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**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN DIEGO**

640 Tenth LP dba Cowboy Star Restaurant and
Butcher Shop, individually. and on behalf of
all others similarly situated,

Plaintiff,

vs.

COUNTY OF SAN DIEGO; DEPARTMENT
OF ENVIRONMENTAL HEALTH; and
CALIFORNIA DEPARTMENT OF
ALCOHOLIC BEVERAGE CONTROL;
DOES 1 THROUGH 10, inclusive,

Defendants.

Case No. 37-2021-00001129-CU-MC-CTL

Assigned for All Purposes to:
Judge Joel R. Wohlfeil
Dept. C-73

CLASS ACTION

**PLAINTIFF'S MEMORANDUM IN
SUPPORT OF MOTION FOR FINAL
APPROVAL OF CLASS ACTION
SETTLEMENT**

[IMAGED FILE]

Date: October 29, 2021
Time: 9:00 a.m.
Dept: C-73

Complaint Filed: January 11, 2021
Trial Date: Not Yet Set

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1 **I. INTRODUCTION**

2 In this class action, Plaintiff 640 Tenth LP alleges that the County of San Diego and County
 3 of San Diego Department of Environmental Health (“County Defendants”) unlawfully charged and
 4 collected permit fees from restaurants in San Diego County, despite ordering closure of restaurants
 5 or severely limiting their operations due to the COVID-19 pandemic. Plaintiff brought this class
 6 action to obtain fee refunds and thus provide much-needed relief to restaurants in San Diego County.
 7 The parties have reached a settlement that provides meaningful relief and goes to the heart of
 8 addressing the County Defendants’ fee assessment and collection policies during the COVID-19
 9 pandemic. On July 22, 2021, the Court preliminary approved the proposed settlement and certified
 10 the Class for settlement purposes. The Court-approved notice plan has been implemented, and
 11 plaintiff now seeks final approval of the settlement, an award of attorneys’ fees and expenses,
 12 approval of a service award for the class representative, and entry of judgment.

13 Under the proposed settlement, Class members receive: (i) a 50% refund for annual permit
 14 fees paid during the class period; (ii) a 50% reduction in annual permit fees owed, but not yet paid
 15 by Class members; and (iii) a waiver of late fees for an untimely payment of permit fees. The refunds
 16 and reductions will be automatically provided—Class members need not do anything to receive
 17 their settlement benefits. The fee refunds and reductions to Class members total over \$4.4 million.

18 The settlement accomplishes Plaintiff’s litigation goals and represents an excellent recovery
 19 for the Class—a point confirmed by the absence of any opt-outs or objections to date.¹

20 By this motion, Class counsel also request attorneys’ fees and expenses for the efforts made
 21 and result they obtained for Class members. The total request—\$446,435.75—is just 10% of
 22 common fund to be distributed to Class members and is thus well within the accepted range of
 23 attorney fee awards in class settlements. Further, the fees and expenses will be paid by the County
 24 Defendants in addition to the Class member refunds and will thus not reduce the payments to Class
 25 members.

26
 27
 28 ¹ Opt-outs and objections are due by October 8, 2021. Preliminary Approval Order (“PA”),
 § II, ¶¶ 5-6. Plaintiff will respond to any objections by October 22, 2021. *Id.*, § II, ¶ 7.

1 **II. SUMMARY OF LITIGATION**

2 **A. Factual Background and Procedural History**

3 Following declarations by the World Health Organization and President Trump concerning
 4 COVID-19, the State of California and County of San Diego issued orders requiring all restaurants
 5 and businesses that served food to limit their services to delivery, take-out, or drive-through only.
 6 Complaint, ¶¶ 2-3. In spite of the severe restrictions which often resulted in complete closures, the
 7 County Defendants continued to charge these businesses permit fees as if they were fully operating.
 8 *Id.*, ¶ 7.

