

1 James M. Finberg (SBN 114850)
2 Eve H. Cervantez (SBN 164709)
3 Eileen B. Goldsmith (SBN 218029)
4 ALTSHULER BERZON LLP
5 177 Post Street, Suite 300
6 San Francisco, CA 94108
7 Tel. (415) 421-7151
8 Fax (415) 362-8064
9 Email: ecervantez@altber.com

6 Matthew J. Matern (SBN 159798)
7 RASTEGAR & MATERN,
8 ATTORNEYS AT LAW APC
9 1010 Crenshaw Boulevard, Suite 100
10 Torrance, CA 90501
11 Tel. (310) 218-5500
12 Fax (310) 218-1155
13 Email: mjm@rastegar-matern.com

10 MATTHEW RIGHETTI (SBN 121012)
11 JOHN GLUGOSKI (SBN 191551)
12 RIGHETTI GLUGOSKI
13 456 Montgomery Street, Suite 1400
14 San Francisco, California 94014
15 Tel. (415) 983-0900
16 Fax. (415) 397-9005

15 Class Counsel

16 SUPERIOR COURT OF THE STATE OF CALIFORNIA
17 FOR THE COUNTY OF LOS ANGELES

19 BRIAN BEHAEIN, BORIS GNEZDILOV,
20 RAQUEL CRUZ, AND BERSAYNA
21 CLEMENTE, on Behalf of Themselves and
22 All Others Similarly Situated,

22 Plaintiffs,

23 vs.

24 PIZZA HUT, INC.,

25 Defendant.

Case No. BC384563

Assigned for all purposes to Judge Amy D.
Hogue, Dept. 307

CLASS ACTION

**PLAINTIFFS' NOTICE OF MOTION AND
MOTION FOR ATTORNEYS' FEES AND
LITIGATION EXPENSES;
MEMORANDUM OF POINTS AND
AUTHORITIES**

Date: November 10, 2016
Time: 10:00 a.m.
Department: 307

Complaint Filed: January 29, 2008

1 **NOTICE OF MOTION AND MOTION**

2 PLEASE TAKE NOTICE that on November 10, 2016 at 10:00 a.m., or as soon thereafter
3 as the parties may be heard, in Department 307 of the Los Angeles Superior Court, 600 S.
4 Commonwealth Ave., Los Angeles, California 90057, Plaintiffs Brian Behaein, Boris Gnezdilov,
5 Raquel Cruz and Bersayna Clemente will and hereby do move this Court to award Class Counsel
6 from Altshuler Berzon LLP, Rastegar & Matern, and Righetti Glugoski, \$2 million in attorneys'
7 fees (one-third of the gross settlement fund of \$2 million) and \$429,810.16 in litigation costs and
8 expenses actually incurred in prosecuting this action, in accordance with the parties' class action
9 Settlement.

10 This motion is made on the grounds that the requested award is fair, reasonable, and
11 appropriate under the common fund doctrine under either the percentage-of-the-fund method or the
12 lodestar method. The requested fee award, which represents one-third of the settlement fund, is
13 considerably less than Class Counsel's lodestar to date, which exceeds \$5 million (calculated by
14 multiplying Class Counsel's reasonable hours worked by their reasonable rates billed).
15 In addition, Class Counsel seek reimbursement of \$429,810.16 in litigation costs and expenses they
16 incurred. The costs and expenses for which Class Counsel seek reimbursement were reasonable
17 and necessary to this litigation and were incurred for the benefit of the Class.

18 This motion is based on this Notice of Motion and Motion; the accompanying
19 Memorandum of Points and Authorities; the supporting declarations of James M. Finberg, Matthew
20 J. Matern, and John Glugoski filed herewith; any reply briefs or declarations that may be filed; all
21 pleadings and papers on file with this Court; and such argument as may be heard by the Court.

