

1 **KINGSLEY & KINGSLEY, APC**
ERIC B. KINGSLEY, Esq., Cal. Bar No. 185123
2 eric@kingsleykingsley.com
KELSEY M. SZAMET, Esq., Cal. Bar No. 260264
3 kelsey@kingsleykingsley.com
DAVID KELEDJIAN, Esq., Cal. Bar No. 309135
4 davidk@kingsleykingsley.com
16133 Ventura Blvd., Suite 1200
5 Encino, CA 91436
Telephone: (818) 990-8300
6 Fax: (818) 990-2903

7 **DAVTYAN LAW FIRM, Inc.**
EMIL DAVTYAN, Esq. (SBN-299363)
8 emil@davtyanlaw.com
880 E. Broadway
9 Glendale, CA 91205
Tel: (818) 722-3974/Fax: (818) 722-3974

10 Attorneys for Plaintiff and the Proposed Class

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

14 ERIC FELIX, an individual, on behalf
15 of himself and others similarly situated

16 PLAINTIFF,

17 v.

18 WM. BOLTHOUSE FARMS, INC.;
and DOES 1 thru 50, inclusive,

19 DEFENDANTS.
20
21

CASE NO. 1:19-CV-00312-AWI-JLT

[Case Assigned for All Purposes to
Hon. Percy Anderson]

**NOTICE OF MOTION AND
MOTION FOR FINAL APPROVAL
OF ATTORNEYS' FEES AND
COST; MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT THEREOF**

22 Date: May 4, 2020

23 Time: 9:00 a.m.

24 Courtroom.: 9A, 9th Floor

25 Magistrate Judge: Jennifer L. Thurston
26
27
28

TO THE COURT AND TO ALL PARTIES:

PLEASE TAKE NOTICE that on May 4, 2020, at 9:00 a.m., in the above-entitled Court located at the Bakersfield Federal Courthouse, 510 19th Street, Suite 200, Bakersfield, CA 93301, Plaintiff ERIC FELIX, an individual (“Plaintiff”), on behalf of himself, and on behalf of all persons similarly situated, through his attorneys of record (“Class Counsel”), and Defendant WM. BOLTHOUSE FARMS, INC. (“Defendant”), through its attorneys of record, will and hereby do, move this Court for an order:

1. Granting Class Counsel’s request for an award of attorneys’ fees in the amount of \$39,425.00 (33.33%) to be paid from the Gross Settlement Amount pursuant to the legal standards set forth in the supporting memorandum of points and authorities filed herewith;

2. Granting Class Counsel’s request for an award of litigation cost reimbursement in the amount of \$931.11 to be paid from the of the Gross Settlement Amount pursuant to Federal Rule of Civil Procedure 23(h) and the legal standards set forth in the supporting memorandum of points and authorities filed herewith; and,

3. Granting Plaintiff ERIC FELIX an enhancement award of \$5,000.00 for his services to the Settlement Class.

The Motion will be based on this Notice of Motion, the attached Memorandum of Points and Authorities, the Declarations of Kelsey M. Szamet, Eric Felix, JND Class Action Administration, the Settlement Agreement and Release, all other papers and records on file in this action, and on such oral and documentary evidence as may be presented at the hearing on this Motion.

///

///

///

///

1 DATED: April 10, 2020

KINGSLEY & KINGSLEY, APC

2
3 By: 

4 KELSEY M. SZAMET

5 DAVID KELEDJIAN

6 Attorneys for Plaintiff ERIC FELIX and the
7 proposed classes
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF CONTENTS

