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all others similarly situated

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SANTA CLARA

BENIYAM KEBEDE, ALAIN TSAI, and
MONICA I. PAZMINO, individually and
on behalf of all others similarly situated,

Plaintiffs,

v.

WRIKE, INC.; and DOES 1 through 25,
inclusive

Defendants.

Case No. 20CV366599

ASSIGNED FOR ALL PURPOSES TO:

The Honorable Patricia M. Lucas
Department 3

CLASS ACTION

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION FOR AN ORDER FOR
FINAL APPROVAL OF
CLASS ACTION SETTLEMENT
AND ENTERING JUDGMENT**

Date: May 4, 2022

Time: 1:30 p.m.

Dept: 3

Judge: Hon. Patricia M. Lucas

Complaint filed: May 13, 2020

Trial date: Not set

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I. INTRODUCTION

Plaintiffs seek final approval of a \$2,000,000 non-reversionary wage and hour class and Private Attorney Generals’ Act (“PAGA”) settlement for 222 Wrike, Inc. (“Wrike”) commissioned employees who worked any time from April 6, 2016 to March 31, 2021 (“Class Period”). The settlement includes \$1,796,000 new money and \$204,000 Wrike paid pre-mediation to 102 employees for individual settlement agreements. Declaration of Jeff Geraci (“Geraci Decl.”) ¶11; Declaration of Evelin Reyes on behalf of Simpluris, Inc., (“Simpluris Decl.”), ¶10.

On January 19, 2022, the Court-approved Notice Packet was mailed to Class Members informing them of their rights and benefits under the Settlement, including the estimated amount of Settlement Payments, and the right to request exclusion, dispute workweeks, or file a written objection to the Settlement, by March 5, 2022. Simpluris Decl. ¶¶8, Exh. A.

Support for the Settlement is strong. No Class Member objected or requested exclusion. Simpluris Decl. ¶¶13, 14. Class Members will receive payments averaging \$4,653.94, with a highest payment of \$13,897.96, upon Settlement Approval. Geraci Decl. ¶12; Simpluris Decl. ¶12.

II. THE PARTIES

A. Plaintiffs

Beniyam Kebede worked as an Account Manager from August 2019 to January 2020. Alan Tsai was a Strategic Account Manager from October 2018 to August 2020. Monica Pazmino was a Senior Account Manager from October 2019 to April 2020. Geraci Decl. ¶13.

B. Defendant

Wrike provides cloud-based project management applications, known as “software as a service,” with customers paying a monthly amount for those services. Wrike is headquartered in San Jose, with offices in San Diego, Japan, Australia, among other places. Geraci Decl. ¶14.

C. The Class and Aggrieved Employees

The Class is, “All current and former commissioned employees who worked for Defendant within the State of California during the Class Period.” Geraci Decl. ¶15. The 222 class members worked 15,112 weeks during the Class Period; 159 aggrieved employees worked 3,879 pay periods from April 6, 2019 to March 31, 2021 (“PAGA Period”). *Id.*

III. PROCEDURAL HISTORY, INVESTIGATION AND INFORMAL DISCOVERY

The action was filed May 13, 2020, alleging failure to provide: all minimum, regular, and overtime wages; compliant rest and meal periods; accurate wage statements; timely final wages; reimbursement of business expenses. PAGA claims were filed June 30, 2020. Geraci Decl. ¶16.

The original plaintiff was dismissed, and a Second Amended Complaint adding plaintiffs, Beniyam Kebede, Alain Tsai, and Monica Pazmino was filed September 30, 2020. A Third Amended Complaint adding PAGA claims was filed October 26, 2020. Geraci Decl. ¶17.

After receiving PAGA charges, and a catalyst letter advising Plaintiffs would challenge subsequent settlements and seek attorneys' fees on amounts paid, Wrike paid \$2,000 each to 102 class members (\$204,000) ("Prior Releasors"). Geraci Decl. ¶18.

Wrike moved to compel arbitration of Ms. Pazmino's claims and stay the others in November 2020. (46 class members signed arbitration provisions). Plaintiffs opposed and soon after the Parties agreed to mediate and stay the motion. Geraci Decl. ¶19.

IV. PLAINTIFFS' CLAIMS AND WRIKE'S DEFENSES

Commissioned sales employees may be exempt from overtime wages in California when earning more than 1.5 times minimum wage per workweek, with more than half of compensation from commissions. *Muldrow v. Surrex Solutions Corp.*, 208 Cal. App. 4th 1381, 1387 (2012). Plaintiffs alleged Wrike misclassified class members as exempt primarily because, in some weeks, less than half their compensation was commission. Plaintiffs also alleged Wrike did not provide rest and meal periods, or reimbursement for cell phone and internet expenses. Geraci Decl. ¶20.

