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12

13 **UNITED STATES DISTRICT COURT**
14 **CENTRAL DISTRICT OF CALIFORNIA**
15 **WESTERN DIVISION**

16 MICHELLE KENDIG and JIM
17 KENDIG, individually and on behalf
of all similarly situated current and
18 former employees,

19 Plaintiffs,

20 v.

21 EXXONMOBIL OIL CORP.;
22 EXXONMOBIL PIPELINE
COMPANY; PBF ENERGY
23 LIMITED; TORRANCE REFINING
COMPANY, LLC; and DOES 1
through 10, inclusive.

24 Defendants,
25

Case No.: 2:18-cv-9224 MWF (SSx)

Assigned to Hon. Michael W. Fitzgerald

**PLAINTIFFS' NOTICE OF MOTION
AND MOTION FOR ATTORNEYS' FEES
AND REIMBURSEMENT OF COSTS**

DATE: August 17, 2020
TIME: 10:00 AM
CRTRM: 5A

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1 **TO DEFENDANTS AND THEIR ATTORNEYS OF RECORD:**

2 PLEASE TAKE NOTICE that on August 17, 2020 at 10:00 a.m., in Courtroom 5A
3 of the above-entitled court, at 350 West 1st Street, Los Angeles, CA 90012, Plaintiffs
4 Michelle Kendig and Jim Kendig will move and hereby do move for an award of
5 attorneys' fees in the amount of \$1,097,896 (25% of the common fund) and costs in the
6 amount of \$7,607.77.

7 The motion will be based on the Federal Rules of Civil Procedure, the foregoing
8 notice, points and authorities, and declarations and exhibits filed concurrently herewith,
9 and the pleadings, records, and files in this action.

10
11 DATED: June 25, 2020

**HADSELL STORMER
RENICK & DAI LLP**

12
13 By: s/ Randy Renick

14 Attorneys for Plaintiffs
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiffs Michelle Kendig and Jim Kendig, on behalf of themselves and the class
4 which has been certified for purposes of settlement, seek an award of attorneys’ fees of
5 \$1,097,896 (25% of the common fund) and reasonable costs of \$7,607.77 from the
6 proposed \$4,391,585 class action settlement (“Settlement”) reached in this action with
7 Defendants ExxonMobil Oil Corp., ExxonMobil Pipeline Company, PBF Energy
8 Limited, and Torrance Refining Company LLC.

9 The fees and costs are sought in connection with the class action settlement of
10 wage and hour claims brought on behalf of all current and former non-exempt hourly
11 employees holding an Operator position while employed by Defendants, or any of their
12 affiliates, working at Defendants’ refinery, distribution, and pipeline facilities in or
13 around Torrance, California (the “Torrance Refinery”) since September 18, 2014. The
14 Settlement was preliminarily approved by this Court on May 11, 2020. Dkt. 43. The
15 Settlement provides that Plaintiffs may seek reasonable fees and costs. *See* Declaration of
16 Randy Renick (“Renick Decl.”) ¶¶ 11, 22.

17 Based on all of the relevant circumstances, the fees requested at the Ninth Circuit’s
18 25%-of-the-fund benchmark are reasonable under the percentage-of-the-fund method
19 with lodestar crosscheck. The high caliber skill and expertise of Class Counsel, and
20 efficient litigation of the action, resulted in a settlement that confers a substantial benefit
21 to the Class. Indeed, every Class Member will receive payment, and the average payment
22 to each of the 335 Class Members is approximately \$9,500. Renick Decl. ¶ 20. In
23 addition, there was considerable risk that litigation of the action, taken by Class Counsel
24 on a contingency basis, would continue for many more years if the matter had not settled.
25 Courts of this district and circuit have awarded fees in the amount of 25% of the fund in
26 similar cases with these same factors present. They have also found these factors to
27 warrant a positive multiplier for purposes of a lodestar crosscheck, including a 2.5
28 multiplier as appropriate here.

1 Accordingly, Plaintiffs respectfully request that the Court grant the requested
2 award of attorneys' fees in the amount of \$1,097,896 (25% of the common fund) and
3 costs in the amount of \$7,607.77.

4 **II. BACKGROUND SUMMARY**¹

5 On September 18, 2018, Plaintiffs filed their class action complaint against
6 Defendants in *Michelle Kendig, et al., v. ExxonMobil Oil Corp., et al.* in the Los Angeles
7 Superior Court. The case was removed to District Court in the Central District of
8 California on October 26, 2018, Case No. 2:18-cv-9224. The Complaint alleged the
9 following causes of action on behalf of a class of operators working at the Torrance
10 refinery, distribution, and pipeline facilities in Los Angeles County: (1) failure to
11 authorize and permit duty free rest periods; (2) failure to furnish accurate wage
12 statements; (3) California Private Attorneys General Act ("PAGA") claims; and (4)
13 unfair competition. Plaintiffs sought unpaid wages, statutory penalties, restitution,
14 attorneys' fees and costs, interest, and injunctive and declaratory relief from September
15 18, 2014 to the present. Renick Decl. ¶ 12.