1
2 I. INTRODUCTION1
3 II. STATEMENT OF FACTS1
4 III. PLAINTIFF REQUESTS THAT THE COURT GRANT CLASS
5 COUNSEL’S APPLICATION FOR AN AWARD OF ATTORNEYS’
6 FEES1
7 A. Class Counsel Provided Adequate Notice to the Class of the Attorney
8 Fee Request1
9 B. Class Counsel are Entitled to Fees and Costs under the Common Fund
10 Doctrine3
11 1. Results Achieved and Risk of Litigation4
12 2. Skills of Counsel and the Quality of Work.....4
13 3. Contingent Nature of the Fee and the Financial Burden5
14 C. Class Counsel’s Fee Request is Reasonable Under a Lodestar
15 Crosscheck.....6
16 IV. THE COURT SHOULD APPROVE THE REQUEST FOR
17 REIMBURSEMENT OF COSTS7
18 V. THE COURT SHOULD GRANT THE REQUESTED ENHANCEMENT
19 TO THE NAMED PLAINTIFF7
20 VI. CONCLUSION.....9

21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES

PAGE(S)

FEDERAL CASES

Boeing Co. v. Van Gemert,
444 U.S. 472 (1980)3

City of Detroit v. Grinnell Corporation,
495 F.2d 448 (2d Cir. 1974)5

Del Llano v. Vivint Solar Inc.,
No. 17-cv-1429-AJB-MDD, 2018 WL 656094 (S.D. Cal. Feb. 1, 2018).....5

Glass v. UBS Financial Services, Inc.,
Case No. C-06-4068 MMC, 2007 WL 221862 (N.D. Cal. Jan. 26, 2007)8

In re Mercury Interactive Corp. Sec. Litig.,
618 F.3d 988 (9th Cir. 2010).....2

In re Omnivision Tech., Inc.,
559 F.Supp.2d 1036 (N.D. Cal. 2008).....3, 7

In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions,
148 F.3d 283 (3d Cir. 1998)6

In re Washington Pub. Power Supply Sys. Sec. Litig.,
19 F.3d 1291 (9th Cir. 1994).....6

Ingram v. The Coca-Cola Company,
200 F.R.D. 685 (N.D. Ga. 2001)7, 8

Missouri v. Jenkins by Agyei,
491 U.S. 274 (1989)6

Nystrom v. City of Vacaville,
No. 204-CV-00330 MCE-PAN, 2009 WL 1327324 (E.D. Cal. May 12, 2009) ...2

Staton v. Boeing Co.,
327 F.3d 938 (9th Cir. 2003).....3

Van Vranken v. Atlantic Richfield Co.,

1 901 F. Supp. 294 (N.D. Cal. 1995).....7, 8
2 *Vincent v. Hughes Air West, Inc.*,
3 557 F.2d 759 (9th Cir. 1977).....3, 7
4 *Vizcaino v. Microsoft Corp.*,
5 290 F.3d 1043 (9th Cir. 2002).....6
6 **Federal Rules**
7 Federal Rule of Civil Procedure 232
8 Federal Rule of Civil Procedure 23(e)2
9 Federal Rule of Civil Procedure 23(h) and 54(d) (2) of the Federal Rules of Civil
10 Procedure1
11 Federal Rule of Civil Procedure 23(h)(1)1, 2
12 Federal Rule of Civil Procedure 54(d)(2)2

13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff ERIC FELIX (“Plaintiff”) seeks an order granting final approval of
4 Class Counsel attorneys’ fees and costs and awarding the Named Plaintiff an
5 enhancement payment pursuant to the terms of the Parties’ “Class Action Release
6 and Settlement Agreement” (“Settlement” or “Settlement Agreement”).

7 Class Counsel seek fees in the amount of \$39,425.00 (1/3) to be paid from the
8 Gross Settlement Amount and reimbursement for costs in the amount of \$931.11¹
9 pursuant to Rules 23(h) and 54(d) (2) of the Federal Rules of Civil Procedure. Class
10 Counsel also requests an enhancement of \$5,000.00 for Plaintiff Felix in recognition
11 of his work and risk incurred in serving as to the sole class representative litigating
12 this case. These requests, and the particular amounts, conform with the amounts
13 described in the Notice provided to Settlement Class Members. Accompanying this
14 Memorandum of Points and Authorities is a separate memorandum filed in support
15 of Plaintiff’s Motion for Final Approval of Class Action Settlement.