9 Plaintiff and its counsel began investigating the fees collected by state and local governments
 10 and researching potential avenues to obtain refunds or other relief for restaurants which were
 11 particularly hard-hit by closures and the stay-at-home orders. Declaration of Brian S. Kabateck in
 12 Support of Preliminary Approval of Class Action Settlement (“Kabateck Preliminary Approval
 13 Decl.”), ¶ 3. Following these initial investigations, in October 2020, Plaintiff sent the requisite
 14 written claim to the County of San Diego pursuant to the California Government Claims Act
 15 outlining the contentions, legal basis and proposed solution. *Id.*, ¶ 5.

16 When the County Defendants did not take any action in response to the government claim,
 17 in early January 2021, Plaintiff filed a class action lawsuit against the County of San Diego;
 18 Department of Environmental Health; and the California Department of Alcohol Beverage Control.²
 19 *Id.* Plaintiff alleges violations of Cal. Gov’t Code § 53723 (imposing taxes without voter approval);
 20 California Constitution Article XIII, C § 2 (Proposition 218—the “Right to Vote on Taxes Act”);
 21 Cal. Gov’t Code § 815.6 (violation of mandatory duty); declaratory and injunctive relief; money
 22 had and received; and unjust enrichment. Class counsel, who had also been approached by
 23 restaurants from various other counties, had filed and had pending similar actions in other California
 24 counties. *Id.*, ¶ 6. As a potential means to coordinate the 12 pending actions—including this case—
 25 Class counsel filed a petition for coordination with the Judicial Council of California (JCCP) on
 26

27 _____
 28 ² The California Department of Alcohol Beverage Control is not a party to the settlement agreement and did not collect the permit fees covered by the settlement.

1 May 6, 2021. The parties here shortly thereafter filed a stipulation to stay the case while awaiting a
2 ruling on the petition. *Id.*

3 The parties also engaged in settlement discussions prior to and after submission of the JCCP
4 petition. They ultimately reached an agreement on the terms of settlement in early July 2021. *Id.*,
5 ¶ 7. After receiving information that the hearing on the petition for coordination could possibly be
6 months away, and appointment of a coordination trial judge even longer, the parties elected to seek
7 settlement approval in San Diego Superior Court where this action is pending.³ *Id.*, ¶ 8.

8 **B. Settlement Negotiations**

9 Settlement talks were initiated in early March 2021 and continued until an agreement was
10 finalized in early July. *Id.*, ¶ 7. Over the course of the discussions, the County Defendants provided
11 informal discovery and information to Class counsel and the parties exchanged several versions of
12 a settlement term sheet outlining the material terms of a proposed settlement. *Id.* Ultimately, the
13 parties formalized the settlement agreement and the exhibits thereto. The comprehensive
14 negotiations were driven by the parties' aim to obtain fair and adequate deals for their respective
15 clients, as well as to provide deserved relief to the restaurant industry in San Diego County.

16 **C. Preliminary Approval Order**

17 On July 22, 2021, the Court granted preliminary approval of the settlement and conditionally
18 certified a Class consisting of:

19 All restaurants and limited food preparation facilities in the County of San Diego that
20 paid or were required to pay annual permit fees to the County Defendants from
21 March 15, 2020 through June 15, 2021, and who did not submit a valid request to be
excluded from the Class.

22 PA, § I, ¶ 1.
23
24

25 ³ On August 6, 2021, the JCCP issued an Order Assigning Coordination Motion Judge and
26 Setting Date for Hearing. The hearing on the petition for coordination took place on September 17,
27 2021, in Los Angeles Superior Court. The judge stated that he intended to grant the petition and
28 assign a coordination trial judge to preside over the actions. An order to that effect has yet to be
served and to date a coordination trial judge has not been assigned. Declaration of Leslie E. Hurst
in Support of Motion for Final Approval ("Hurst Decl."), ¶ 4.

1 Plaintiff 640 Tenth was appointed as Class Representative and Class counsel Kabateck LLP
2 and Blood Hurst & O'Reardon, LLP were appointed Class counsel. *Id.*, ¶¶ 3-4. The Court also
3 approved the Class Notice and the proposed Notice Plan. *Id.*, §III.