16 Both prior and subsequent to the filing of the Complaint, Plaintiffs conducted a
17 diligent investigation of Defendants' wage and hour practices, particularly with regard to
18 rest breaks, so as to evaluate liability and damages. Plaintiffs interviewed operators at the
19 refinery and reviewed extensive written materials, including employee handbooks,
20 training materials, and emergency protocol materials. In addition, Plaintiffs evaluated
21 payroll and timecard data for class members, which allowed Plaintiffs to calculate the
22 estimated total amount of damages for which Defendants would be liable were Plaintiffs
23 successful in their efforts to certify the class and prevail at trial. *Id.* ¶¶ 12-14.

24 On August 23, 2019, the Parties participated in mediation in Los Angeles,
25

26
27 ¹ This motion includes only a summary of the relevant background, as Plaintiffs will be
28 filing a separate motion for final approval to be heard on the same date as the instant
motion wherein the case history and facts will be more fully set out.

1 California, and were able to reach a settlement of all claims. *Id.* ¶ 14. The Settlement
2 was ultimately reduced to a written Joint Stipulation of Class Action Settlement and
3 Release (the “Settlement Agreement”), which has been executed by all parties. *Id.* ¶ 15.

4 Plaintiffs’ Motion for Preliminary Approval of Settlement Agreement was granted
5 on May 11, 2020. Dkt. 43. The Settlement provides that Defendants will pay \$4,391,585
6 for the benefit of the Class. The Settlement provides for cash payment to Class Members
7 according to the number of qualifying shifts worked by each class member during the
8 class period; additional service awards not to exceed \$7,500 for each of the two named
9 Plaintiffs; \$50,000 to penalties under the Private Attorneys General Act (“PAGA”), with
10 75% of the PAGA penalties (\$37,500) being paid to the California Labor and Workforce
11 Development Agency (“LWDA”) and 25% of the PAGA penalties (\$12,500) being paid
12 to Settlement Class Members who do not opt out; an estimated \$30,000 to CAC Services
13 for claims administration; and reasonable attorneys’ fees and costs. Renick Decl. ¶¶ 18-
14 19.

15 **III. ARGUMENT**

16 **A. Plaintiffs’ Fee Request for 25% of the Fund, \$ 1,097,896, Is Reasonable** 17 **Under Both the Percentage of the Fund and Lodestar Method.**

18 Federal Rule of Civil Procedure 23(h) provides that “[i]n a certified class action,
19 the court may award attorney’s fees and nontaxable costs that are authorized by law or
20 by the parties’ agreement.” Federal courts apply state law in diversity actions to
21 determine “not only the right to fees, but also in the method of calculating the fees.”
22 *Mangold v. Cal. Pub. Utils. Comm’n*, 67 F.3d 1470, 1478 (9th Cir. 1995).

23 The common fund doctrine provides that “‘when a number of persons are entitled
24 in common to a specific fund, and an action brought by a plaintiff or plaintiffs for the
25 benefit of all results in the creation or preservation of that fund, such plaintiff or
26 plaintiffs may be awarded attorney’s fees out of the fund.’” *Laffitte v. Robert Half*
27 *Internat., Inc.*, 1 Cal. 5th 480, 497 (2016); *see also Boeing Co. v. Van Gemert*, 444 U.S.
28 472, 478 (1980) (“[A] litigant or a lawyer who recovers a common fund for the benefit

1 of persons other than himself or his client is entitled to a reasonable attorney’s fee from
2 the fund as a whole.”). Under California law, the choice of a fee calculation method for
3 a fee award from a class action common fund “is generally one within the discretion of
4 the trial court, the goal under either the percentage or lodestar approach being the award
5 of a reasonable fee to compensate counsel for their efforts.” *Laffitte v. Robert Half*
6 *Internat., Inc.*, 1 Cal. 5th 480, 504 (2016). Similarly, under Ninth Circuit law, “[w]here
7 a settlement produces a common fund for the benefit of the entire class, courts have
8 discretion to employ either the lodestar method or the percentage-of-recovery method”
9 to award attorneys’ fees. *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 942
10 (9th Cir. 2011) (citing *In re Mercury Interactive Corp.*, 618 F.3d 988, 992 (9th Cir.
11 2010)); *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047 (9th Cir. 2002). “As always,
12 when determining attorneys’ fees, the district court should be guided by the
13 fundamental principle that fee awards out of common funds be ‘reasonable under the
14 circumstances.’” *In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1296
15 (9th Cir. 1994).

16 In the last few decades, both federal and state courts have regularly approved a
17 percentage fee calculation in determining a fee award where the class action settlement
18 establishes a common fund for the benefit of the class out of which the attorneys’ fee is
19 awarded. *Laffitte*, 1 Cal. 5th at 493-94 (citing federal and state cases). In *Laffitte*, the
20 California Supreme Court approved the percentage of the fund calculation under
21 California law, holding that “trial courts have discretion to conduct a lodestar cross-
22 check on a percentage fee . . . [or] to forgo a lodestar cross-check and use other means
23 to evaluate the reasonableness of the requested percentage fee.” *Id.* at 506.

