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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

PENNY A. SCOTT, on behalf of
herself and other similarly-situated
employees,

Plaintiff,

v.

BLACKSTONE CONSULTING,
INC., a California Corporation; and
DOES 1 Through 10, inclusive,

Defendants.

CASE NO. 21CV1470 MMA (KSC)

CLASS ACTION

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PLAINTIFF'S MOTION FOR
PRELIMINARY APPROVAL OF
CLASS ACTION SETTLEMENT**

Date: July 10, 2023

Time: 2:30 p.m.

Judge: Michael M. Anello

Ctrm.: 3D (3rd Floor)

Complaint filed: May 21, 2021

Removal Date: August 18, 2021

Trial date: Not set

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I. INTRODUCTION

Plaintiff Penny A. Scott (“Plaintiff Scott”) seeks preliminary approval of a \$1,000,000 non-reversionary, pre-certification wage and hour class action and Private Attorneys General Act (“PAGA”) Settlement with Blackstone Consulting, Inc. (“BCI” or “Defendant”) for an estimated approximately 1,179 California Class Members as of December 31, 2022.¹ Declaration of Isam C. Khoury (“Khoury Decl.”), ¶ 10, Exhibit 1 – Class Action and PAGA Settlement Agreement (“Settlement Agreement” or “SA”), ¶¶ 24, 71.

II. PARTIES

Defendant BCI hires, employs, manages, and provides service employees to hospitals, schools, universities, and industrial sites throughout California. Khoury Decl., ¶ 11. Plaintiff Scott was employed by Defendant BCI as a non-exempt Security Officer at the Kaiser Permanente Zion Medical Center in San Diego County from approximately December 15, 2017 through March 8, 2021. Khoury Decl., ¶ 12; Declaration of Penny A. Scott (“Scott Decl.”), ¶ 3.

As part of this Settlement, the Parties sought leave of court to file a Second Amended Complaint adding plaintiffs who filed other actions against BCI to this action. Khoury Decl., ¶ 13. Specifically, Plaintiff Scott sought to add as Plaintiffs Kawana Anderson,² Tiffany Lockett and Tocashema Williams,³ and Ahmir Ringo.⁴ Each worked as a non-exempt Security Officer for BCI at a Kaiser facility during the Class Period: Anderson from approximately July 2019 through February 2022 in Los Angeles County; Lockett from approximately August 2021

¹ The putative class consists of approximately 87.5% non-exempt Security Officers and 12.5% non-exempt employees in other positions.

² *Anderson v. Blackstone Consulting, Inc.*, Los Angeles Superior Court Case Nos. 22STCV31450 (Class) and 22SMCV01667 (PAGA).

³ *Lockett, et al. v. Blackstone Consulting, Inc.*, Riverside Superior Court Case No. CVRI2201443 (Class).

⁴ *Ringo v. Blackstone Consulting, Inc.*, Los Angeles Superior Court Case No. 22SMCV00066 (PAGA).

1 through January 31, 2022 in Riverside County; Williams from approximately
 2 June 2021 through January 19, 2022 in Riverside County; and Ringo from
 3 approximately April 2021 through September 2021 in Los Angeles County.
 4 Khoury Decl., ¶ 14; Declaration of Kawana Anderson (“Anderson Decl.”), ¶ 2;
 5 Declaration of Tiffany Lockett (“Lockett Decl.”), ¶ 3; Declaration of Tocashema
 6 Williams (“Williams Decl.”), ¶ 3; Declaration of Ahmir Ringo (“Ringo Decl.”),
 7 ¶ 2.

8 **III. THE CLASS AND AGGRIEVED EMPLOYEES**

9 The Class is “all individuals who are or previously were employed by BCI
 10 in California as non-exempt employees working at Kaiser Permanente facilities
 11 and hospitals in California at any time during the Class Period.” SA, ¶ I (5). The
 12 Class Period is May 21, 2017 to April 30, 2023. SA, ¶ I (13). The PAGA group
 13 (“Aggrieved Employees”) is made up of Class Members who worked any time
 14 from May 21, 2020 to April 30, 2023 (“PAGA Period”). SA, ¶ I (34). As of
 15 December 31, 2022, there were an estimated 84,405 class Workweeks worked by
 16 1,179 Class Members and 73,715 PAGA Pay Periods worked by 874 Aggrieved
 17 Employees. SA, ¶ IV (71).

18 **IV. PROCEDURAL HISTORY**

19 On May 21, 2021, Plaintiff Penny Scott filed a wage and hour class action
 20 against Defendant in the Superior Court of the State of California, County of San
 21 Diego (Case No. 37-2021-00022564-CU-OE-CTL) (the “Scott matter”). On July
 22 21, 2021, Plaintiff Scott filed an Amended Complaint. Plaintiff Scott asserted
 23 that Defendant failed to pay or provide: minimum, regular, and overtime wages;
 24 meal periods; rest periods; accurate wage statements; vacation wages; final
 25 wages; and business expense reimbursements. Plaintiff Scott further alleged the
 26 failure to pay wages violated the Unfair Competition Law and sought PAGA
 27 civil penalties for the above violations and for the failure to maintain accurate
 28 records. SA, ¶ IV (52). On August 18, 2021, Defendant removed the Scott matter

1 to this Court. SA, ¶ II (53).

2 On January 18, 2022, Plaintiff Ahmir Ringo filed a PAGA action against
3 Defendant in the Superior Court of the State of California, County of Los
4 Angeles (Case No. 22SMCV00066) (the “Ringo matter”). Plaintiff Ringo sought
5 civil penalties for Defendant’s alleged failure to pay or provide: overtime wages;
6 meal periods; rest periods; minimum wages; final wages; wages during
7 employment; accurate wage statements; accurate payroll records; and business
8 expense reimbursements. SA, ¶ II (54). On March 23, 2022, Defendant removed
9 the Ringo matter to the United States District Court, Central District of
10 California. On May 3, 2022, the Central District Court remanded the Ringo
11 matter back to the state court. SA, ¶ II (55).