4 **III. THE SETTLEMENT TERMS AND RELIEF**

5 **A. Refunds of Permit Fees Paid**

6 The County Defendants will provide Class members who paid permit fees during the class
7 period a 50% refund for those fees. Settlement agreement ("SA"), § 2.1. In the event a Class member
8 paid two annual payments during the class period, the 50% refund will be applied to the most recent
9 annual fees paid. *Id.*

10 The County Defendants will automatically mail the 50% refund to the Class member's last
11 known address. There is no claims process or claim forms; no action is required by Class members.
12 Checks will be mailed within six months of the Final Effective Date, which will either be the date a
13 judgment in this Court becomes final and non-appealable, or an earlier date agreed to by Class
14 counsel and the County Defendants' counsel. *Id.* For any checks returned as undeliverable, the
15 County Defendants will attempt to obtain a current address and promptly resend the refund check
16 to the Class members. *Id.* The total amount of refund checks that remain uncashed nine months after
17 the check date will be distributed to the California Restaurant Association Foundation, a 501(c)(3)
18 organization. *Id.*

19 **B. Credit of Permit Fees Due**

20 For Class members who owe annual fees but have not yet paid, the County Defendants will
21 reduce those fees by 50%. SA, § 2.2. If a Class member was required to pay two annual payments
22 during the class period, the County Defendants will automatically apply the 50% reduction to the
23 most recent annual fees owed by that Class member. *Id.* The 50% reduction will automatically be
24 applied to the Class member's outstanding balance owed. *Id.*

25 **C. Waiver of Late Fees**

26 The County Defendants will also waive late fees for untimely payment of permit fees due
27 during the class period, so long as the fees are paid within 12 months of the original due date or by
28 December 31, 2021, whichever is sooner. SA, § 2.3.

Direct Mail Notice

For all Class members for which an email address is not available, the County Defendants sent the Full Class Notice by U.S. mail on August 15, 2021, to the Class members' last known address. For any such mailed notices returned as undeliverable, the County Defendants utilized the National Change of Address registry in an attempt to obtain better addresses for such returned mail notices, and in the event that registry showed a more current address, the County Defendants sent the returned mail notice to the more current address. For any such mailed notices returned with a forwarding address, the County Defendants promptly resent the Full Class Notice to such forwarding address.

Website Notice

On August 15, 2021, the County Defendants posted the Full Class Notice on their websites. The County Defendants also posted additional documents and information, including the settlement agreement and Preliminary Approval Order.

IV. THE SETTLEMENT MERITS FINAL APPROVAL

A. Legal Standard for Final Approval

Settlement of a class action requires court approval. Cal. Rules of Court 3.769. California has a strong judicial policy that favors settlement. *Hamilton v. Oakland Sch. Dist.*, 219 Cal. 322, 329 (1933) ("it is the policy of the law to discourage litigation and to favor compromises"); *Rich Vision Ctrs., Inc. v. Bd. of Med. Exam'rs*, 144 Cal. App. 3d 110, 115 (1983) (there exists a "general policy of favoring compromises of contested rights"). This is particularly true in class actions, where substantial resources can be conserved by avoiding the time, cost, and rigors of litigation. *In re Microsoft I-V Cases*, 135 Cal. App. 4th 706, 723 n.14 (2006) ("Public policy generally favors the compromise of complex class action litigation."); *Cellphone Termination Fee Cases*, 180 Cal. App. 4th 1110, 1125 (2009).

To warrant final approval, a class settlement must be fair, adequate, and reasonable. *Dunk v. Ford Motor Co.*, 48 Cal. App. 4th 1794, 1801 (1996); *Cho v. Seagate Tech. Holdings, Inc.*, 177 Cal. App. 4th 734, 742-43 (2009). The court has "broad discretion" in determining whether to approve a

1 proposed settlement. *Cellphone Termination Fee Cases*, 186 Cal. App. 4th 1380, 1389 (2010);
2 *Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 234-35 (2001).