24 Courts have recognized a number of reasons and advantage in adopting the
25 percentage of fund method for the fee calculation. *In re Omnivision Techs.*, 559 F.
26 Supp. 2d 1036, 1046 (N.D. Cal. 2007). A primary reason is that “a percentage-of-the-
27 fund approach more accurately reflects the economics of litigation practice,” which is
28 “result-oriented.” *Swedish Hosp. Corp. v. Shalala*, 1 F.3d 1261, 1269 (D.C. Cir. 1993).

1 In a common fund case, as here, “the monetary amount of the victory is often the true
2 measure of success, and therefore it is most efficient that it influence the fee award.”
3 *Id.* In addition, courts have found use of the percentage of the fund method to be the
4 “better practice” because it “will encourage plaintiffs’ attorneys to move for early
5 settlement, provide predictability for the attorneys and the class members, and reduce
6 the time consumed by counsel and court in dealing with voluminous fee petitions.” *In*
7 *re Activision Sec. Litig.*, 723 F. Supp. 1373, 1378-79 (N.D. Cal. 1989).

8 The Court, therefore, should apply a percentage of fund and use the lodestar to
9 cross-check its approach. The application of the lodestar will confirm that the requested
10 fee award of 25% of the settlement fund, \$1,097,896, is reasonable.

11
12 **1. Using the Percentage of Fund Method, Class Counsel’s Fee Request Is Reasonable.**

13 In approving the percentage of the fund method, the California Supreme Court in
14 *Laffitte* instructed only that courts “may determine the amount of a reasonable fee by
15 choosing an appropriate percentage of the fund created.” 1 Cal. 5th at 503 (emphasis
16 added). Looking to the range of fee awards, one-third of the total potential recovery is
17 regularly awarded in California as a “reasonable” fee in common fund cases. *Laffitte v.*
18 *Robert Half Int’l Inc.*, 231 Cal. App. 4th 860, 878 (2014) (concluding that award of
19 one-third the common fund was “consistent with, and in the range of, awards in other
20 class action lawsuits”); *In re Consumer Privacy Cases*, 175 Cal. App. 4th 545, 557 n.13
21 (2009) (“Empirical studies show that, regardless whether the percentage method or the
22 lodestar method is used, fee awards in class actions average around one-third of the
23 recovery.”); *Chavez v. Netflix, Inc.*, 162 Cal. App. 4th 43, 66 (2008) (same). Plaintiffs
24 request a fee award of 25% of the settlement fund, which is *well below* the average one-
25 third of the recovery regularly awarded in such cases.

26 “As there is no definitive set of factors that California courts mandate or endorse
27 for determining the reasonableness of attorneys’ fees in the context of a common-fund
28 percentage-of-the-benefit approach, [federal courts] consider the reasonableness of the

1 percentage requested in light of the factors endorsed by the Ninth Circuit, with the 25
2 percent award as a starting point.” *Schiller*, 2012 U.S. Dist. LEXIS 80776, at *47
3 (applying percentage of the fund method in wage and hour class case); *see, e.g., In re*
4 *Consumer Privacy Cases*, 175 Cal. App. 4th at 557 n.13 (citing *Six Mexican Workers v.*
5 *Arizona Citrus Growers*, 904 F. 2d 1301, 1311 (9th Cir. 1990)). Courts in the Ninth
6 Circuit “typically calculate 25% of the fund as the ‘benchmark’ for a reasonable fee
7 award, providing adequate explanation in the record of any ‘special circumstances’
8 justifying a departure.” *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 942
9 (9th Cir. 2011). The Ninth Circuit has identified a number of factors that courts may
10 consider when determining whether an award is reasonable and whether a departure
11 from the benchmark is appropriate, including: (1) the results achieved; (2) the risk of
12 litigation; (3) the skill required; (4) the quality of work performed; (5) the contingent
13 nature of the fee and the financial burden; and (6) the awards made in similar cases. *See*
14 *Barbosa v. Cargill Meat Solutions Corp.*, 297 F.R.D. 431, 449 (E.D. Cal. 2013) (citing
15 *Vizcaino*, 290 F.3d at 1047).

16 As addressed herein, the fee award requested by Class Counsel at the Ninth
17 Circuit’s 25% benchmark falls within what has been deemed reasonable ranges under
18 both California and Ninth Circuit law and is supported by the *Vizcaino* factors.

19 **a) Class Counsel Achieved an Excellent Result.**

20 Class Counsel achieved an excellent result in this case (the first *Vizcaino* factor).
21 “The overall result and benefit to the class from the litigation is the most critical factor in
22 granting a fee award.” *Lusby v. Gamestop Inc.*, 2015 U.S. Dist. LEXIS 42637, at *9
23 (N.D. Cal. Mar. 31, 2015). “Compromise is inherent and necessary in the settlement
24 process [E]ven if the relief afforded by the proposed settlement is substantially
25 narrower than it would be if the suits were to be successfully litigated, this is no bar to a
26 class settlement because the public interest may indeed be served by a voluntary
27 settlement in which each side gives ground in the interest of avoiding litigation.”
28 *Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 250 (2001) (quotations omitted).