12 On April 8, 2022, Plaintiffs Tiffany Lockett and Tocashema Williams filed
13 a wage and hour class action against Defendant in the Superior Court of the State
14 of California, County of Riverside (Case No. CVRI2201443) (the
15 “Lockett/Williams matter”). Plaintiffs Lockett and Williams asserted that
16 Defendant failed to pay or provide: minimum wages; overtime wages; business
17 expense reimbursements; meal periods; rest periods; and accurate wage
18 statements. Plaintiffs Lockett and Williams further alleged the failure to pay
19 wages violated the Unfair Competition Law. SA, ¶ II (56). On May 17, 2022,
20 Defendant removed the Lockett/Williams matter to the United States District
21 Court, Central District of California. On June 2, 2022, the Central District Court
22 remanded the Lockett/Williams matter back to state court. SA, ¶ II (57).

23 On September 26, 2022, Plaintiff Kawana Anderson filed a wage and hour
24 class action against Defendant in the Superior Court of the State of California,
25 County of Los Angeles (Case No. 22STCV31450) (the “Anderson Class Action
26 matter”). Plaintiff Anderson asserted that Defendant failed to pay or provide:
27 overtime wages; meal periods; rest periods; minimum wages; final wages; wages
28 during employment; accurate wage statements; required payroll records; and

1 business expense reimbursements. Plaintiff Anderson further alleged the failure
2 to pay wages violated the Unfair Competition Law. SA, ¶ II (58). On September
3 26, 2022, Plaintiff Kawana Anderson separately filed a PAGA action against
4 Defendant in the Superior Court of the State of California, County of Los
5 Angeles (Case No. 22SMCV01667) (the “Anderson PAGA Action matter”).
6 Plaintiff Anderson sought civil penalties for the same underlying claims as in the
7 Anderson Class Action matter. SA, ¶ II (59).

8 The Scott matter, Ringo matter, Lockett/Williams matter, and Anderson
9 matters (collectively, “BCI Wage and Hour Actions”) were all brought on behalf
10 of all non-exempt employees of Defendant. Khoury Decl., ¶ 15.

11 **V. INVESTIGATION, DISCOVERY, AND MEDIATION**

12 In June 2021, Counsel for Plaintiff Scott and Defendant met telephonically
13 to discuss Plaintiff Scott’s claims, her employment, and Defendant’s operations.
14 Thereafter, Plaintiff Scott requested, and Defendant provided, extensive
15 information regarding Defendant’s operations.⁵ After months of informational
16 exchanges, in October 2021, the Parties agreed to mediate and Plaintiff Scott
17 agreed to limit the scope of the mediation to only Defendant’s non-exempt
18 employees who worked at Kaiser facilities and hospitals. Khoury Decl., ¶ 16.

19 For mediation, the Class was defined as all non-exempt employees of
20 Defendant who have worked at a Kaiser facility or hospital in California at any
21 time from May 21, 2017 forward, with aggrieved employees being only those
22 who worked from May 21, 2020 forward. The mediation was initially scheduled
23 for March 24, 2022, but was continued to December 1, 2022 to allow the Parties
24 adequate time to produce and analyze data and documents for mediation. The

25 _____
26 ⁵ Specifically, Defendant provided the number of companies to which it provides employees in
27 California, the number of non-union and union contracts Defendant has with these companies,
28 the number of employees employed by Defendant in California (including the number
employed at Kaiser facilities), the different positions its non-exempt employees hold, and that
Defendant handles payroll for all its employees. Defendant also produced the Kaiser CBA to
which Plaintiff Scott was subject.

Parties and Counsel in the Scott, Ringo, Lockett/Williams, and Anderson matters agreed mediation would encompass all of these matters. Khoury Decl., ¶ 17.

For mediation, Plaintiff Scott requested, and Defendant produced: the approximate class size, class workweeks, and number of employees separated within the three-year waiting time penalty statute of limitations; a five percent sample of randomly selected payroll records; thousands of pages of corresponding timekeeping records (“shift activity reports”); thousands of wage statements; exemplar completed missed meal and rest period reports and time correction forms; a signed On Duty Meal Period Agreement and Meal Period Waiver for Plaintiff Scott; and all work policies relevant to the claims at issue.⁶ Khoury Decl., ¶ 18.

Plaintiff Scott retained a consultant to review the data and prepare a damage model after discussing the claims in detail with Class Counsel. Khoury Decl., ¶ 19. On December 1, 2022, the Parties attended mediation with Louis Marlin, Esq., an experienced and well-regarded wage and hour class action mediator and reached an agreement in principle, later negotiating the detailed Settlement Agreement offered for Court approval. Khoury Decl., ¶ 20.

VI. SUMMARY OF PROPOSED SETTLEMENT

A. Settlement Terms.

Plaintiffs Penny Scott, Kawana Anderson, Tiffany Lockett, Tocashema Williams, and Ahmir Ringo and Defendant (collectively the “Parties”) agreed to settle the Actions for the Gross Settlement Amount of \$1,000,000 (“GSA”), no part of which may revert to Defendant. SA. ¶ I (24), III (67). The GSA includes, subject to the Court approval: (a) a Class Counsel Fees Payment of not more than

⁶ Defendant produced: (1) BCI’s Healthcare Security – Rest Break and Meal Period Policy, (2) a July 30, 2018 BCI Memorandum regarding Rest Break Policies sent to all California Kaiser Healthcare Non-Exempt (“Hourly”) Employees; and (3) the CBAs between Kaiser and BCI for June 26, 2013 through July 31, 2018 and for November 1, 2018 through October 31, 2023, each of which contained policies regarding wages, overtime, and breaks.

one-third of the GSA, or approximately \$333,333.33, to compensate Class Counsel for work performed and remaining to be performed in securing final settlement approval (Plaintiffs consented to apportion fees 65% to Cohelan Khoury & Singer LLP; 25% to Lawyers for Justice; and 10% to Diversity Law Group); (b) a Class Counsel Litigation Expenses Payment of not more than \$25,000; (c) Class Representative Service Payments of \$10,000 to each Plaintiff, for a total of \$50,000, for work performed, risks undertaken for Defendant's costs if the case had not successfully concluded, and substantial benefits conferred on absent Settlement Class Members; (d) actual Settlement Administration Expenses not to exceed \$15,000⁷; (e) PAGA Payment to the Labor Workforce and Development Agency ("LWDA") of \$37,500 (75% of the \$50,000 PAGA Penalties); and (f) PAGA Payment of \$12,500 to Aggrieved Employees (25% of the \$50,000 PAGA Penalties). Khoury Decl., ¶ 21; SA, ¶¶ III (67-69).