3 In evaluating the fairness of a class settlement, courts consider several factors, including “the
4 strength of plaintiff’s case, the risk, expense, complexity and likely duration of further litigation, the
5 risk of maintaining class action status through trial, the amount offered in settlement, the extent of
6 discovery completed and the stage of the proceedings, the experience and views of counsel, the
7 presence of a governmental participant, and the reaction of the class members to the proposed
8 settlement.” *Dunk*, 48 Cal. App. 4th at 1801; *Cellphone Termination*, 186 Cal. App. 4th at 1389.
9 The court “is free to engage in a balancing and weighing of factors depending on the circumstances
10 of each case.” *Wershba*, 91 Cal. App. 4th at 245.

11 “[A] presumption of fairness exists where: (1) the settlement is reached through arm’s-length
12 bargaining; (2) investigation and discovery are sufficient to allow counsel and the court to act
13 intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of objectors is
14 small.” *Dunk*, 48 Cal. App. 4th at 1802; *Cellphone Termination*, 186 Cal. App. 4th at 1389. The
15 settlement satisfies these requirements so it is presumed fair, reasonable and adequate.

16 **B. The Settlement Is Fair, Reasonable, and Adequate**

17 **1. The Settlement Resulted from Arm’s Length and Informed Negotiations**

18 The settlement was reached after obtaining informal discovery and conducting arm’s-length,
19 negotiations that took place over four months between Class counsel and counsel for the County
20 Defendants. Kabateck Preliminary Approval Decl., ¶ 7. The negotiations were initiated in early
21 March 2021 and continued in spite of the formal litigation stay. The parties spent substantial time
22 exchanging numerous proposals and counterproposals, and related documents, including the
23 notices, which culminated in the settlement agreement. *Id.*

24 **2. Investigation and Discovery Have Been Conducted to Allow Thorough**
25 **Evaluation of the Fairness of the Settlement**

26 The Court also must be satisfied that “investigation and discovery are sufficient to allow
27 counsel and the [C]ourt to act intelligently” in deciding whether to approve a settlement. *Dunk*, 48
28 Cal. App. 4th at 1802; *Chavez v. Netflix, Inc.*, 162 Cal. App. 4th 43, 53 (2008).

1 Prior to filing the class action complaint, Class counsel conducted an initial investigation
2 into potential causes of action. Kabateck Preliminary Approval Decl., ¶ 3. Class counsel thereafter
3 prepared and presented a formal claim to the County of San Diego in accordance with the California
4 Government Claims Act. *Id.*, ¶ 4. Following rejection of Plaintiff's claim, and after further
5 investigation into potential causes of action, Class counsel prepared and filed the class action
6 complaint. *Id.*, ¶ 5.

7 Class counsel also engaged in informal discovery during the settlement discussions with the
8 County Defendants. *Id.*, ¶ 7. Counsel obtained information pertaining to the number of restaurants
9 and limited food preparation facilities in the County of San Diego, the restaurants and facilities that
10 paid or were required to pay annual permit fees, the facilities that had not yet paid the permit fees,
11 and the refund and credit amounts the Class would receive. *Id.* The information put Class counsel
12 in a position to negotiate a settlement that provides significant relief for the Class. The settlement
13 achieves the very purpose of this lawsuit by timely providing fee refunds, fee credits, and waivers
14 of late fees.

15 **3. The Settlement Is Reasonable Given the Value of the Claims Asserted**
16 **and the Risks of Further Litigation**

17 The risk, expense, complexity and duration of the case if litigated rather than settled weighs
18 heavily in favor of final approval of the settlement. "In the context of a settlement agreement, the
19 test is not the maximum amount plaintiffs might have obtained at trial on the complaint, but rather
20 whether the settlement is reasonable under all of the circumstances." *Wershba*, 91 Cal. App. 4th at
21 250.