1 A settlement, therefore, need not obtain 100% of the damages and may, in fact, provide
2 only a fraction of the recovery sought to be found fair and reasonable. *Linney v. Cellular*
3 *Alaska P'ship*, 151 F.3d 1234, 1242 (9th Cir. 1998); *Wershba*, 91 Cal. App. 4th at 250.

4 Here, the net settlement to be distributed to the Class after the reduction of the
5 LWDA payment for PAGA penalties, attorneys' fees, costs, incentive awards, and
6 administration is \$3,181,189.00.² Renick Decl. ¶ 19. The average payment to each of the
7 335 Class Members is approximately \$9,500 with a median of approximately \$10,800.
8 *Id.* ¶ 20. Class members who worked the highest number of qualifying Shifts during the
9 class period will receive as much as \$20,636.79. *Id.* Thus, the financial benefit conferred
10 upon the class is significant, and the settlement is an excellent result for the class. *Id.* ¶¶
11 19-21.

12 Moreover, the settlement is supported by the class representatives and the union
13 that represents many of the workers in this case, and, to date, no class members have
14 objected to the Settlement Agreement's provisions. Young Decl. ¶¶ 7, 18.

15 **b) Class Counsel Litigated the Case on a Contingency Basis**
16 **and Faced Considerable Risk.**

17 The risk of further litigation and contingent nature of the fee and the financial
18 burden, the second and fifth *Vizcaino* factors, favor approval of the requested fee award.
19 *See In re Pac. Enter. Sec. Litig.*, 47 F.3d 373, 379 (9th Cir. 1995).

20 Plaintiffs faced a considerable risk of further litigation here. Plaintiffs filed the case
21 following the California Supreme Court's decision in *Augustus v. ABM Security Services,*
22 *Inc.*, 2 Cal. 5th 257 (2016). While Plaintiffs believed that the decision provided clear
23 guidance regarding employer's rest break obligations under California law and confirmed
24 Defendants' failure to provide its operators with lawful rest breaks, district courts have

25 _____
26 ² This calculation assumes that Plaintiffs seek the full amount of estimated costs of
27 \$30,000. As Plaintiff's request for costs is only \$7,607.77, the amount available to the
28 Class increases by \$22,392.23, resulting in a slight increase to the amount to be
distributed to each Class Member. Plaintiffs will provide an exact calculation in
connection with the Motion for Final Approval. Renick Decl. ¶ 19.

1 since diverged in their interpretation and application of the decision. *See, e.g., Bell v.*
2 *Home Depot U.S.A., Inc.*, No. 2:12-cv-02499 JAM-CKD, 2017 U.S. Dist. LEXIS 55442,
3 at *5 (E.D. Cal. Apr. 10, 2017) (concluding *Augustus* not applicable because the court did
4 not consider an on-premises rest break policy which does not require employees to
5 remain on call). Moreover, Defendants PBF Energy Limited and Torrance Refining
6 Company LLC have taken the position that the class period ended on September 20,
7 2018, when California Governor Gavin Newsom approved Assembly Bill No. 2605, a
8 law which exempts employees who hold safety-sensitive positions at petroleum refineries
9 from rest break laws to the extent they are required to carry radios, respond to
10 emergencies, and remain on the employer’s premises during their shifts. *See* Cal. Lab.
11 Code § 226.75(a). Plaintiffs’ position is that based on the plain language of AB 2605, the
12 exemption does not apply to “existing cases filed before the effective date” of the law, as
13 this one was. Cal. Lab. Code § 226.75(g). Renick Decl. ¶ 31.

14 Indeed, with class claims for violation of rest break and other wage and hour laws,
15 litigation can extend for many years due to the many hurdles facing plaintiffs in class
16 actions. *See, e.g.,* Renick Decl. ¶¶ 28-29 (class actions involving overtime, living wage,
17 and/or meal and rest break violations litigated five years, six years, and more than 10
18 years before resolving). Accordingly, many more years of litigation and an appeal was a
19 very real possibility here.

20 Second, the fact that Class Counsel litigated this case on a contingency fee basis
21 and has foregone payment since the outset of the litigation supports the percentage sought
22 in the instant motion. Renick Decl. ¶ 27; Young Decl. ¶ 17. “Courts are loathe to
23 penalize experienced counsel for efficient representation under contingency agreements.”
24 *Sproul v. Astrue*, 2013 U.S. Dist. LEXIS 12667, at *6 (S.D. Cal. Jan. 30, 2013). “Courts
25 consistently recognize that the risk of non-payment or reimbursement of expenses is a
26 factor in determining the appropriateness of counsel’s fee award.” *In re Heritage Bond*
27 *Litig.*, 2005 U.S. Dist. LEXIS 13555, at *68 (C.D. Cal. June 10, 2005). Thus, Class
28 Counsel’s vigorous but efficient litigation of this case on a contingency fee basis with no

1 certainty of recovery of its fees and costs supports an award of 25% of the common fund
2 in attorneys' fees.