A payment of PAGA penalties will be made to the estimated 874 Aggrieved Employees based on the number of pay periods worked during the PAGA Period, whether or not they opt out of the class settlement. Khoury Decl., ¶ 22; SA, ¶¶ III (68(c)).

After all Court-approved deductions from the GSA, the remaining "Net Settlement Amount" ("NSA") estimated at \$526,666.67 will be distributed to Settlement Class Members (those Class Members who do not opt out). Submission of a claim form is not required. Khoury Decl., ¶ 23; SA, ¶¶ I (24, 30), III (69). Each Participating Class Member will receive an Individual Class Payment based on the following calculation: Net Settlement Amount/Total Workweeks Worked = Weekly Rate x Number of Workweeks Worked by Participating Class Member. Khoury Decl., ¶ 24; SA, ¶ III (69(b)).

The per workweek value of the settlement is: \$6.23 (\$526,666.67

⁷ Settlement administration expenses are currently estimated at a discounted flat fee of \$12,250. "This is a fixed fee so long as the class size has been accurately represented." Declaration of Julie Green on Behalf of CPT Group, Inc. ("CPT Decl."), ¶ 8.

1 NSA/84,405 class workweeks). A Class Member who worked the entire Class
2 Period (310 weeks), can expect to receive a total payment of: \$1,931.30. Khoury
3 Decl., ¶ 25.

4 The method of distribution allocates funds based on weeks worked and
5 does not give preference to any Class Member. The information to distribute the
6 Settlement is readily available from BCI's records, and the Administrator can
7 apply the settlement formula fairly and transparently. Settlement payments are
8 allocated one-third to wages, one-third to interest, and one-third to penalties. A
9 W-2 Form will be issued for wages, and a Form 1099 for interest and penalties.
10 Khoury Decl., ¶ 26; SA, ¶ III (69(b)(i)).

11 **B. Settlement Administration and Notice to the Class.**

12 The Parties selected CPT Group, Inc. ("CPT") to administer the
13 settlement. Khoury Decl., ¶ 27; SA, ¶¶ I (2), VII (80). Following preliminary
14 approval, CPT will conduct a search of the National Change of Address database
15 to update Class Member addresses, and mail a Notice of Class Action Settlement
16 ("Class Notice"), Request for Exclusion form, and pre-printed return envelope
17 ("Class Notice Packet") to each member of the Class identified by Defendant's
18 employment records. Khoury Decl., ¶ 28; SA, ¶¶ I (10-12), IV (72), VII (84(a)).

19 The proposed Notice advises the Class of the terms of the proposed
20 Settlement and of their right to, and the manner and timing to: (1) participate in
21 the Settlement without submitting a claim; (2) dispute the basis of the Individual
22 Settlement Payment; (3) object; and/or (4) opt out. The Notice informs Class
23 Members of estimated individual payments, release to be given, date of the Final
24 Approval hearing, and how to obtain further information by contacting Class
25 Counsel or CPT. Khoury Decl., ¶ 29, Ex. 1, A - Class Notice.

26 **C. Released Claims.**

27 Released Class Claims are defined as "all claims that were, or reasonably
28 could have been, alleged, based on the facts contained, in the BCI Wage and

Hour Actions, relating to the payment or non-payment of wages and alleging violations of federal, state or local law or administrative order, such as the Industrial Welfare Commission Wage Orders and California Labor Code sections 201, 202, 203, 204, 226, 226.2, 226.7, 510, 512, 558, 1194, 1194.2, 1197, 1197.1, and 2802 and Business and Professions Code sections 17200 *et seq.*, including the failure to pay wages for hours worked, minimum wage claims, overtime claims, regular rate claims, meal break violations, rest break violations, waiting time penalties, wage statement claims, failure to provide vacation wages, failure to reimburse business expense claims, and Unfair Competition Law violations.” SA, ¶ 75.

Released PAGA Claims are defined as “all PAGA claims that were, or reasonably could have been, alleged based on facts contained in the BCI Wage and Hour Actions, and Plaintiffs’ PAGA Notices, relating to PAGA penalties in violation of Cal. Labor Code §§ 2698, *et seq.*” SA, ¶ 75.

VII. THE SETTLEMENT SHOULD BE PRELIMINARILY APPROVED

A class action may not be settled without court approval. FRCP Rule 23(e). This procedure safeguards Class members’ due process rights and fulfills the court’s role as a guardian of class interests. *See Alba Conte & Herbert Newberg, 4 Newberg on Class Actions (“Newberg”), §§ 11.22, et seq. (2002).* The court initially determines whether the proposed Settlement is within the “range of reasonableness,” and whether notice to the Class and a formal fairness hearing are appropriate. *Newberg* § 11.25.

Courts must give “proper deference” to settlement agreements because, “the court’s intrusion upon what is otherwise a private consensual agreement negotiated between the parties to a lawsuit must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between the negotiating parties, and the settlement, taken as a whole, is fair, reasonable and adequate to all concerned.”

1 *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1027 (9th Cir. 1988) (citations
2 omitted.)