22 Litigating against well-resourced governmental defendants with myriad immunities
23 presented Plaintiff with significant expense, risk and a protracted route to resolving this litigation
24 on the merits. Weighed against these risks, and coupled with the delays associated with continued
25 litigation, the settlement benefits to the Class fall well within the range of reasonableness. The
26 settlement will conserve the resources of the parties and the Court and will ensure that Class
27 members receive refunds, credits, and late fee waivers quickly. If Class counsel litigated these
28 claims against the County Defendants to conclusion, any recovery would come years in the future,

1 and at the very real risk that Class members would receive nothing. Kabateck Preliminary Approval
2 Decl., ¶ 10. With this settlement, Class members receive the necessary relief they need to aid their
3 recovery from operating under restrictions during the COVID-19 pandemic.

4 **4. The Experience and Views of Counsel**

5 Also weighing in favor of final approval is Class counsel's significant experience and
6 success in similar class cases. *Dunk*, 48 Cal. App. 4th at 1802. Class counsel have decades of
7 experience serving as class counsel in hundreds of complex actions, including actions against local
8 governments for the unlawful collection of fees, charges and taxes. *See* Kabateck Preliminary
9 Approval Decl., ¶ 2, Exs. 2 and 3; *Id.*, ¶ 11. Class counsel fully endorse the settlement as fair,
10 reasonable and adequate. *Id.*, ¶¶ 9-10.

11 **5. The Positive Reaction of Class Members Favors Final Approval**

12 Another factor to be considered at final approval is class members' reaction to the settlement.
13 *Dunk*, 48 Cal. App. 4th at 1801. Here, the reaction has been very positive. While the opt out and
14 objection deadline is not until October 8, to date, no Class member has opted out or objected to the
15 settlement. Hurst Decl., ¶ 19. This represents a vote of approval by Class members.

16 Consideration of the above factors confirms that the settlement is fair, reasonable, and
17 adequate.

18 **C. Class Notice Satisfied the Requirement of Due Process**

19 The manner of giving notice and the content of notice must "fairly apprise the prospective
20 members of the class of the terms of the proposed settlement and of the options that are open to
21 them in connection with the proceedings." *7-Eleven Owners for Fair Franchising v. Southland*
22 *Corp.*, 85 Cal. App. 4th 1135, 1164 (2000) (internal citations and quotations omitted). An
23 appropriate notice has a "reasonable chance of reaching a substantial percentage of the class
24 members." *Wershba*, 91 Cal. App. 4th at 251; *Cellphone Termination*, 186 Cal. App. 4th at 1392;
25 *see also* Cal. Rules of Court 3.766.

26 The Notice Plan was designed to reach Class members and fairly apprise them of the
27 settlement. The Notice provided a brief, clear, and thorough explanation of the case; the terms of
28 the proposed settlement; the amount Counsel would seek for attorneys' fees and expenses; the

1 amount Plaintiff would seek as a service award; the date, time, and place of the fairness hearing;
2 and the steps for Class members to follow to opt out or object to the settlement. The Notice also
3 described how to appear at the fairness hearing to object. *See* Cal. Rules of Court 3.769(f).

4 Notice was disseminated using email to Class members with email addresses known to the
5 County Defendants, which comprised approximately 92% of all Class members. The County as a
6 matter of course communicates with these Class members by email. For all Class members whose
7 email addresses were not known to the County Defendants, notice was disseminated by U.S. mail.
8 The County Defendants also posted the Full Class Notice on their websites. SA, § 3.2(i); *id.*, Ex. C
9 (Notice Plan). This readily satisfies California's notice requirements. *Wershba*, 91 Cal. App. 4th at
10 251.

11 In accordance with the settlement agreement, the County Defendants will provide the Court
12 with a declaration attesting that Notice was provided in accordance with the terms of the settlement
13 and the Court's Preliminary Approval Order. SA, § 3.2(i).

14 **V. THE CLASS SHOULD BE CERTIFIED FOR SETTLEMENT PURPOSES**

15 The Court's Preliminary Approval Order analyzed the requirements of California Code of
16 Civil Procedure § 382, found the requirements satisfied, and certified the Class for settlement
17 purposes. PA, § I, ¶¶ 1-2. Nothing has changed since the Court entered its Preliminary Approval
18 Order that would affect the Court's ruling on class certification. For the reasons stated in the
19 preliminary approval motion and the Preliminary Approval Order, the Court's certification of the
20 Class for settlement purposes should be affirmed.