16 **II. STATEMENT OF FACTS**

17 The relevant procedural history is set forth in the concurrently-filed Motion
18 for Approval of Class Action Settlement. To conserve the Court’s time and
19 resources, Plaintiff will not recite the same facts here. (See concurrently filed
20 Motion and Declaration of Kelsey M. Szamet ¶¶4-10.) (“Szamet Dec.”)

21 **III. PLAINTIFF REQUESTS THAT THE COURT GRANT CLASS**
22 **COUNSEL’S APPLICATION FOR AN AWARD OF ATTORNEYS’**
23 **FEES**

24 A. Class Counsel Provided Adequate Notice to the Class of the Attorney
25 Fee Request

26 Federal Rule of Civil Procedure 23(h)(1) requires a claim for attorneys’ fees

27 ¹ The Settlement Agreement provides for a reimbursement request of up to \$1,000. Plaintiff’s
28 Counsel limits the request to actual costs incurred.

1 to be made by motion under Rule 54(d)(2) and for notice of the motion to be served
2 on all parties and, for motions by class counsel, directed to class members in a
3 reasonable manner. Fed. R. Civ. P. 23. “The plain text of the rule requires that any
4 class member be allowed an opportunity to object to the fee ‘motion’ itself.” *In re*
5 *Mercury Interactive Corp. Sec. Litig.*, 618 F.3d 988, 993-94 (9th Cir. 2010). In cases
6 in which settlement approval is contemplated under Rule 23(e), notice of class
7 counsel's fee motion should be combined with notice of the proposed settlement, and
8 the provision regarding notice to the class is parallel to the requirements for notice
9 under Rule 23(e). *See* Fed.R.Civ.P. 23 (h)(1), *Advisory Committee Notes; Nystrom*
10 *v. City of Vacaville*, No. 204-CV-00330 MCE-PAN, 2009 WL 1327324, at *1 (E.D.
11 Cal. May 12, 2009).

12 Pursuant to the Court’s Order re: Preliminary Approval of Class Action
13 Settlement, Class Counsel provided adequate notice to the Settlement Class of their
14 intention to apply for attorneys’ fees of \$39,425.00, which is 1/3 of the Gross
15 Settlement Amount, and to seek reimbursement of reasonable costs expended in the
16 litigation. (Szamet Decl. ¶56; ECF Nos. 35 and 33-1(class notice packet)).

17 The Notice informed Class Members they could participate, object, or opt out
18 of the settlement and provided detailed instructions. (Szamet Decl. ¶57; ECF No.
19 33-1)

20 The Settlement Administrator mailed 1,227 notices on February 14, 2020.
21 (Declaration of Jennifer M. Keough, “Keogh Dec.” ¶5.) Members of the Settlement
22 Class had until April 5, 2020 to submit a valid request for exclusion or to object.
23 (*Id.*, at ¶¶ 13-16.)

24 To date, there are zero (0) objections and one (1) request for exclusion.
25 (Keough Dec. ¶¶13-16.) As such, the reaction of the Class Members to Class
26 Counsel is positive and weighs in favor of approval.

27 ///

28 ///

B. Class Counsel are Entitled to Fees and Costs under the Common Fund Doctrine

Courts have long recognized that, when attorneys’ efforts result in the creation of a common fund that benefits the plaintiff and unnamed class members, counsel have an equitable right to be compensated from that fund for their successful efforts in creating it. *See, e.g., Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); *Staton v. Boeing Co.*, 327 F.3d 938, 967 (9th Cir. 2003). “The common fund doctrine provides that a private plaintiff, or her attorney, whose efforts create, discover, increase or preserve a fund to which others also have a claim is entitled to recover from the fund the costs of her litigation, including attorneys’ fees.” *Vincent v. Hughes Air West, Inc.*, 557 F.2d 759, 769 (9th Cir. 1977); *see also In re Omnivision Tech., Inc.*, 559 F.Supp.2d 1036, 1046 (N.D. Cal. 2008). This doctrine rests on the understanding that attorneys should normally be paid by their clients, and that unless attorneys’ fees are paid out of the common fund, those who benefitted from the fund would be unjustly enriched. *Boeing*, 444 U.S. at 478. To prevent this unfair result, courts exercise their inherent equitable powers to assess attorneys’ fees against the entire fund, thereby spreading the cost of those fees among all those who benefitted. *Id.*