3 To determine whether a proposed settlement is “fair, reasonable and
4 adequate” a Court must balance several factors including “the strength of
5 plaintiff’s case; the risk, expense, complexity, and the likely duration of further
6 litigation; the risk of maintaining class action status throughout the trial; the
7 amount offered in settlement; the extent of discovery completed, and the stage of
8 the proceedings; the experience and views of counsel; the presence of a
9 governmental participant; and the reaction of the class members to the proposed
10 settlement. This list is not exclusive and different factors may predominate in
11 different factual contexts.” *Torrissi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1378
12 (9th Cir. 1993) (citation and internal quotations omitted.)

13 **A. The Settlement Resulted from Informed Arms’-Length**
14 **Negotiations Between Counsel with Extensive Wage and Hour**
15 **Class Action Experience.**

16 “In the Ninth Circuit, a Court affords a presumption of fairness to a
17 settlement, if: ‘(1) the negotiations occurred at arm’s length; (2) there was
18 sufficient discovery to allow counsel to act and the Court to review their actions
19 in an informed manner; (3) the proponents of the settlement are experienced in
20 similar litigation; and (4) only a small fraction of the class objected.’” *Rodriguez*
21 *v. West Publishing Corp.*, No. CV-05-3222 R (MCx), 2007 U.S. Dist. LEXIS
22 74849, *33 (C.D. Ca. Sept. 10, 2007). The view of attorneys actively conducting
23 the litigation “is entitled to considerable weight” in settlement approval. *Ellis v.*
24 *Naval Air Rework Facility*, 87 F.R.D. 15, 18 (N.D. Cal. 1980), *aff’d*. 661 F.2d
25 939 (9th Cir. 1981). “[R]ecommendations of plaintiffs’ counsel should be given a
26 presumption of reasonableness.” *In re Omnivision Technologies, Inc.*, 559 F.
27 Supp. 2d 1036, 10432 (N.D. Cal. 2007).

28 Here, three out of four factors are met, and the fourth must be evaluated

1 after Class notice is given, post-preliminary approval. First, negotiations
 2 remained at arms'-length at all times before and after mediation, which a neutral
 3 third-party mediator facilitated. Second, Defendant produced, and Plaintiff Scott
 4 and her consultant thoroughly reviewed and analyzed, thousands of pages of
 5 relevant timekeeping, payroll, and policy documents to evaluate this action for
 6 settlement. Third, Class Counsel Isam C. Khoury, Michael D. Singer, and
 7 Rosemary C. Khoury of Cohelan Khoury & Singer, who have significant wage
 8 and hour class action experience and have obtained certification and settlement
 9 approval in dozens of cases, endorse this settlement; as such, their assessment
 10 should be given a presumption of reasonableness. Khoury Decl., ¶¶ 2-9, 30.⁸
 11 Defendant's counsel Pankit J. Doshi and Rae Y. Chung, and their firm
 12 McDermott Will & Emery LLP, are also knowledgeable, experienced, and
 13 capable in wage and hour class action litigation and do not oppose this motion.
 14 Khoury Decl., ¶ 31.

15 **B. The Amount Offered in Settlement Falls Within the Range of**
 16 **Possible Approval.**

17 "To evaluate the range of possible approval criterion, . . . courts primarily
 18 consider plaintiffs' expected recovery balanced against the value of the
 19 settlement offer." *Hudson v. Libre Tech., Inc.*, 2019 U.S. Dist. LEXIS 196964,
 20 *30-31 (S.D. Cal. Nov. 13, 2019) (quoting *Vasquez v. Coast Valley Roofing, Inc.*,
 21 670 F.Supp.2d 1114, 1125 (E.D. Cal. 2009)). Here, the Settlement value is fair
 22 and adequate when viewed in light of the risks and delays associated with
 23 continued litigation, as explained in detail below. Specifically, through this
 24 Settlement, Plaintiff will recover \$1,000,000, which represents approximately
 25

26 ⁸ Diversity Law Group, P.C and Lawyers for Justice, PC, who seek to be added to this action
 27 via the filing of a Second Amended Complaint for the purpose of processing this settlement, are
 28 similarly experienced in wage and hour litigation. Declaration of Max Gavron on behalf of
 Diversity Law Group, P.C. ("Gavron Decl."), ¶¶ 5-15; Declaration of Joanna Ghosh on behalf
 of Lawyers for Justice, PC ("Ghosh Decl."), ¶¶ 2-6.

85% of the reasonable value of the class claims released (\$1,000,000/\$1,174,325) and 71% of the reasonable value of the class and PAGA claims released (\$1,000,000/\$1,414,394).⁹ Khoury Decl., ¶ 32.

A settlement is not judged solely against what might have been recovered at trial, nor must a settlement provide 100% of damages sought to be fair and reasonable. *Linney v. Cellular Alaska Partnership*, 151 F.3d 1234, 1242 (9th Cir. 1998) (internal quotations and citations omitted) (“[T]he very essence of a settlement is compromise, a yielding of absolutes and an abandoning of highest hopes...The fact that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved.”). The proposed settlement value offered here is reasonable and will provide a tangible benefit to the proposed Settlement Class. Each claim’s reasonable value is calculated in detail below. Khoury Decl., ¶ 33.