22 Dated: October 18, 2016

Respectfully submitted,

23
24 RASTEGAR & MATERN, APC
Matthew J. Matern

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26 ALTSHULER BERZON LLP

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28 James M. Finberg
Eve H. Cervantez

Eileen B. Goldsmith

RIGHETTI GLUGOSKI

Matthew Righetti

John Glugoski

Class Counsel

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1 ordinarily paid by paying clients. This is over \$20,000 less than the \$450,000 for litigation
2 expenses that was authorized by the Settlement. The remainder of the \$450,000 in costs authorized
3 by the settlement will become part of the Net Settlement Fund that is available for class member
4 settlement payments.

5 II. BACKGROUND

6 A. Class Counsel Devoted Substantial Time and Resources to Litigating This Case on a 7 Contingency Basis, Despite the Risks Involved.

8 Over the eight years of this case, Class Counsel from the three law firms have incurred
9 nearly 8,600 hours in litigating this action.¹ Class Counsel undertook this case on an entirely
10 contingent basis notwithstanding the very substantial litigation risks, and as a result of their
11 tenacity have achieved a \$6 million Settlement that will provide substantial benefits to Class
12 Members.

13 Plaintiff Brian Behaein originally filed this case in January 2008, seeking damages for
14 under-reimbursement of business-related vehicle expenses incurred by Pizza Hut's delivery drivers
15 in violation of Labor Code §2802, missed and late meal and rest breaks under the Labor Code, and
16 failure to pay reporting time required by the applicable IWC Wage Order. When the case was
17 originally filed, the legal standards and availability of class certification on the principal claims for
18 missed meal and rest breaks and vehicle expense reimbursement were extremely unsettled.

19 Since 2012, when the Supreme Court decided *Brinker Restaurants, Inc. v. Superior Court*
20 (2012) 53 Cal.4th 1004, the law has become settled as to the legal standards that apply to a claim
21 for premium pay for missed or late meal and rest breaks under Labor Code §226.7, which
22 authorized premium pay whenever an employer "fail[ed] to provide" a meal or rest break required
23 by law, and that courts must take into account when deciding a motion to certify meal and rest
24 break claims as a class action. But when Plaintiffs filed this case in 2008, the law was entirely
25 unsettled. Based on misreadings of the Labor Code's substantive requirements, many courts at that
26

27 ¹ The full background of this litigation is set forth at pp.1-2, 5 of Plaintiffs' Motion for Preliminary
28 Approval (filed Feb. 10, 2016).

1 time were refusing to certify meal and rest break claims as class actions.² Even after the Supreme
2 Court granted review in *Brinker* in early 2009, there remained substantial uncertainty as to both the
3 legal standards to be applied to the claim on the merits, and how those legal standards played out at
4 class certification.

5 This uncertainty led to much of the work Class Counsel had to do in pursuing class
6 certification of these claims. Additional courts continued to rule that meal and rest break classes
7 could not be certified³ -- and Pizza Hut repeatedly filed notices of supplemental authority to bring
8 those decisions to the Court's attention before the Court's February 2013 issue-only class
9 certification decision on those claims. Judge Mohr held *four* substantive hearings on the initial
10 class certification motion before reaching a decision, and ordered much supplemental briefing from
11 the parties. Even after the Supreme Court decided *Brinker* in 2012, there was substantial further
12 briefing and oral argument regarding its applicability to class certification in this case. To further
13 protect Class Members' interests, Class Counsel submitted requests for depublication to the
14 California Supreme Court on several occasions to try to blunt the impact of Court of Appeal
15 decisions denying class certification on meal and rest break claims. Finberg Decl., ¶24;
16 Declaration of Eileen B. Goldsmith in Support of Plaintiffs' Mot. for Preliminary Approval
17 ("Goldsmith Prelim. Approval Decl."), ¶¶11-14.