As detailed fully in the Settlement Agreement, the Settlement provides for Defendants to pay a Gross Settlement Amount of \$118,275.00. (Settlement at §§ I, ¶14, II, ¶2 and III, ¶3). The Court preliminarily approved, the following allocation of the Settlement:

<i>Category</i>	<i>Amount</i>
Gross Settlement Amount:	\$118,275.00
Class Counsel Fees (1/3):	\$ [39,425.00]
Class Counsel Costs:	\$ [1,000.00]
Settlement Administration	\$ [18,500.00]
Service Award to Plaintiff:	<u>\$ [5,000.00]</u>

1 Net Settlement Fund: \$ 54,350.00

2 (Szamet Dec. ¶57.)

3 Class Counsel's application for an award of attorneys' fees in the amount of
4 \$39,425.00 or 1/3 of the Gross Settlement Amount created on behalf of the Class, is
5 reasonable and fair. This litigation resulted in the creation of a common fund for the
6 Class, namely a non-reversionary settlement fund of \$118,275.00. Because none of
7 the class members have paid fees to Class Counsel for their efforts during the
8 litigation, equity requires them to pay a fair and reasonable fee based on what the
9 market would traditionally require, no less than if they had hired private counsel to
10 litigate their cases individually. Class Counsel is therefore entitled to fees from the
11 settlement fund as a whole.

12 1. Results Achieved and Risk of Litigation

13 Class Counsel obtained an excellent result for the Class in view of the strength
14 of this case, the possible range of recoveries, and the great risks posed in continuing
15 with this litigation. In particular, as discussed in-depth in the accompanying Motion
16 for Final Approval of Class Action Settlement, the changing and uncertain legal
17 environment for Article III standing for claims under the FCRA made the ultimate
18 outcome of this litigation uncertain. Further, there is uncertainty surrounding
19 Plaintiff's ability to prove his claims given the unpredictability associated with class
20 certification as well as complex jury trials.

21 Despite these risks, Plaintiff and Class Counsel recovered \$118,275.00 on
22 behalf of the Settlement Class, that the class members would likely not have
23 recovered independent of this action. Based upon the anticipated Net Settlement
24 Fund, each of the 1,226 Settlement Class members shall each receive approximately
25 anywhere between \$37.38 and \$74.76. (Keough Dec., ¶18.)

26 2. Skills of Counsel and the Quality of Work

27 Class Counsel showed great skill, thoroughness, and diligence in investigating
28 and developing the claims, liability theories, and estimated possible recoveries in

1 this litigation. (Szamet Dec. ¶¶58) Class Counsel have many years of experience
2 litigating complex class action cases in the employment and consumer context.
3 (Szamet Dec. ¶¶53-55.)

4 As shown in Plaintiff’s motion for final approval, the legal issue of Article III
5 standing is cutting-edge, complex, and district courts in the Ninth Circuit and across
6 the country are split on what is sufficient for a “concrete injury” under the FCRA.
7 (*E.g., Del Llano v. Vivint Solar Inc.*, No. 17-cv-1429-AJB-MDD, 2018 WL 656094,
8 at *1 (S.D. Cal. Feb. 1, 2018) (granting defendant’s motion to dismiss plaintiff’s
9 FCRA claim for lack of Article III standing). Class Counsel’s thoroughness in its
10 research was critical to obtaining the Gross Settlement Amount of \$118,275.00.
11 Moreover, Class Counsel gained important information through the informal
12 exchange of pertinent discovery which allowed counsel to create an accurate damage
13 model. (Szamet Dec., ¶59.)