Wrike denied liability, asserting, even if liability were found, damages would be limited because some positions were reclassified soon after the class period began, and virtually all others, four months before it ended. Wrike contended class members met the commission exemption in all weeks they met the compensation test, and in weeks they did not, they met the administrative exemption. These issues require highly fact specific inquiries, making both certification and proof of liability challenging, and similar issues have been decided against employees. For example, *Muldrow* found recruiters primarily engaged in sales and exempt. No meal period violation was found because Muldrow did "not impede or discourage them from" from taking breaks. *Id.* at 1398.

1 Wrike argued it did not discourage breaks, and provided evidence it provided food, and
2 separate spaces to relax and eat. This was confirmed in employee interviews. Geraci Decl. ¶21.

3 Wrike reimbursed expenses for most of the class period, but Plaintiffs contended they were
4 inadequate, and applied specifically only to cell phone, not internet, expenses. Wrike credibly
5 argued it was unnecessary to use cell phones while in the office, and only a reasonable percentage
6 of an employee's cell phone charges must be reimbursed. This argument may have prevailed.
7 "Because of the differences in cell phone plans and work-related scenarios, the calculation of
8 reimbursement must be left to the trial court and parties in each particular case." *Cochran v.*
9 *Schwan's Home Service, Inc.*, 228 Cal. App. 4th 1137, 1145 (2014).

10 **V. INVESTIGATION AND MEDIATION**

11 The Parties mediated with Louis Marlin, Esq., a respected mediator of wage and hour class
12 actions, after documents and class pay data, and aggregate workweeks and pay periods for the class
13 and PAGA periods were exchanged and a class wide damage model created. Geraci Decl. ¶22.

14 After a full day of arms'-length negotiations, the Parties reached a settlement in principle
15 and later negotiated the Joint Stipulation of Settlement and Release of Class Action, ("Settlement
16 Agreement"), preliminarily approved by the Court. Geraci Decl. ¶23.

17 **VI. SUMMARY OF PROPOSED SETTLEMENT**

18 **A. Settlement Terms**

19 Subject to Court approval, Wrike will pay the maximum Gross Settlement Amount
20 ("GSA") of \$2,000,000, (\$1,796,000, plus \$204,000 paid to 102 class members pre-mediation)
21 including: (a) attorneys' fees of \$666,666 (1/3 of GSA; the SA allows up to 35%) to compensate
22 Class Counsel for work performed and remaining to secure final Court approval (apportioned
23 50/50 between Class Counsel with Plaintiffs' consent. Geraci Decl. ¶25); (b) litigation costs of
24 \$10,657.85 (The SA estimated \$12,500); (c) Class Representative Service Awards of \$10,000 each
25 to the Class Representatives for risks undertaken for costs if the case had not successfully
26 concluded, and benefits conferred on the Class; (d) PAGA Payment of \$50,000 [\$37,500 to LWDA
27 (75%)/\$12,5000 to Aggrieved Employees (25%]); and (e) Settlement Administration costs of
28 \$5,500. Wrike will pay employer's payroll taxes in addition to GSA. Geraci Decl. ¶24.

After Court-approved deductions, the estimated Net Settlement Amount (“NSA”) of \$1,033,176.15, will be distributed to Participating Class Members. Individual Settlement Payments will be calculated by first allocating \$2,000 each to the estimated 102 class members (\$204,000), who did not receive \$2,000 for a release before mediation. The Administrator will divide total number of weeks worked by all class members in the Class Period by the remainder of the NSA, \$829,176.15, to determine “workweek dollar value.” ($\$829,176.15 / 15,112.05 \text{ weeks} = \54.868). The Administrator will then multiply the number of weeks each Prior Releasor worked by 1.0, then by the workweek dollar value. For class members who did not previously receive a \$2,000 payment, the Administrator will multiply number of weeks worked by 1.1, then by the workweek dollar value. This provides a greater amount to class members who did not risk exclusion from the class by accepting an individual settlement this class Settlement. Geraci Decl. ¶26.

The 222 Class Members will receive an average estimated payment of \$4,653.94, with a highest payment of \$13,897.96, upon Approval. Plaintiffs’ estimated individual settlement amounts are: Beniyam Kebede - \$3,058.35; Alain Tsai - \$6,227.45; Monica Pazmino - \$3,025.88. Geraci Decl. ¶12; Simpluris Decl. ¶12.