1. Unpaid Wages (Rounding) – §§ 1194, 510

Plaintiff contends Defendant rounded Class Members’ time worked to the nearest quarter-hour at the start and end of shifts without informing them of this rounding policy. As a result, Plaintiff contends Defendant failed to pay class members wages for all time worked. Plaintiff’s consultant determined that this rounding practice led to approximately 2,384 *net* hours not being compensated, with 5,440 gross hours underpaid and 3,056 overpaid. Assuming half of these net underpaid hours were overtime and half were regular hours, damages were calculated as \$56,226 (1,192 hours x \$18.87 [regular hourly rate] + 1,192 x \$28.30 [overtime rate]). Plaintiff estimated the chance of recovering this amount at 25%, yielding damages of **\$14,056**, given the risk this claim would not be

⁹ See, infra: **\$14,056** (Unpaid Rounding Wages) + **\$183,687** (Meal Period Premium Wages—512, 226.7) + **\$183,687** (Rest Period Premium Wages) + **\$48,507** (Unreimbursed Cell Phone Expenses) + **\$457,987** (Wage Statement Penalties) + **\$286,401** (Waiting Time Penalties) = **\$1,174,325**. Adding PAGA Penalties of **\$240,069** yields **\$1,414,394**.

certified, *see, e.g. McCarty v. SMG Holdings, I, LLC*, No. 17-cv-06232-JD, 2022 U.S. Dist. LEXIS 57579, at *13 (N.D. Cal. Mar. 29, 2022) (denying certification on nearest quarter-hour rounding claim), or proven at trial, given that Defendant sometimes underpaid and sometimes overpaid wages due to rounding, *see Corbin v. Time Warner Entm't-Advance/Newhouse P'ship*, 821 F.3d 1069, 1079-80 (9th Cir. 2016) (explaining that a rounding policy is “neutral in application” where “[s]ometimes [the employee] gained minutes and compensation, and sometimes [they] lost minutes and compensation.”). Khoury Decl. ¶ 34.

2. Meal and Rest Period Premiums – Labor Code §§ 226.7, 512

Plaintiff contends Defendant failed to provide legally required uninterrupted and off-duty meal and rest periods or premium wages in lieu of them. *See* Labor Code §§ 512(a), 226.7(b-c); Wage Order 4-2001, §§ 11(A-B), 12(A-B). Specifically, Plaintiff contends that security guard employees were required to remain on premises and on call during rest periods and that time records sampled for all non-exempt employees show missed, late, and short meal periods. Khoury Decl., ¶ 35.

As to rest periods, Defendant argues that its non-exempt security guard employees are exempt under Labor Code section 226, subdivisions (e) and (f) because they are security officers; thus, they can be asked to remain on premises and on call and to carry a communication device during rest periods. Khoury Decl., ¶ 36.

As to meal periods, Defendant argues that its non-exempt security guard employees are exempt from the requirement of Labor Code section 512, subdivision (a) under both Labor Code section 512, subdivisions (e) and (f) and under valid, signed on-duty meal period agreements. Khoury Decl., ¶ 37.

Specifically, Defendant contends Class Members were subject to a Kaiser CBA which meets all the requirements of Subdivision (e) and that as such they are exempt security officers under Subdivision (f). As to the on-duty meal period

1 agreement argument, Defendant produced signed examples which included a
2 right to revoke at any time; Defendant also explained why the nature of the work
3 prevented off-duty meal periods. *See Lubin v. The Wackenhut Corp.*, 5 Cal. App.
4 5th 926, 942-43 (2016). Khoury Decl., ¶ 38.

5 Defendant further contends many of its non-exempt employees employed
6 during the class period signed meal period waivers and produced as an example
7 Plaintiff Scott's signed meal period waiver. Khoury Decl., ¶ 39.

8 Defendant also contends that, as to all its non-exempt employees, and as to
9 both the meal and rest period claims, Plaintiff will not be able to show that
10 Defendant did not *provide* non-exempt employees with these breaks. Khoury
11 Decl., ¶ 40.

12 Plaintiff counters that only 87.5% of the class worked in security guard
13 positions to exempt them from meal and rest period provision requirements, but
14 acknowledges the effect meal period waivers may have on potential recovery and
15 the potential issues of proof raised by Defendant. Khoury Decl., ¶ 41.

16 As to meal periods, Plaintiff's analysis of time records revealed that in an
17 extrapolated 390,000 shifts over 5 hours during the Class Period, approximately
18 270,000 first meal periods were missed, 27,000 were late, and 14,500 were short
19 (less than thirty minutes). If records show a missed, late, short, or interrupted
20 meal period there is a presumption of liability, which the employer may rebut.
21 *Donohue v. AMN Servs., LLC*, 11 Cal. 5th 58, 77 (2021). Presuming under
22 *Donohue* 311,500 shifts were violative, meal period premium wages of
23 \$5,878,005 (311,500 x \$18.87) would be at issue. Accounting for Defendant's
24 statutory defenses prevailing as to the security guards reduces this figure by
25 87.5%, to \$734,750. Plaintiff further reduces this figure by 75% to account for
26 Defendant's myriad other defenses discussed above, to **\$183,687**. Khoury Decl.,
27 ¶ 42.

28 As to rest periods, because Defendant did not keep any records of rest

1 periods, as is typical, Plaintiff assumed the value of the rest period premium
 2 wages claim to be similar to that of the meal period premium claim, at **\$183,687**.
 3 Although there is an additional defense of meal period waiver for the meal period
 4 premium wages claim, the rest period premium wages claim has a vulnerability
 5 that the meal period claim does not in that there are no records to support a
 6 *Donohue*-type presumption. Thus, the claims were assessed to have relatively the
 7 same value. Khoury Decl., ¶ 43.

8 **3. Business Expense Reimbursements – Labor Code § 2802**

9 An employer must indemnify its employees for all their necessary
 10 expenditures or losses incurred in the discharge of their duties. Labor Code §
 11 2802. A reasonable percentage of an employee’s cell phone charges, which varies
 12 in each case, must be reimbursed. *Cochran v. Schwan’s Home Services, Inc.*, 228
 13 Cal. App. 4th 1137, 1145 (2014). Plaintiff alleged Defendant failed to reimburse
 14 them for the use of personal cell phones to clock in and out for work. Defendant
 15 countered that at many locations, non-exempt employees could clock in and out
 16 on a physical time clock and the use of a personal cell phone was not required.
 17 Presuming that clocking in and out constituted five percent of the total use of
 18 employees’ personal cell phones, and that a cell phone line cost approximately
 19 \$100 per month, Plaintiff calculated reimbursement owed at \$5 per month. Given
 20 that there are 84,405 class Workweeks, this constitutes 19,403 work months
 21 (84,405 weeks/4.35 weeks per month), which at \$5 per month yields in \$97,015
 22 in unreimbursed cell phone expenses. Given Defendant’s defenses and that this
 23 claim might not be certified¹⁰ or prevail, Plaintiff reduces Defendant’s exposure
 24 by 50% to **\$48,507**. Khoury Decl., ¶ 44.