14 3. Contingent Nature of the Fee and the Financial Burden

15 It is recognized that one of the primary factors justifying an attorney fee award
16 in cases such as this are the risks inherent in contingency fee litigation. As observed
17 in *City of Detroit v. Grinnell Corporation*, 495 F.2d 448, 470 (2d Cir. 1974):

18 No one expects a lawyer whose compensation is contingent upon
19 his success to charge, when successful, as little as he would
20 charge a client who had agreed to pay for his services, regardless
21 of success. Nor, particularly in complicated cases producing
22 large recoveries, is it just to make a fee depend solely on the
reasonable amount of time expended.

23 In addition to the complexity of this case, Class Counsel has borne the entire
24 risk and costs of this litigation, all on a pure contingency basis. (Szamet Dec., ¶60.)
25 Class Counsel has expended **87.4** hours on this case. (Szamet Dec., ¶61) In addition,
26 if the Court grants final approval, Class Counsel anticipates that they will continue
27 to spend 5-20 hours of attorney time on this matter overseeing the settlement payout
28 procedures set forth in the Settlement Agreement. (Szamet Dec., ¶62.) Class counsel

1 also has incurred \$931.11, to date, in costs with no guarantee of repayment. (Szamet
2 Dec. ¶63.)

3 These are significant outlays of time and resources given the fee requested,
4 and it is this kind of situation, involving high risk and complex issues, that has been
5 recognized as justifying the requested fee award.

6 C. Class Counsel’s Fee Request is Reasonable Under a Lodestar
7 Crosscheck

8 A lodestar cross-check confirms that the percentage requested is reasonable.
9 *See Vizcaino v. Microsoft Corp.*, 290 F.3d 1043 1050 (9th Cir. 2002) (“while the
10 primary basis of the fee award remains the percentage method, the lodestar may
11 provide a perspective on the reasonableness of a given percentage award”). Here,
12 Class Counsel has spent **87.4** hours on this litigation, resulting in lodestar fees
13 through the present of **\$42,900.50** (Szamet Dec. ¶64.) Class Counsel has submitted
14 a declaration evidencing the reasonableness of the hours spent working on this case
15 and of the hourly rates for their services. (Szamet Dec. ¶65-82.) Note that rates are
16 provided at the current hourly rate, which is appropriate as a means of compensating
17 for delay in payment. *Missouri v. Jenkins by Agyei*, 491 U.S. 274, 283-84 (1989);
18 *In re Washington Pub. Power Supply Sys. Sec. Litig.* 19 F.3d 1291, 1305 (9th Cir.
19 1994).

20 Using the above lodestar, the percentage of the fund requested represents a
21 negative multiplier of approximately **0.92**. (Szamet Decl. ¶85.) *Vizcaino v.*
22 *Microsoft Corp.*, 290 F.3d 1043, 1051 (9th Cir. 2002) (holding that multipliers
23 “ranging from one to four are frequently awarded in common fund cases when the
24 lodestar method is applied”) (quoting *In re Prudential Ins. Co. Am. Sales Practice*
25 *Litig. Agent Actions*, 148 F.3d 283, 341 (3d Cir. 1998)). Comparison with the
26 lodestar thus demonstrates that the requested fee award of 1/3 (**\$39,450**) is
27 reasonable.

28 ///

1 **IV. THE COURT SHOULD APPROVE THE REQUEST FOR**
2 **REIMBURSEMENT OF COSTS**

3 Class Counsel has incurred \$931.11 in costs and requests reimbursement of
4 that amount. (Szamet Dec. ¶94, Ex. B (cost report). Under the common fund
5 doctrine, the attorneys whose efforts helped to create the fund are entitled to recover
6 “the costs of . . . [the] litigation,” in addition to attorneys’ fees. *Vincent*, 557 F.2d at
7 769; *see In re Omnivision*, 559 F.Supp.2d at 1048-49 (awarding payment for
8 reimbursement of expenses, plus interest from settlement fund; discussing that
9 attorneys may recover reasonable expenses that would typically be billed to paying
10 clients in non-contingency matters, including expenses for photocopying, printing,
11 postage, messenger services, legal research in electronic databases, experts,
12 consultants, and travel costs).