The 159 aggrieved employees will divide the 25% PAGA payment based on pay periods worked in the PAGA period, even if they opt-out of the settlement. The average PAGA payment is \$56.31, and the highest PAGA payment is \$167.10. Geraci Decl. ¶27; Simpluris Decl. ¶12.

Settlement Checks uncashed 180 days after issuance will be sent to cy pres recipient, Legal Aid at Work. Uncashed PAGA payments will be sent to the State Controller, Unclaimed Property Division, in the appropriate employee’s name. Geraci Decl. ¶28.

B. Preliminary Approval, Notice to the Class, and Its Response

1. Preliminary Approval and Class Notice

On December 6, 2021, the Court preliminarily approved the proposed Settlement and Notice Packet for mailing to the Class. Geraci Decl. ¶29. On January 19, 2022, after searching the National Change of Address database, and updating Class Member addresses, the Settlement Administrator mailed Notice Packets to 222 Class Members. The Notice Packet informed them of (1) the pendency of the Class Action; (2) terms of the proposed Settlement; (3) automatic payment

of a proportionate Settlement share if exclusion was not requested; (4) estimated amount each Participating Class Members will receive based on eligible weeks worked during the Class and PAGA Period; (5) released claims; (6) the right to object or request exclusion, and (7) the date, time and place of the final approval hearing. Geraci Decl. ¶30; Simpluris Decl. ¶8, Exh. A.

2. The Class' Response to the Notice

The Class response to the Settlement was extremely favorable. No objections and no requests for exclusion were received. Geraci Decl. ¶31; Simpluris Decl. ¶¶13, 14.

The Court determined the first three Dunk factors were met when it granted preliminary approval: (1) the settlement was reached through arm's-length bargaining; (2) investigation and discovery allowed counsel and the court to act intelligently; and, (3) counsel was experienced in similar litigation. The fourth factor could not be known until the Class had notice and an opportunity to respond. *Dunk v. Ford Motor Co.*, 48 Cal. App. 4th 1794, 1801-1802 (1996).

The fourth *Dunk* factor was established when the Class overwhelmingly approved the Settlement, allowing the Court to do the same.

VII. THE SETTLEMENT IS FAIR, ADEQUATE, AND REASONABLE

The Preliminary Approval Motion thoroughly analyzed the terms of the proposed Settlement in light of *Dunk*, (establishing factors supporting a presumption of fairness); and *Kullar v. Foot Locker Retail, Inc.*, 168 Cal.App.4th 116, 130 (2008), (establishing factors determining whether a settlement is in the Class' best interest, is adequate, and reasonable). The Court carefully reviewed and ruled on these analyses and they are fully incorporated here by reference. See, Preliminary Approval Motion, at 7:25 – 12:25, and Order Granting Preliminary Approval.

Nothing has changed since Preliminary Approval to negate the presumption of fairness. Class Counsel remains convinced the Settlement is in the Class' best interest.

VIII. ATTORNEYS' FEES ARE REASONABLE AND SHOULD BE AWARDED

Class Counsel requests attorneys' fees of one-third of the GSA and actual litigation costs. Class Counsel have expended 414.8 hours, a lodestar of \$277,826. Geraci Decl. ¶¶33, Exh. 1 – Consolidated Summary of Class Counsel's Time & Costs, Exh. 2 – Lodestar Task Chart; Exh 3. – Itemized Costs; Declaration of Jonathan M. Lebe, ("Lebe Decl."), ¶¶9, 10, 13, Exh. A - Time.

A. The Results Achieved Support the Fee Request

The most important factor to consider in granting a fee award is the success obtained. *In re Heritage Bond Litig. v. U.S. Trust Co. of Tex., N.A.*, No. 02-ML-1475 (RCx), 2005 U.S. Dist. LEXIS 13627, at *27 (C.D. Cal. June 10, 2005) (citing *Hensley v. Eckerhart*, 461 U.S. 424 (1983)). An excellent result was achieved, enforcing the law and providing benefits to the Class.

The Class was provided notice of all settlement terms, including that Counsel would request an award of attorneys' fees up to one-third of the GSA, \$666,666. Simpluris Decl. ¶¶8, 14, Exh. A, ¶7. No Class Member objected to the attorneys' fees award. *Id.* at ¶14.