25
 26 ¹⁰ See, e.g., *Dugan v. Ashley Furniture Indus., Inc.*, 2016 U.S. Dist. LEXIS 189011, 2016 WL
 27 9173459, at *4 (C.D. Cal. Nov. 29, 2016) (denying certification of cell phone reimbursement
 28 claim because “the determination of necessity would require” individual inquiries into factors
 such as each putative class member’s “motivation” in using a personal cell phone). Similarly,
 here, Defendant argues class members used their cell phones to clock in and out for
 convenience, not out of necessity.

4. Derivative Penalties (Wage Statement and Waiting Time)
– Labor Code §§ 226, 203

Wage statements must show “gross wages earned,” “total hours worked by the employee,” “net wages earned,” and the “corresponding number of hours worked at each hourly rate.” Labor Code §§ 226(a)(1), (2), (5), and (9). “An employee suffering injury as a result of a *knowing and intentional* failure by an employer to comply with subdivision (a) is entitled to recover the greater of all actual damages or fifty dollars (\$50) for the initial pay period in which a violation occurs and one hundred dollars (\$100) per employee for each violation in a subsequent pay period, not to exceed an aggregate penalty of four thousand dollars (\$4,000), and is entitled to an award of costs and reasonable attorney’s fees.” Labor Code § 226(e) (emphasis added).

An employer must pay all wages due to an involuntarily terminated employee at the time of termination, or within 72 hours to an employee voluntarily terminating. Labor Code §§ 201-202. “If an employer *willfully* fails to pay, without abatement or reduction, in accordance with Sections 201, 201.3, 201.5, 201.6, 201.8, 201.9, 202, and 205.5, any wages of an employee who is discharged or who quits, the wages of the employee shall continue as a penalty from the due date thereof at the same rate until paid or until an action therefor is commenced; but the wages shall not continue for more than 30 days.” Labor Code § 203 (emphasis added).

An employer’s good faith defense to liability precludes both a finding of willfulness under Labor Code section 203 and intentionality under Labor Code section 226, and thus precludes penalties from being assessed. *Naranjo v. Spectrum Sec. Servs., Inc.*, 88 Cal. App. 5th 937, 951, 304 Cal. Rptr. 3d 898 (2023) (affirming denial of 203 penalties and reversing grant of 226 penalties based on failure to report and pay meal period premium wages where employer alleged it had a good faith belief these premiums were not owed because federal

1 law applied and because its security guard employees were subject to on-duty
2 meal period agreements).

3 Plaintiff contends Defendant's wage statements were non-compliant in
4 each pay period that Defendant failed to report wages earned but not paid. See
5 *Naranjo v. Spectrum Sec. Servs., Inc.*, 13 Cal. 5th 93, 117-119 (2022). Maximum
6 wage statement penalties were calculated as follows, given 73,715 pay periods
7 and 874 employees employed during the one-year statutory period: 874 initial
8 pay periods x \$50 + 72,841 subsequent pay periods x \$100 = \$43,700 +
9 \$7,284,100 = \$7,327,800. However, given that Plaintiff estimated only a 25%
10 chance of recovery on the underlying wage claims, and that this wage statement
11 claim is derivative of them, Plaintiff reduces this figure by the same amount, to
12 \$1,831,950. Khoury Decl., ¶ 45.

13 Defendant argues it had a good faith belief its rounding policy was not
14 unlawful because it both under- and over- compensated employees in different
15 pay periods. Defendant further contends it believes its employees are exempt
16 from meal and rest period requirements such that it does not owe premium
17 wages. Given these arguments, which Defendant contends are made in good
18 faith, and which might totally preclude liability, Plaintiff further reduces this
19 figure by 75% to \$457,987. Khoury Decl., ¶ 46.

20 As to waiting time penalties, Plaintiff contends they are owed to an
21 estimated 496 employees whose employment ended within the three-year statute
22 of limitations period. Maximum exposure of thirty days' wages for these
23 employees is calculated at \$2,246,284 (8 hours per day x 30 days x \$18.87 per
24 hour¹¹ x 496 employees). However, in analyzing Defendant's records, Plaintiff's
25 consultant found that only 51 percent of Class Members were underpaid due to
26 rounding. Plaintiff thus reduces this figure by 49 percent, to \$1,145,604. Finally,

27 _____
28 ¹¹ Plaintiff's consultant derived this average hourly rate of pay from the payroll records
Defendant provided in advance of mediation. - 16 -

1 in recognition of Defendant’s purportedly good faith belief that its rounding
 2 policy was legal and that it did not owe meal or rest period premiums wages,
 3 Plaintiff reduces this figure by 75% to **\$286,401**. Khoury Decl., ¶ 47.

4 **5. PAGA Penalties – Labor Code §§ 2698, et seq.**

5 “PAGA penalties are paid 75% to the California Labor and Workforce
 6 Development Agency and 25% to aggrieved employees. Thus, in wage and hour
 7 class action cases that settle, [] very little of the total settlement is paid to PAGA
 8 penalties in order to maximize payments to class members.” *Magadia v. Wal-*
 9 *Mart Assocs.*, 384 F. Supp. 3d 1058, 1101 (2019).

10 For the estimated 73,715 weekly pay periods during the PAGA Period,
 11 maximum PAGA penalties were estimated at \$24,006,900 for five underlying
 12 violations: Secs. 1194, 510 (unpaid wages due to rounding) - \$7,371,500 (\$100);
 13 Sec. 226.7 (unpaid premium wages) –\$7,371,500 (\$100); Sec. 2802
 14 (unreimbursed business expenses) - \$1,842,800 (\$100, monthly); Sec. 226 (wage
 15 statements)– \$7,371,500 (\$100); Sec. 203 - \$49,600 (\$100 for final pay period of
 16 496 separated within SOL). Khoury Decl., ¶ 48.