18 Similar uncertainty prevailed at the time the case was filed regarding whether the delivery
19 drivers' vehicle reimbursement claims could be certified as a class action. In 2007, the Supreme
20 Court had decided *Gattuso v. Harte-Hanks Shoppers, Inc.* (2007) 42 Cal.4th 554, which set forth
21 three ways that a plaintiff could prove a claim for under-reimbursement of work-related vehicle
22 expenses under Labor Code §2802, and vacated a trial court decision that had denied class

23 _____
24 ² See, e.g., *Kenny v. Supercuts, Inc.* (N.D. Cal. 2008) 252 F.R.D. 641; *White v. Starbucks Corp.*
25 (N.D. Cal. 2007) 497 F. Supp. 2d 1080. By contrast, in the *Brinker* litigation itself, the trial court
had certified a meal and rest break class, but the Court of Appeal had vacated that decision, finding
it erroneous. *Brinker Restaurants, Inc. v. Superior Court* (2008) 165 Cal.App.4th 25, 31, *rev'd*, 53
Cal.4th 1004.

26 ³ See, e.g., *Hernandez v. Chipotle Mexican Grill* (2010) 189 Cal.App.4th 751; *Lamps Plus*
27 *Overtime Cases* (2011) 195 Cal.App.4th 389. The Supreme Court vacated both opinions following
its decision in *Brinker*, and later depublished those courts' subsequent decisions that continued to
28 reject class certification.

1 certification based on an inaccurate understanding of the law. At the time Plaintiffs filed this case
2 (and Plaintiff Gnezdilov filed his separate case), there were no decisions applying *Gattuso* in the
3 class certification context. Throughout this litigation, much uncertainty has remained regarding the
4 ability to pursue such claims on a class basis.⁴

5 Following Judge Mohr's denial, without prejudice, of Plaintiffs' motion to certify the
6 vehicle expense reimbursement claim, and his direction that any renewed motion would have to
7 establish that Pizza Hut's per-order flat-rate reimbursement policy actually under-reimbursed
8 delivery drivers for their business-related vehicle expenses (Feb. 5, 2013 Order at 32-34), Plaintiffs
9 undertook the substantial discovery and expert witness analysis that was necessary to make that
10 showing. Through discovery, Plaintiffs secured all of Pizza Hut's available historical data
11 reflecting actual deliveries and amounts paid to drivers in flat-rate reimbursements. Plaintiffs
12 retained expert Paul Regan to analyze this massive body of data, and coordinated with him closely
13 over more than a year to develop the comparison of the amounts Pizza Hut actually paid plaintiffs
14 to the amount it would have paid had it reimbursed drivers for their vehicle expenses on a mileage
15 reimbursement method. Plaintiffs then defended Mr. Regan's deposition and took the deposition
16 of Pizza Hut's expert Sonya Kwon, who had submitted an expert report disputing Mr. Regan's
17 analysis. While these efforts greatly increased both the lodestar time and the litigation costs, they
18 were essential to meeting the standard Judge Mohr had established for certifying the vehicle
19 expense reimbursement claim. The value of this work was borne out when the Court granted
20 Plaintiffs' renewed motion to certify the vehicle expense reimbursement claim in July 2015,
21 enabling the parties to reach a settlement by the end of 2015. (Nevertheless, the uncertainty of
22 maintaining class certification of that claim remains, as Pizza Hut promptly filed a writ petition to
23 overturn the certification order, which remained pending in the Court of Appeal at the time of
24 settlement.) Finberg Decl., ¶23; Goldsmith Prelim. Approval Decl., ¶11-13; Mot. for Preliminary
25

26 ⁴ See, e.g., *Lewis v. Starbucks Corp.* (E.D. Cal. 2008) 2008 WL 4196690 (granting certification);
27 *Schulz v. QualXServ, LLC* (S.D. Cal. Apr. 26, 2012) 2012 WL 1439066 (same); *Ruiz v. Affinity*
28 *Logistics Corp.* (S.D. Cal. Jan. 29, 2009) 2009 WL 648973 (denying certification); *Ortiz v. CVS*
Caremark Corp. (N.D. Cal. Dec. 2, 2013) 2013 WL 6236743 (same).