the preclusion of other employment. As set forth in the concurrently filed declaration of Paul T. Cullen, as a sole practitioner, his dedication of 299.3 hours to the prosecution of this case already has necessarily precluded him from taking on other profitable matters.

8. The Reaction of the Class

The reaction of the class may also be considered when determining the reasonableness of a fee request. *In re Heritage Bond Litigation*, *supra*, 2005 WL at p. at *15; *see also National Rural Telecommunications Cooperative v. DIRECTV, Inc.* (C.D. Cal. 2004) 221 F.R.D. 523, 529 ("It is established that the absence of a large number of objections to a proposed class action settlement raises a strong presumption that the terms of a proposed class settlement action are favorable to the class members. [Citations.]"); *Richardson v. THD At-Home Services, Inc.* (E.D. Cal., Apr. 6, 2016, No. 1:14-CV-0273-BAM) 2016 WL 1366952, at *8. Here, the court-approved notice, clearly and explicitly stating the intention of Class Counsel to request $600,000.00 in attorneys' fees, was mailed to Class Members on August 23, 2024. Talavera Decl., ¶2. Class Members will have the opportunity to inspect Class Counsel's fee motion for another two weeks before their deadline to object to the settlement or requested attorneys' fees expires, because it will not only be available on PACER, it will also be available on the Claims Administrator's website that has been created for this

Settlement. *See In re Mercury Interactive Corp. Securities Litigation* (9th Cir. 2010) 618 F.3d 988, 993–94, holding that members must have the opportunity to object to the fee motion itself. To date, *zero* Class Members have objected to the settlement or attorneys' fees (and zero class members opted out). Moreover, approximately 8% of eligible FLSA collective class members have submitted claims, which is a fairly typical result in FLSA collective class settlements. Cullen Decl. ¶ 8. The absence of any objection to the request of attorneys' fees, after notice, indicates its reasonableness. *In re Immune Response Securities Litigation* (S.D. Cal. 2007) 497 F.Supp.2d 1166, 1177. Assuming that the claims process continues on its same trajectory, there will be abundant evidence supporting the requested attorneys' fees.

C. Class Counsel's Costs

The out-of-pocket costs Class Counsel incurred while prosecuting this action are also reasonable. Although this Court did not specifically order that Class Counsel seek costs in this motion for fees, Class Counsel has included this information so that, before the deadline to opt in, opt out, or object, class members are aware of the costs that have been incurred to date by Class Counsel in the prosecution of this case. It is anticipated that there will be no objections to the costs incurred, which will, in turn, provide further support for the Settlement at final approval. Plaintiff's costs in this case are approximately $6,319, the largest component of which is the mediator's fee of $5000. (*Ibid.* at ¶ 72-79.) The modest costs incurred in this case are because this case did not undergo contentious litigation. Instead, the case presents what Plaintiff considered to be one of clear liability, and Defendants were quick to try to resolve the case and correct their payroll errors. They and their counsel were transparent in their dealings with Plaintiff's Counsel, and they sought proactively to promptly resolve this matter after its filing. That kept costs to a minimum. Nevertheless, these costs are still substantial, and they were necessarily incurred in the furtherance of the objectives of this litigation. Defendant has agreed to reimburse Class Counsel for expenses incurred up to

$10,000. And as such, ordering Class Counsel to be reimbursed for these costs is not only supported by case law, it is entirely appropriate here.

III. CONCLUSION

Considering the foregoing, Plaintiff respectfully requests that the Court grant the instant motion providing the relief set forth in the proposed order lodged concurrently herewith.

Dated: September 23, 2024

PAUL T. CULLEN
THE CULLEN LAW FIRM, APC

By: /s./ *Paul T. Cullen*
Paul T. Cullen

Attorneys for PLAINTIFF IA BROWN

CERTIFICATE OF SERVICE

I, Paul T. Cullen, certify and declare as follow:

I am over the age of 18 and not a party to this action.

My business address is 9800 Topanga Canyon Boulevard; Suite D, PMB 325; Chatsworth, CA 91311-4057.

On September 23, 2024, I caused a copy of the following document:

NOTICE OF MOTION AND MOTION FOR APPROVAL OF CLASS COUNSEL'S FEES

to be served upon the following counsel via the Court's CM/ECF system:

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I declare under penalty of perjury that the foregoing is true and correct, and that I am employed in the office of a member of the bar of this Court at whose direction the service was made. Executed on September 23, 2024, at Los Angeles, California.

/s/ *Paul T. Cullen*
Attorneys for Plaintiff IA BROWN