17 Penalties were calculated using initial violation rates based on the defense
 18 argument that “courts have held that employers are not subject to heightened
 19 penalties for subsequent violations unless and until a court or commissioner
 20 notifies the employer that it is in violation of the Labor Code.” *Vieyara-Flores v.*
 21 *Sika Corp.*, 2019 U.S. Dist. LEXIS 98081, *13 (C.D. Cal. 2019). Khoury Decl.,
 22 ¶ 49.

23 From that point, penalties were discounted to one percent of the
 24 maximum—or **\$240,069**—given the following: first, “California Law is unsettled
 25 as to whether PAGA penalties may be stacked” and “courts have gone in
 26 different directions” on this issue, per *Merante v. Am. Inst. for Foreign Study,*
 27 *Inc.*, 2022 U.S. Dist. LEXIS 131833, *18-19 (N.D.Cal. July 25, 2022); second,
 28 courts have the authority to reduce PAGA penalties from the maximum, as long

as not to “zero,” per *Thurman v. Bayshore Transit Management, Inc.*, 203 Cal. App. 4th 1112, 1135 (2012); *see also Carrington v. Starbucks Corp.*, 30 Cal. App. 5th 504, 517 (4th DCA) (2018) (trial court’s award of \$150,000 out of a maximum value of “nearly \$70 million” upheld on appeal—representing 0.2% of the maximum); *Manzo v. Mcdonald's Rests. of Cal., Inc.*, 2022 U.S. Dist. LEXIS 178236, at *19 (E.D. Cal. Sep. 29, 2022) (finding recovery of “less than one percent (1%) of the verdict value” “fair, reasonable, and adequate” where the LWDA did not object and noting “PAGA penalties may be reduced by a court if the amount would be unjust, arbitrary and capricious, or confiscatory” under California Labor Code section 2699, subdivision (e)); third, records revealed rounding only resulted in underpayment in twelve (12) percent of shifts, with rounding resulting in overpayment in seven (7) percent of shifts, and no rounding occurring in the remaining eighty-one (81) percent of shifts; and fourth, Defendant offered significant defenses to the underlying claims, as discussed herein. Khoury Decl., ¶ 50.

As to the allocation of PAGA Penalties from the GSA, \$50,000 (or five (5) percent of the GSA) is well within the range accepted by Courts in this Circuit. *See, e.g. Nen Thio v. Genji, LLC*, 14 F. Supp. 3d 1324, 1330 (N.D. Cal. 2014) (approving \$10,000 PAGA penalties in settlement \$1.25m, or 0.8%); *Franco v. Ruiz Food Prods.*, 2012 U.S. Dist. LEXIS 169057, *5-6 (E.D. Cal. Nov. 27, 2012) (approving \$10,000 PAGA penalties in \$2.5m settlement, or 0.4%); *Garcia v. Gordon Trucking, Inc.*, 2012 U.S. Dist. LEXIS 160052 (E.D. Cal. Oct. 31, 2012) (approving \$10,000 PAGA penalties in \$3.7m settlement, or 0.3%). Khoury Decl., ¶ 51.

VIII. ATTORNEYS’ FEES AND SERVICE PAYMENT

A. Motion for Award of Attorneys’ Fees and Litigation Costs.

Before final approval, Class Counsel will file a motion for reimbursement of litigation expenses not to exceed \$25,000 and for attorneys’ fees not to exceed

1 \$333,333.33 (one-third of GSA). The motion will detail expenses actually
2 incurred and hours actually expended in this action. Khoury Decl., ¶ 52.

3 **B. Class Representative Service Award.**

4 “[T]he Ninth Circuit has recognized that service awards to named
5 Plaintiffs in a class action are permissible and do not render a settlement unfair or
6 unreasonable.” *Harris v. Vector Mktg. Corp.*, 2011 U.S. Dist. LEXIS 48878, *28
7 (N.D. Cal. Apr. 29, 2011) (citing *Stanton v. Boeing Co.*, 327 F.3d 938, 977 (9th
8 Cir. 2003) and *Rodriguez v. W. Publ’g Corp.*, 563 F.3d 948, 958-69 (9th Cir.
9 2009)). Furthermore, where, as here, there is a “general release by a class
10 representative,” that broader release “is often coupled with an incentive payment
11 in class action settlements.” See *Frieri v. Sysco Corp.*, 2019 U.S. Dist. LEXIS
12 207481, * 22 (S.D. Cal. Dec. 2, 2019) (Sammartino, J.).

13 Class Counsel will request \$10,000 for Plaintiff Scott for her time, effort,
14 risks undertaken, possible retaliation by potential employers, and for a general
15 release of all claims. Class Counsel will also request \$10,000 each for proposed
16 Plaintiffs Anderson, Lockett, Ringo, and Williams for the same reasons. See
17 *generally* Declarations of Penny A. Scott, Kawana Anderson, Tiffany Lockett,
18 Ahmir Ringo, and Tocashema Williams. A \$10,000 service award is well within
19 the range approved by courts in wage and hour class actions, and should be
20 awarded here. See, e.g., *Singer v. Becton Dickinson & Co.*, 2010 U.S. Dist.
21 LEXIS 53416 at *24-26 (S.D. Cal. June 1, 2010) (“\$25,000 incentive award is ...
22 well within the acceptable range awarded in similar cases”); *Glass v. UBS*
23 *Financial Services*, 2007 U.S. Dist. LEXIS 8476, 50-52 (N.D. Cal. Jan. 26, 2007)
24 (awarding \$25,000 class representative payment). Khoury Decl., ¶ 53.