3 **c) The Skill and Quality of the Work Performed by Class**
4 **Counsel Merits Approval of the Requested Fee Award.**

5 The experience, ability, and quality of Class Counsel's work, the third and fourth
6 *Vizcaino* factors, support the requested fee award. Class Counsel in this case has
7 extensive experience successfully litigating wage-and-hour class actions, as well as other
8 types of employment actions. Renick Decl. ¶¶ 4-8 & Ex. 1 thereto; Young Decl. ¶¶ 3-8.
9 Mr. Renick and Ms. Dai at Hadsell Stormer Renick & Dai as well as Mr. Young at
10 Gilbert & Sackman have been recognized for their skill and expertise in the field of
11 employment and class action litigation. *Id.* Moreover, both firms have extensive
12 experience litigating wage and hour claims on behalf of oil refinery operators. Renick
13 Decl. ¶ 30 & Ex. 1; Young Decl. ¶¶ 5, 7.

14 This Court can note that defense counsel in this case is also highly skilled. *Cf. In*
15 *re Equity Funding Corp. Sec. Litigation*, 438 F. Supp. 1303, 1336-37 (C.D. Cal. 1977)
16 (“[P]laintiffs’ attorneys in this class action have been up against established and skillful
17 defense lawyers, and should be compensated accordingly.”). The defendants in this case
18 are represented by attorneys from well-regarded law firms representing sophisticated
19 clients with formidable resources.

20 Class Counsel's high-quality and effective representation of the class is further
21 evidenced by Defendants' desire to mediate prior to protracted motion and discovery
22 work, including class certification. *See* Renick Decl. ¶ 10. *See, e.g., Barbosa v. Cargill*
23 *Meat Solutions Corp.*, 297 F.R.D. 431, 449 (E.D. Cal 2013) (In awarding fees, the court
24 recognized the “specialized skill” of Class Counsel in wage-and-hour law was an “asset
25 to Class Members” and found the “quality of the work performed was good.”).

26 **d) The Amount Requested to Compensate Class Counsel is**
27 **Reasonable in Comparison to Awards in Similar Cases.**

28 The final *Vizcaino* factor – comparable awards in similar cases – supports Class
Counsel's request for 25% of the common fund. Federal courts “have consistently

1 approved of attorney fee awards over the 25% benchmark,” specifically at a rate of “30%
2 or higher.” *In re Heritage Bond Litig.*, 2005 U.S. Dist. LEXIS 13555, at *18 n.12 (C.D.
3 Cal. June 10, 2005). This range is consistent with California law. *See Laffitte*, 231 Cal.
4 App. 4th at 878 (one-third of the fund); *In re Consumer Privacy Cases*, 175 Cal. App.
5 4th at 557 n.13 (one third of the recovery); *Chavez*, 162 Cal. App. 4th at 66 (same). In
6 fact, fifty percent has generally been accepted as the “upper limit, with 30-50%
7 commonly being awarded in cases in which the common fund is relatively small.”
8 *Martin v. AmeriPride Servs.*, 2011 U.S. Dist. LEXIS 61796, at *22-*23 (S.D. Cal. June
9 9, 2011).

10 Under the very circumstances here, where Class Counsel achieves a positive result
11 quickly and prior to extensive motion practice or class certification, courts in this district
12 and others of this Circuit have consistently found the 25% of the fund benchmark to be
13 an appropriate fee award. *See, e.g., Navarro v. Servisair*, No. C 08-02716 MHP, 2010
14 U.S. Dist. LEXIS 41081, at *10 (N.D. Cal. Apr. 26, 2010) (finding “a 25% fee consistent
15 with the Ninth Circuit benchmark” appropriate where class action settlement reached
16 “relatively quickly without litigating any motions for summary judgment or class
17 certification”); *Bravo v. Gale Triangle, Inc.*, No. CV 16-03347 BRO (GJSx), 2017 U.S.
18 Dist. LEXIS 77714, at *47-*48 (C.D. Cal. Feb. 16, 2017) (finding award of the standard
19 25% fee benchmark appropriate where settlement “was a favorable result” “but not
20 exceptional” and “reached after two mediations and before the case had reached class
21 certification or otherwise participated in motion practice”); *Ozga v. U.S. Remodelers,*
22 *Inc.*, No. C 09-05112 JSW, 2010 U.S. Dist. LEXIS 91196, at *7-*8 (N.D. Cal. Aug. 9,
23 2010) (concluding a deviation upward from 25% benchmark to 29% appropriate where
24 Plaintiff’s counsel obtained an excellent result, received an overwhelmingly positive
25 reaction to the settlement, and faced a significant risk in prosecuting this case given the
26 uncertain state of California law in similar wage and hour cases but “reached this
27 settlement quickly and did not engage in any motion practice”).

28 ///

1 **2. Based on Fees Calculated under the Lodestar Method, Class**
2 **Counsel’s Fee Request is Also Reasonable.**

3 Under both California and Ninth Circuit law, a lodestar cross-check on a
4 percentage fee is acceptable. *Laffitte*, 1 Cal. 5th at. at 506; *Vizcaino*, 290 F.3d at 1043. In
5 addition, the court “may increase or decrease [the lodestar] amount by applying a positive
6 or negative ‘multiplier’ to take into account a variety of other factors, including the
7 quality of the representation, the novelty and complexity of the issues, the results
8 obtained, and the contingent risk presented.” *Lealao v. Beneficial Cal., Inc.*, 82 Cal. App.
9 4th 19, 26 (2000); see *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1029 (9th Cir. 1998)
10 (identifying same factors).