21 **VI. THE FEE AND EXPENSE REQUEST SHOULD BE APPROVED**

22 **A. The Requested Fee is Reasonable Under the Percentage of Fund Approach**

23 The percentage method is often preferred because it focuses on the benefit conferred on the
24 class resulting from the efforts of counsel, and thereby aligns the interest of the class with the interest
25 of counsel. *Lealao v. Beneficial Cal., Inc.*, 82 Cal. App. 4th 19, 48 (2000). Here, Class counsel
26 requests \$446,435.75 in attorneys' fees and expenses, which represents 10% of the value of permit
27 fee refunds.

28

1 In assessing whether the percentage requested is fair and reasonable, courts have considered
2 the following factors: (1) the result achieved; (2) the skill required and quality of work by counsel;
3 (3) the risk involved in the litigation and complexity of the issues; (4) the contingent nature of the
4 fee; and (5) awards made in similar cases. *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1048-50 (9th
5 Cir. 2002); *see also Laffitte v. Robert Half Int'l, Inc.*, 1 Cal. 5th 480, 504 (2016).

6 Here, the settlement provides over \$4.4 million in permit fee refunds, alone, with the County
7 Defendants also waiving late fees for untimely payment of permit fees during the class period;
8 \$446,435.75 in attorneys' fees and expenses paid by the County Defendants, which will not reduce
9 the credit or refund amounts paid; and notice and administration costs to be borne by the County
10 Defendants. The requested fees and expenses represent just 10% of the license fee refunds payable
11 to the Class.

12 1. Results Achieved

13 "Where a plaintiff has obtained excellent results, his attorney should recover a fully
14 compensatory fee." *Hogar Dulce Hogar v. Cmty. Dev. Comm'n of City of Escondido*, 157 Cal. App.
15 4th 1358, 1369 (2007). The settlement achieves its ultimate and most important objective—to
16 provide restaurants in San Diego County reimbursements for permit fees paid and credits for fees
17 due while they were shuttered or operating in a significantly reduced capacity, as well as waivers of
18 late fees for such fees that were not timely paid. SA, §§ 2.1-2.3. This relief will aid San Diego
19 County restaurant businesses in their recovery from the difficult times posed by the COVID-19
20 pandemic. In addition, as part of the settlement, the County Defendants will pay all costs of
21 administering and providing notice, as well as all costs of administering and providing license fee
22 credits, distributing refunds, and all other costs of administering and distributing settlement benefits
23 to the Class. *Id.*, § 3.2. Moreover, the County Defendants agreed to pay the attorneys' fees and
24 expenses, and Plaintiff's service award, separate and apart from the class benefits. *Id.*

25 These results strongly support the very moderate amount of fees requested.

26 2. Skill Required and the Quality of the Work

27 This case required counsel skilled in class action litigation, of which Class counsel have
28 substantial experience and success. *See Kabateck Preliminary Approval Decl.*, ¶ 11; *id.*, ¶ 2, Exs. 2

1 and 3. This has been no ordinary lawsuit. Class counsel faced unprecedented circumstances and
2 novel questions of law, including those relating to the validity and legality of the County
3 Defendants' collection of permit fees during the COVID-19 pandemic and whether the money
4 collected could be construed as an illegal tax. *Id.*, ¶ 10. In researching the case and drafting the
5 complaint, Class counsel developed a high level of familiarity with the legal and factual issues, and
6 the strengths and weaknesses of the case, which put them in a position to make an appraisal of the
7 adequacy of the settlement and provide meaningful relief to Class members. *Id.*, ¶ 7.