25 **IX. CONDITIONAL CLASS CERTIFICATION IS APPROPRIATE**

26 **A. All Rule 23(a) Prerequisites For Certification Are Met.**

27 A court may certify a settlement class at preliminary approval. *Amchem*
28 *Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997). A settlement class is subject to

1 Federal Rule of Civil Procedure 23 which is “designed to protect absentees by
2 blocking unwarranted or overbroad class definitions,” but, “[c]onfronted with a
3 request for settlement-only class certification, a district court need not inquire
4 whether the case, if tried, would present intractable management problems, [] for
5 the proposal is that there be no trial.” *Amchem*, 521 U.S. at 620. The court takes
6 the substantive allegations of the complaint as true when certifying a settlement
7 class. *Blackie v. Barrack*, 524 F.2d 891, 901 n.17 (9th Cir. 1975).

8 **1. Rule 23(a)(1) —Numerosity**

9 With an estimated 1,179 Class Members, joinder is impossible and
10 numerosity is satisfied. See, e.g. *Parker v. Cherne Contracting Corp.*, No. 18-cv-
11 01912-HSG, 2020 U.S. Dist. LEXIS 218187, at *16 (N.D. Cal. Nov. 20, 2020)
12 (“No precise number establishes numerosity, although even a number larger than
13 40 generally has been considered sufficient.”). Khoury Decl., ¶ 54.

14 **2. Rule 23(a)(2) —Commonality**

15 Rule 23(a)(2) commonality requirements are “minimal” and “construed
16 permissively.” *Hanlon*, 150 F.3d at 1019. Only “a single common question” is
17 required. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 359 (2011). Plaintiff
18 alleges numerous questions here that are common to all non-exempt employees
19 in the class including: whether they were subject to impermissible time rounding,
20 resulting in unpaid wages; whether they were required to use their personal cell
21 phones to clock in and out, giving rise to unreimbursed business expenses; and
22 whether Defendant’s failure to pay wages due to rounding was willful and
23 intentional such that Defendant owes them wage statement and waiting time
24 penalties. Common questions also exist for the approximately 87.5 percent of the
25 class who worked as security guards, including whether they were exempt from
26 the requirements to provide meal and rest periods or premium wages in lieu
27 thereof. Plaintiff contends answering these questions would resolve class-wide
28 issues “in one stroke.” *Id.* at 350. Khoury Decl., ¶ 55.

3. Rule 23(a)(3) —Typicality

Under this Rule’s “permissive standards,” Plaintiff’s claims are “typical” if “reasonably co-extensive with those of absent class members.” *Hanlon*, 150 F.3d at 1020. Here, Plaintiff’s claims are typical because they are based on Defendant’s uniform practices. *Ventura v. New York City Health and Hosp., Inc.*, 125 F.R.D. 595, 600 (S.D.N.Y. 1989). Specifically, Plaintiff contends Defendant’s rounding practice extended to all its non-exempt employees, Plaintiff’s meal period damages calculations are based on a *Donohue* analysis of a representative sample of all non-exempt employee’s time records, and Plaintiff contends all non-exempt employees were equally likely to have clocked in and out using their personal cell phones. Khoury Decl., ¶ 56.

4. Rule 23(a)(4) —Adequacy of Representation

Adequacy is established when proposed Class Representatives have no conflict of interest with class members and are represented by qualified counsel. *Hanlon*, 150 F.3d at 1020. Plaintiffs have no conflict with the Class, and their counsel are qualified Class Counsel because they are experienced wage and hour class action attorneys fully able to pursue the interests of the Class. See Counsel Declarations of Khoury, Gavron, and Ghosh; Plaintiff Declarations of Scott, Anderson, Lockett, Williams, and Ringo. Khoury Decl., ¶ 57.

B. Rule 23(b)(3) —Predominance and Superiority.

“The predominance inquiry tests whether the proposed classes are sufficiently cohesive to warrant adjudication by representation.” *Amchem Products, Inc.*, 521 U.S. at 623. Class actions in which a defendant’s uniform policies are challenged generally satisfy the predominance requirement of Rule 23(b)(3). *Cavazos v. Salas Concrete, Inc.*, 2022 U.S. Dist. LEXIS 30201, at *33 (E.D. Cal. Feb. 18, 2022); *see also Vaquero v. Ashley Furniture Indus., Inc.*, 824 F.3d 1150, 1154-1155 (9th Cir. 2016) (upholding predominance determination in wage and hour suit despite the need for individualized damages calculations).

To resolve the Rule 23(b)(3) superiority inquiry in the settlement context ‘the court should consider class members’ interests in pursuing separate actions individually [and] any litigation already in progress involving the same controversy...” *Cavazos* 2022 U.S. Dist. LEXIS 30201, at *33.

Here, predominance is met because Defendant’s uniform policies as to rounding and cell phone clock-in procedures without reimbursement for all non-exempt employees, and meal and rest period provision for all non-exempt security guard employees, are being challenged. Further, a class action settlement is superior because of the relatively small potential individual recoveries and because Plaintiff seeks to resolve five actions against BCI involving the same controversy by way of this class action settlement. Khoury Decl., ¶ 58.

X. CONCLUSION

Plaintiff respectfully requests the Court preliminarily approve the proposed Settlement, certify the proposed Class pursuant to FRCP Rule 23 for settlement purposes, appoint Plaintiff Penny A. Scott and Proposed Plaintiffs Kawana Anderson, Tiffany Lockett, Ahmir Ringo, and Tocashema Williams as Class Representatives, appoint Plaintiffs’ attorneys as Class Counsel, approve the form of Class Notice and order it provided to the Class, appoint CPT Group, Inc. as Administrator, and set a final approval hearing—to consider the proposed Settlement, the request for attorneys’ fees and litigation costs, and requested Service Payments to Plaintiffs.

COHELAN KHOURY & SINGER

Dated: May 17, 2023

By: s/Rosemary C. Khoury

Isam C. Khoury, Esq.

Michael D. Singer, Esq.

Rosemary C. Khoury, Esq.

Counsel for Plaintiff PENNY A. SCOTT,
on behalf of herself and other similarly-
situated employees