11 **a) Class Counsel’s Rates are Reasonable.**

12 In order to calculate the lodestar, a court must determine the reasonable hourly rate
13 for the services rendered by class counsel. *Consumer Privacy Cases*, 175 Cal. App. 4th
14 545, 556 (2009). A reasonable rate is typically based upon the prevailing market rate in
15 the community for similar work performed by attorneys of comparable skill, experience,
16 and reputation. *Heritage Pac. Fin., LLC v. Monroy*, 215 Cal. App. 4th 972, 1009 (2013).
17 Generally, the “market rate” is based on the rates in the community where the court is
18 located. *Altavion, Inc. v. Konica Minolta Sys. Lab., Inc.*, 226 Cal. App. 4th 26, 71 (2014);
19 *Camacho v. Bridgeport Fin., Inc.*, 523 F.3d 973, 979 (9th Cir. 2008).

20 As set forth in the supporting declarations of counsel,³ the hourly rates applied
21 here are consistent with the attorneys’ and paralegals’ skill and experience and reflect the
22 prevailing market rates. Renick Decl. ¶¶ 5-9, 33-43; Young Decl. ¶¶ 3-9, 14. The
23 requested rates are also consistent with and comparable to rates approved by courts in
24 this district and in cases similarly filed by counsel against other oil refineries for rest
25 break violations. Renick Decl. ¶¶ 33-43; Young Decl. ¶ 14.

26 _____
27 ³ “Affidavits of the plaintiffs’ attorney . . . regarding prevailing fees in the community,
28 and rate determinations in other cases, particularly those setting a rate for the plaintiffs’
attorney, are satisfactory evidence of the prevailing market rate.” *Heritage Pac. Fin.*, 215
Cal. App. 4th at 1009. The court may also “rely on its own knowledge and familiarity
with the legal market in setting a reasonable hourly rate.” *Id.*

1 **b) Plaintiffs' Lodestar Amount for Hours Expended Is**
2 **Reasonable.**

3 Below are charts reflecting the hours worked on this case by the two firms
4 representing the class, Hadsell Stormer Renick & Dai LLP and Gilbert & Sackman:

5 Hadsell Stormer Renick & Dai LLP

	<u>Hours</u>	<u>Hourly Rate</u>	<u>Lodestar</u>
Randy Renick (Partner)	183.7	\$875	\$160,737.50
Cornelia Dai (Partner)	97.5	\$775	\$75,562.50
Elizabeth Song (Associate)	43.2	\$450	\$19,440.00
Maria Stroud (Paralegal)	<u>20.4</u>	\$300	<u>\$6,120.00</u>
Total	344.8		\$261,860.00

11 Gilbert & Sackman

	<u>Hours</u>	<u>Hourly Rate</u>	<u>Lodestar</u>
Joshua Young (Partner)	150.8	\$750	\$113,100.00
Mitzi Marquez (Associate)	<u>9.9</u>	\$325	<u>\$3,217.50</u>
Total	160.7		\$116,317.50

16 Renick Decl. ¶ 24; Young Decl. ¶ 12.

17 The combined lodestar for the two firms at the time of the filing of this motion is
18 \$378,177.50 (which would require a 2.9 multiplier). In addition, Plaintiffs' counsel
19 expects to spend an additional 100 hours meeting with class members, preparing the
20 motion for final approval, resolving claims, working with the Administrator to ensure that
21 the settlement amount is properly allocated to class members and distributed to each class
22 member. Renick Decl. ¶ 17; Young Decl. ¶¶ 16, 19. The additional hours represent a
23 lodestar of approximately \$60,000, resulting in a total lodestar of \$438,177.50 and a
24 multiplier of 2.5. Renick Decl. ¶ 17. As described below, the number of hours expended
25 by the two firms on the case was reasonable.⁴

26 _____
27 ⁴ “[T]rial courts conducting lodestar cross-checks have generally not been required to
28 closely scrutinize each claimed attorney-hour, but have instead used information on

1 *Due Diligence and Initiation of Lawsuit*— In the summer of 2018, Class Counsel
2 conducted their due diligence in evaluating the filing of a lawsuit against Defendants on
3 behalf of refinery operators for failure to comply with their duty to provide rest breaks in
4 compliance with California law, as clarified by the California Supreme Court in *Augustus*
5 *v. ABM Security Services, Inc.*, 2 Cal. 5th 257 (Dec. 22, 2016) (modified on March 15,
6 2017). The tasks performed included legal research, investigating the facts and evidence
7 available via witnesses and documents, and communications regarding strategies and
8 legal theories. Class Counsel also spent time researching, preparing, and filing the class
9 action complaint against Defendants on September 18, 2018, which initiated the lawsuit
10 in the Los Angeles County Superior Court, captioned as *Michelle Kendig, et al., v.*
11 *ExxonMobil Oil Corp., et al.* The lawsuit, which was removed by Defendants to this
12 Court on October 26, 2018, alleges the following causes of action: (1) failure to authorize
13 and permit duty free rest periods; (2) failure to furnish accurate wage statements; (3) the
14 California Private Attorneys General Act; and (4) unfair competition. Plaintiffs sought
15 unpaid wages, statutory penalties, restitution, attorneys’ fees and costs, interest, and
16 injunctive and declaratory relief for the time period from September 18, 2018 to the
17 present. Plaintiffs alleged that Defendants violated California’s wage and hour laws by
18 not providing them with rest breaks, by failing to pay them premium wages for missed
19 rest breaks, and by failing to provide accurate wage statements. Plaintiffs’ counsel spent
20 124.2 hours on the case related to these tasks. Renick Decl. ¶ 12; Young Decl. ¶¶ 10, 13.a.