13 Here, all of the requested costs incurred are reasonable. (Szamet Decl. ¶95.)
14 To date, Class Counsel has incurred costs for filing fees, postage and legal research.
15 (Szamet Dec., ¶96; Ex. B.) All of these costs were necessarily incurred in the course
16 of this litigation, and all costs advanced have already been paid by Class Counsel.
17 (Szamet Decl. ¶97.)

18 **V. THE COURT SHOULD GRANT THE REQUESTED**
19 **ENHANCEMENT TO THE NAMED PLAINTIFF**

20 Finally, the Court should approve an enhancement of \$5,000.00 to the named
21 Plaintiff ERIC FELIX for his work on behalf of the Class. “Courts routinely approve
22 incentive awards to compensate named plaintiffs for the services they provide and
23 the risks they incurred during the course of the class action litigation.” *Ingram v. The*
24 *Coca-Cola Company*, 200 F.R.D. 685, 694 (N.D. Ga. 2001) (internal quotations and
25 citations omitted); *see also Van Vranken v. Atlantic Richfield Co.*, 901 F. Supp. 294,
26 299 (N.D. Cal. 1995). In *Coca-Cola*, the Court approved service awards of \$300,000
27 to each named plaintiff in recognition of the services they provided to the class by
28 responding to discovery, participating in the mediation process, and taking the risk

1 of stepping forward on behalf of the class. *Coca-Cola*, 200 F.R.D. at 694; *see also*,
2 *e.g.*, *Van Vranken*, 901 F. Supp. at 299 (approving \$50,000 participation award to
3 plaintiffs); *Glass v. UBS Financial Services, Inc.*, Case No. C-06-4068 MMC, 2007
4 WL 221862, at *17 (N.D. Cal. Jan. 26, 2007) (approving \$25,000 enhancement to
5 each named plaintiff).

6 Here, ERIC FELIX spent important time researching competent counsel
7 before bringing this lawsuit. (Szamet Dec. ¶99; Felix Decl. ¶5.) Once the lawsuit
8 was filed, he helped to gather relevant employment documents in his possession.
9 (Szamet Dec. ¶100; Felix Dec., ¶5.) He maintained regular contact with Class
10 Counsel to discuss the status of the case and regularly checked in about the case’s
11 progress. (Szamet Dec. ¶101; Felix Decl. ¶5.) He also reviewed all relevant
12 settlement documents. (Szamet Dec. ¶102.)

13 The Class Notice disclosed the enhancement award. Doc. No. 33-1 (Class
14 Counsel will request that the Named Plaintiff receive an enhancement award of up
15 to \$5,000 in his role as Named Plaintiff). (Szamet Dec. ¶103.)

16 As of today, no Class Member has objected to the proposed enhancement.
17 (Szamet Dec. ¶104; Keough Dec., ¶14.) Under the circumstances, a representative
18 payment of \$5,000.00 is justified and the Court should award this payment to ERIC
19 FELIX from the common fund as provided in the Settlement Agreement. (Szamet
20 Dec. ¶105.)

21 ///

22 ///

23 ///

24 ///

25 ///

26 ///

27 ///

28 ///

1 **VI. CONCLUSION**

2 For the foregoing reasons, Plaintiff respectfully requests that the Court award
3 attorneys' fees equal to 1/3 of the Global Settlement Fund, or \$39,425, and
4 reimbursement of costs of \$931.11. Plaintiff also requests an enhancement for the
5 Representative Plaintiff of \$5,000.00. For the above reasons, all of these requests
6 are justified as part of the overall settlement, and the Court should approve them as
7 reasonable and fair.

8
9 DATED: April 10, 2020

KINGSLEY & KINGSLEY, APC

10
11 By: 

12 KELSEY M. SZAMET
13 DAVID KELEDJIAN

14 Attorneys for Plaintiff ERIC FELIX and the
15 Class
16
17
18
19
20
21
22
23
24
25
26
27
28