B. A Fee Award Based on a Percentage of the Common Fund is Appropriate

The California Supreme Court recognized it is appropriate to award attorneys' fees based on a percentage of the total value of benefits to Class Members from the settlement, also known as the "common fund" method. *Laffitte v. Robert Half International, Inc.*, 1 Cal.5th 480, 503 (2016); see also, *Serrano v. Priest*, 20 Cal.3d 25, 34 (*Serrano III*) (1977); *Vincent v. Hughes Air West, Inc.* 557 F.2d 759, 769 (9th Cir. 1977). (California courts may look to federal authority analyzing class issues for guidance. See *Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 239-40 (2001))

"Despite its primacy, the lodestar method is not necessarily utilized in common fund cases." *Lealao v. Beneficial California, Inc.*, 82 Cal.App.4th 19, 27 (2000); *Dunk*, at 1808 (attorneys' fees may be calculated as percentage of common fund where settlement amount is certain or easily calculable).

A common fund fee award is proper here as it spreads the attorneys' fees among all beneficiaries of the fund, aligns the incentives between Plaintiffs' counsel and the class, better approximates market conditions in a contingency case, and encourages class counsel to seek early settlement and avoid unnecessarily prolonging litigation. *Laffitte*, 1 Cal.5th at 503.

A lodestar "cross-check" is not required, but may be used at the trial court's option to double check "reasonableness of the percentage fee through a lodestar calculation." *Id.* at 504.

With the guiding principle that early class action settlements are favored and may not diminish an award of attorneys' fees, Class Counsel submits the fee request should be awarded, based on substantial hours expended, risks and complexities of prosecuting the action, the

contingent nature of any fee, their experience in handling cases of this type, fees commonly awarded in these cases, and vindication of the Class' rights.

The purpose of the common fund approach is to "spread litigation costs proportionally among all the beneficiaries so that the active beneficiary does not bear the entire burden alone." *Vincent, supra*, 557 F.2d at 769. "[O]ne who expends attorneys' fees in winning a suit which creates a fund from which others derive benefits may require those passive beneficiaries to bear a fair share of the litigation costs." *Quinn v. State of California*, 15 Cal.3d 162, 167 (1995). The common fund doctrine has been applied "consistently in California when an action brought by one party creates a fund in which other persons are entitled to share." *City and County of San Francisco v. Sweet*, 12 Cal.4th 105, 110 (1995).

Class Counsel undertook representation at their own expense, with compensation wholly contingent upon providing a Class benefit. Class Members will benefit from the proposed Settlement and receive monetary payments. Based on the defined and clearly traceable Class benefit, the Court may award a percentage of the common fund as attorneys' fees.

C. One-Third of the Common Fund is a Reasonable Fee

"California courts routinely award attorneys' fees of one-third of the common fund." *Beaver v. Tarsadia Hotels*, 2017 U.S. Dist. LEXIS 160214, *28 (S.D. Cal. Sept. 28, 2017). Several studies of class action fee awards have found the median common fund fee award is approximately one-third of the total settlement fund. See, e.g., *Chavez v. Netflix, Inc.*, 162 Cal. App. 4th 43, 66, n.11 (2008) ("fee awards in class actions average around one-third of the recovery."); Reagan W. Silber and Frank E. Goodrich, *Common Funds and Common Problems: Fee Objections and Class Counsel's Response*, 17 Rev. Litig. 525, 546 (1998); T. Willging, L. Hooper and R. Niemic, *Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules*, 90 (1996) (attorneys' fees in class litigation "were generally in the traditional range of approximately one-third of the total settlement").

Counsel's request for one-third of the common fund is in the mid-range of awards which commonly range from 20% to 50%, and is fair compensation for undertaking complex, risky, litigation on a contingent basis, and for the result achieved for the Class. Geraci Decl. ¶34.

Some courts have found an award of 33% of a common fund is the “benchmark” in California. *Smith v. CRST Van Expedited, Inc.*, No. 10-CV-1116-IEG (WMC), 2013 U.S. Dist. LEXIS 6049, *14 (S.D. Cal. Jan. 14, 2013) (“These percentages compare favorably with” the California (33%) benchmark.); *Dennis v. Kellogg Co.*, No. 09-CV-1786-L (WMC), 2013 U.S. Dist. LEXIS 163118, at *7 (S.D. Cal. Nov. 14, 2013). Class Counsel’s fee request is in line with awards in similar California cases, consistent with market rates, and is reasonable. Geraci Decl. ¶35.

D. Optional Lodestar Cross-Check Confirms Reasonableness of Fee

Courts are not required to cross-check a common fund fee award against a lodestar increased by a risk multiplier, and many Courts decline to do so. See, *Glass v. UBS Financial Services, Inc.*, No. 06-4066-MMC, 2007 U.S. Dist. LEXIS 8476 (N.D. Cal. Jan. 26, 2007) (“no need to conduct a lodestar cross-check [as] [c]lass counsel’s prompt action in negotiating a settlement while the state of the law remained uncertain should be fully rewarded”); *Lopez v. Youngblood*, No. 07-0474-DLB, 2011 U.S. Dist. LEXIS 99289 (E.D. Cal. Sep. 1, 2011) (“lodestar cross-check is not required in this circuit, and in a case such as this, is not a useful reference.”)