21 *Discovery.* Following the negotiation and entry of a stipulated protective order on
22 April 24, 2019, Plaintiffs turned their attention to obtaining written discovery necessary
23 to support their contemplated Motion for Class Certification and ultimately for trial. The
24 discovery propounded by Plaintiffs included Special Interrogatories, Requests for
25 Admission, and Requests for the Production of Documents. The discovery was carefully

26 attorney time spent to “focus on the general question of whether the fee award
27 appropriately reflects the degree of time and effort expended by the attorneys.” *Laffitte*, 1
28 Cal. 5th at 505.

1 tailored to focus on establishing Defendants' workplace policies and practices as well
2 timecard and payroll records for each of the Class Members. Defendants produced their
3 discovery in late July 2019. In addition, counsel met and spoke with the Named Plaintiffs
4 regularly to obtain information necessary to prosecute the case and satisfy Plaintiffs'
5 obligations under the Federal Code of Civil Procedure. Counsel carefully reviewed both
6 the documents produced by Defendants as well as documents produced by the Named
7 Plaintiffs, including collective bargaining agreements, workplace manuals, employee
8 handbooks, schedules, policies and paychecks. Plaintiffs' counsel spent 40.3 hours on the
9 case related to these tasks. Renick Decl. ¶ 13; Young Decl. ¶¶ 10, 13.b.

10 *Early Mediation*— After the parties exchanged extensive written discovery and
11 documents, Class Counsel prepared for the mediation scheduled with T. Warren Jackson
12 in Los Angeles, California. As part of their preparation, Class Counsel reviewed
13 Defendants' payroll and timecard data containing all of the shifts worked by class
14 members during the class period as well as documents, including collective bargaining
15 agreements, which reflected the specific pay rate which applied to each of those shifts.
16 Based on that data, Class Counsel was able to assess damages and perform damage
17 calculations. Renick Decl. ¶ 14.

18 Class Counsel also interviewed operators at the refinery and reviewed thousands of
19 pages of relevant written materials, including employee handbooks, training materials,
20 and emergency protocol materials. In addition, they conducted further legal research and
21 drafted the mediation brief. In addition, Class Counsel communicated with and met with
22 the named plaintiffs in advance of the mediation. On August 23, 2019, the Parties
23 participated in mediation with Mr. Jackson and reached a settlement in principle of their
24 claims against the ExxonMobil Defendants only, but not Defendants PBF Energy Limited
25 or Torrance Refinery LLC. The following month, through further discussions mediated
26 by Mr. Jackson, Plaintiffs entered into a settlement that also included the remaining
27 Defendants PBF Energy Limited and Torrance Refinery LLC, thereby settling their
28 claims against all Defendants in this action for a total settlement amount of \$4,391,585.

1 Plaintiffs’ counsel spent 145.4 hours on the case related to these tasks. Renick Decl. ¶ 14;
2 Young Decl. ¶¶ 10, 13.c.

3 *Settlement Agreement and Preliminary Approval*— Over the following six months,
4 the parties engaged in robust negotiations to finally reach agreement on all terms of the
5 written settlement agreement. During this time, the parties addressed the various deal
6 points that were not a part of the original agreement, including notice to the class,
7 funding, and plan for distribution. In addition, Class Counsel worked with the claims
8 administrator to formalize the administration process, including mailing of the Notice and
9 Claim Form, follow-up letters and calls, and to address other issues arising out of the
10 claim process. Class Counsel also worked on drafting the settlement agreement and
11 notice and reviewing and addressing the responses and edits from defense counsel. The
12 agreement was ultimately reduced to writing. Dkt. 32-2, Ex. 1. During this time, Class
13 Counsel also communicated with the named plaintiffs regarding the settlement.
14 Thereafter, Class Counsel drafted the Motion for Preliminary Approval and supporting
15 documents. Plaintiffs’ counsel spent 127.1 hours on tasks relating to the written
16 settlement agreement, coordinating with the Claims Administrator, and obtaining
17 preliminary approval. Renick Decl. ¶ 15; Young Decl. ¶¶ 10, 13.d.