8 The skill and competence of opposing counsel should also be considered when awarding a
9 fee. *In re Equity Funding Corp. Sec. Litig.*, 438 F. Supp. 1303, 1337 (C.D. Cal. 1977). Here, Class
10 counsel faced the Office of County Counsel for the County of San Diego. County Counsel is well-
11 resourced and staffed with highly experienced attorneys who routinely litigate cases challenging
12 County fees and taxes, including the many challenges that have arisen because of the COVID-19
13 closures.

14 Class counsel should also be rewarded for the rapidity with which they were able to resolve
15 the case. *See In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prods. Liab. Litig.*, No.
16 2672 CRB (JSC), 2017 U.S. Dist. LEXIS 56931, at *613-14 (N.D. Cal. Apr. 12, 2017) (noting that
17 counsel should be rewarded for efforts in achieving "a swift settlement.") Their diligent and efficient
18 work benefitted the Class by keeping litigation expenses low, while achieving the desired relief. The
19 result of this combination of skill and diligence directly benefitted the Class.

20 3. Litigation Risks and Difficulty of the Issues Presented

21 Class counsel knew they faced many obstacles. They faced well-resourced government
22 defendants with myriad immunities, which presented significant expense, risk and a protracted route
23 to resolving this litigation on the merits. And the legal claims at issue are complex and risky,
24 involving alleged violations of statutory and Constitutional protections against unlawfully levied
25 taxes and fees, including Cal. Gov't Code sections 53723 and 815.6, and Article XIII C § 2 of the
26 California Constitution. If Class counsel litigated these claims against the County Defendants to
27 conclusion, any recovery would come years in the future and after potential appeals, and at the very
28 real risk that Class members would receive nothing.

4. Contingent Nature of the Case

Attorneys whose compensation is dependent on success—who take a significant risk of no compensation—should expect a significantly higher fee than an attorney who is paid a market rate as the case goes along, win or lose. *Cazares v. Saenz*, 208 Cal. App. 3d 279, 288 (1989). As stated by the Supreme Court of California:

A contingent fee must be higher than a fee for the same legal services paid as they are performed. The contingent fee compensates the lawyer not only for the legal services he renders but for the loan of those services. The implicit interest rate on such a loan is higher because the risk of default (the loss of the case, which cancels the debt of the client to the lawyer) is much higher than that of conventional loans.

Ketchum v. Moses, 24 Cal. 4th 1122, 1132-33 (2001).

Class counsel undertook this litigation on a purely contingent basis, thereby bearing the full risk of non-recovery. Declaration of Brian S. Kabateck in Support of Final Approval (“Kabateck Final Approval Decl.”), ¶ 4; Hurst Decl., ¶ 5. The fee should reflect this risk.

5. The Market Rate in Similar Contingent Litigation

In California, attorneys’ fee awards of 33% of the value of the recovery to the class are common. Indeed, “[e]mpirical 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.” *Chavez*, 162 Cal. App. 4th at 66 n.11 (citation and quotations omitted). In *Laffitte*, the Supreme Court upheld a fee award of 33% of the common fund and stated an award of 33% “is within a historical range of 20 to 50 percent of a common fund.” *Lafitte*, 1 Cal. 5th at 487.

Accordingly, an award representing 10% of the refund and credit benefits conferred to the Class—and which does not include the value of waived late fees, the value of notice costs or the value of attorneys’ fees and expenses—is within the range for class action fees, and further confirms that the fees sought are reasonable and should be approved.

B. The Requested Fee Is Also Reasonable Under the Lodestar Method

“A lodestar cross-check ... provides a mechanism for bringing an objective measure of the work performed into the calculation of a reasonable attorney fee.” *Laffitte*, 1 Cal.5th at 504. When, however, the percentage method results in a reasonable fee award, courts grant the award without

1 performing a lodestar crosscheck.⁴ Here, the collective lodestar of Class counsel's law firms is
2 \$166,887, resulting in a multiplier of [2.66]. Kabateck Final Approval Decl., ¶ 15; Hurst Decl., ¶ 10.
3 The lodestar crosscheck confirms the fee is reasonable. *See Wershba*, 91 Cal. App. 4th at 255
4 ("Multipliers can range from 2 to 4 or even higher."); *see also Chavez*, 162 Cal. App. 4th at 66 (2.53
5 multiplier is in "line with prevailing case law")

6 VII. THE SERVICE AWARD IS REASONABLE AND APPROPRIATE

7 Courts routinely approve service awards to compensate named plaintiffs for the efforts they
8 provide and the risks they incur during class action litigation. As part of the settlement, the County
9 Defendants have agreed to pay Plaintiff a service award of \$500. SA, § 2.4.