18 *Claims Administration and Fee Motion*— Following the Court’s order granting
19 preliminary approval, Class Counsel worked closely with the named plaintiffs and the
20 class members, including conducting virtual meetings and conference calls with class
21 members, to ensure that class members fully understand the Settlement and Notice and to
22 answer their questions. In addition, Class Counsel maintained regular communication
23 with the claims administrator to ensure that the Court’s preliminary approval order was
24 followed with respect to the notice and claims process. Class Counsel also spent time
25 preparing Plaintiffs’ Motion for Attorneys’ Fees and Reimbursements of Costs. To date,
26 Plaintiffs’ counsel has spent 68.5 hours on the case related to claims administration, the
27 fee motion, and meetings with the Class. Renick Decl. ¶ 16; Young Decl. ¶¶ 10, 13.d.

28 ///

1 c) **An Upward Multiplier Is Appropriate Under the**
2 **Circumstances of this Case.**

3 Based on the total lodestar of \$438,177.50, the lodestar cross-check requires a 2.5
4 multiplier to be equivalent to the fee amount sought here. An upward multiplier is
5 supported by the factors California and federal courts consider for this determination. *See*
6 *Lealao*, 82 Cal. App. 4th at 26; *see Hanlon*, 150 F.3d at 1029. Here, Class Counsel
7 achieved a very successful result with a relatively large recovery for individual class
8 members, an average payment to each of the 335 Class Members is approximately
9 \$9,500. Renick Decl. ¶ 20. Further, it was likely that the action would be highly
10 contested and lengthy given the inherently complex nature of class actions and the
11 lengthy settlement negotiations, which were finalized over the course of several months.
12 In addition, this case was taken on a contingency basis by experienced and well-regarded
13 counsel. Renick Decl. ¶ 27, Young Decl. ¶ 17.

14 Indeed, with the presence of similar factors, the court in *Reed v. 1-800 Contacts,*
15 *Inc.*, No. 12-cv-02359 JM (BGS), 2014 U.S. Dist. LEXIS 255, at *26-28 (S.D. Cal. Jan.
16 2, 2014), approved a 25 percent of \$11.7 million settlement fee award which was
17 supported by a lodestar cross-check with a multiplier of more than 2.9. The court found
18 that approval of this multiplier was further supported by the frequent approval by the
19 Ninth Circuit of much higher multipliers. *Id.* at *28 (citing *Vizcaino*, 290 F.3d at 1051
20 n.6 and Appendix [citing cases utilizing a range of multipliers “of 0.6-19.6, with most
21 (20 of 24, or 83%) from 1.0-4.0 and a bare majority (13 of 24, or 54%) in the 1.5-3.0
22 range”]).

23 For these reasons, the Court should approve Plaintiffs’ request for a fee award of
24 25 percent of the \$4,391,585 settlement fund, supported here by a lodestar cross-check
25 with a 2.5 multiplier.

26 **B. The Costs that Class Counsel Seek for Reimbursement Are Reasonable.**

27 Class Counsel also seeks reimbursement of \$7,607.77 (HSR&D: \$3,861.80; and
28 G&S: \$3,745.97) in costs incurred in prosecuting this case. Renick Decl. ¶¶ 44-45;

1 Young Decl. ¶¶ 20-27. The Settlement Agreement provides for the reimbursement of
2 reasonable costs. Renick Decl. ¶ 11. Plaintiffs' costs are set forth in detail in the
3 declarations of Class Counsel. *Id.* ¶ 44; Young Decl. ¶¶ 20-27. "There is no doubt that an
4 attorney who has created a common fund for the benefit of the class is entitled to
5 reimbursement of reasonable litigation expenses from that fund." *Ontiveros v. Zamora*,
6 303 F.R.D. 356, 375 (E.D. Cal. 2014). As one commentator noted, "the prevailing view
7 is that expenses are awarded in addition to the fee percentage." Conte, *Attorney Fee*
8 *Awards*, § 2.08 at pp. 50-51 (2d Ed. 1977). Indeed, courts routinely reimburse class
9 counsel for the costs incurred in prosecuting cases on a contingent fee basis. *See In re*
10 *Businessland Sec. Litig.*, No. C-90-20476-RFP, 1991 U.S. Dist. LEXIS 8962, at *6 (N.D.
11 Cal. June 14, 1991) (citing cases).

12 The recovery of costs is to include all out of pocket costs and part of overhead
13 costs that are typically billed to a client. *See Norris v. Mazzola*, No. 15-cv-04962-JSC,
14 2017 U.S. Dist. LEXIS 208610, at *40 (N.D. Cal. Dec. 19, 2017) (citing *Harris v.*
15 *Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994)). All of the categories of costs sought here are
16 typically billed to a client. Renick Decl. ¶ 44. The costs sought by Class Counsel are
17 reasonable and were necessarily incurred in order to advance the litigation for the benefit
18 the class. *Id.* They, therefore, should be reimbursed. *See In re Immune Response Sec.*
19 *Litig.*, 497 F.Supp.2d 1166, 1178 (S.D. Cal. 2007).

20 **IV. CONCLUSION**

21 For the foregoing reasons, Plaintiffs respectfully request that the Court grant
22 Plaintiffs' motion for reasonable attorneys' fees in the amount of 25% of the settlement
23 fund, \$1,097,896, and reimbursement of costs in the amount of \$7,607.77.

24
25 DATED: June 25, 2020

HADSELL STORMER
RENICK & DAI LLP

26
27 By: s/ Randy Renick
28 Attorneys for Plaintiffs