10 The modest amount requested is below the amounts typically awarded as incentive awards.
11 *See, e.g., Gergetz v. Telenav, Inc.*, No. 16-cv-04261-BLF, 2018 U.S. Dist. LEXIS 167206, at *21-
12 22 (N.D. Cal. Sept. 27, 2018) (approving incentive award of \$5,000); *Lee v. Glob. Tel*Link Corp.*,
13 No. 2:15-cv-02495-ODW (PLA), 2018 U.S. Dist. LEXIS 163410, at *34-35 (C.D. Cal. Sept. 24,
14 2018) ("[I]n \$5,000 incentive award"); *Cox v. Clarus Mktg. Grp., LLC*, 291 F.R.D. 473, 483 (S.D.
15 Cal. 2013) (approving \$5,000 award).

16 Class counsel request the Court approve a modest service award of \$500 for Plaintiff in
17 recognition of the time and effort it expended on the Class's behalf. This amount is based on time
18 Plaintiff expended in this action, which included communications with Counsel, including telephone
19 calls and email exchanges to gather information for the Government Claim and the complaint.
20 Kabateck Final Approval Decl., ¶ 24. Plaintiff also spent time reviewing complaint, consulting for
21 settlement and reviewing and questioning the terms of the settlement agreement, and suggesting
22 modifications thereof. *Id.* This modest service award is fair and reasonable and should be approved.

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⁴ *See, e.g., Ochoa v. Haralambos Beverage Co.*, No. BC319588 (L.A. Super. Ct. 2007) (approving 33.3% fee award with no mention of lodestar crosscheck); *Jones v. Alliance Imaging, Inc.*, No. RG05210418 (Alameda Super. Ct. 2006) (approving 33% fee award with no mention of lodestar crosscheck).

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VIII. CONCLUSION

Plaintiff respectfully requests that the Motion for Final Approval be granted and the Court enter a final judgment and order: (1) confirming certification of the Class; (2) confirming appointment of Brian S. Kabateck, Shant A. Karnikian, and Marina R. Pacheco of Kabateck LLP and Timothy G. Blood and Leslie E. Hurst of Blood Hurst & O’Reardon, LLP as Class counsel; (3) granting final approval of the settlement; and (4) awarding the requested attorneys’ fees and costs award, and Plaintiff’s service award.

A proposed trial order and judgment will be submitted in conjunction with Plaintiff’s reply brief.

Respectfully submitted,

Dated: September 24, 2021

BLOOD HURST & O’REARDON, LLP
Timothy G. Blood (149343)
Leslie E. Hurst (178432)

By: *s/ Leslie E. Hurst*

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DECLARATION OF SERVICE

640 Tenth LP v. County of San Diego
San Diego County Superior Court, Case No. 37-2021-00001129-CU-MC-CTL

I, the undersigned, declare:

1. That declarant is and was, at all times herein mentioned, a citizen of the United States and a resident of the State of California, over the age of 18 years, and not a party to or interested party in the within action; that declarant's business address is 501 West Broadway, Suite 1490, San Diego, California 92101.

2. That on September 24, 2021, I electronically filed the foregoing **Memorandum in Support of Motion for Final Approval of Class Action Settlement** with the Clerk of the Court using One Legal Online Court Services, and electronically served the foregoing upon the attorney(s) of record for each party in this case at the e-mail address(es) registered for such service through One Legal Online Court Services, addressed as follows:

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3. Parties may access this filing through the Court's website.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on September 24, 2021, at San Diego, California.

s/ Janet Kohnenberger

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