When it is used, the cross-check “calculation need entail neither mathematical precision nor bean-counting,” is not intended to be a “full-blown lodestar inquiry,” and “can be performed with a less exhaustive cataloguing and review of counsel’s hours.” *Barbosa v. Cargill Meat Solutions Corp*, 297 F.R.D. 431, 451 (E.D. Cal. July 2, 2013).

Under the lodestar method, a base fee amount is calculated from a compilation of time reasonably spent on the case and the reasonable hourly compensation of the attorneys. *Serrano v. Priest, supra*, at 48. The court then enhances the lodestar by a “multiplier” to account for a range of factors, such as the novelty and difficulty of the case, its contingent nature, and the degree of success achieved. *Id.*, at 49; see also *Ketchum v. Moses*, Cal.4th 1122, 1132-36 (2001).

Class Counsel’s lodestar is \$277,826. If the fee award were calculated using the lodestar, rather than the common fund method, a multiplier of slightly more than 2 would be applied. ($\$666,666/\$277,826 = 2.39$). Class Counsel’s work to obtain a class settlement was reasonable and necessary and is reflected in the excellent result achieved for Class Members and those who benefit from reclassification. Geraci Decl. ¶38, Exh. 1 - Consolidated Summary of Class Counsel’s Time.

E. Counsel's Hourly Rates Are Reasonable

Class Counsel is entitled to hourly rates charged by attorneys of comparable experience, reputation, and ability for similar litigation. *Ketchum, supra* at, 1133; *Children's Hospital and Med. Center v. Bonta*, 97 Cal. App. 4th 740, 783 (2002) (affirming rates as "within the range of reasonable rates charged by and judicially awarded comparable attorneys for comparable work"). When determining reasonable rates, Courts may consider the attorney's skill and experience, the nature of the work performed, and the relevant area of expertise and the attorney's customary billing rates. *Flannery v. California Highway Patrol*, 61 Cal. App. 4th 629, 632 (1998).

Class Counsel's skill and experience support their hourly rates and are in line with rates typically approved in California wage and hour class action litigation. Geraci Decl. ¶¶3-10, 39; Lebe Decl. ¶¶7, 8, 11, 12. Cohelan Khoury & Singer's practice is limited to litigating class and representative actions on behalf of employees and consumers. The firm has been appointed Class Counsel or co-Class Counsel in over 175 such cases. Geraci Decl. ¶¶4, 9, ,10, 40; Lebe Decl. ¶¶7, 8. As leading attorneys in the field, Class Counsel monitors prevailing market rates and sets billing rates to follow attorneys and staff of comparable skill, qualifications and experience. Other Class and Representative Counsel before California courts charge comparable if not higher rates. Geraci Decl. ¶41, Exh. 4 - 2014 National Law Journal Billing Survey; Lebe Decl. ¶14, Exh. C – 2020 Real Rate Report.

F. Plaintiffs' Counsel's Total Hours are Reasonable

Hours are reasonable if, "at the time rendered, [they] would have been undertaken by a reasonable and prudent lawyer to advance or protect his client's interest." *Moore v. Jas. H. Matthews & Co.*, 682 F.2d 830, 839 (9th Cir. 1982). *Norman v. Housing Auth.*, 836 F.2d 1292, 1306 (11th Cir. 1988) ("The measure of reasonable hours is determined by the profession's judgment of the time that may be conscionably billed and not the least time in which it might theoretically have been done").

G. A Multiplier of the Lodestar Would Be Awarded

A lodestar amount may be enhanced by a multiplier in order to make an appropriate fee award. *Serrano III*, 20 Cal.3d at 48. Pertinent factors determining the level of

enhancement include the difficulty of the questions involved and the skill in presenting them, the contingent nature of the fee award, the extent to which the litigation precluded other employment, and the percentage-of-the-fund the attorney would have received on the fair market. *Lealao* at 49. This list is not exhaustive and the Court can consider other factors it deems important in setting the multiplier. *Id.* at 40; *Ketchum, supra* at 1139. “Multipliers ranging from one to four frequently are awarded in common fund cases when the lodestar method is applied.” (Newberg on Class Actions §14.03 (4th ed. 2009)). Plaintiffs’ counsel pursued difficult claims, presented them with skill based on long experience prosecuting employment class actions, and achieved an excellent result, all on a purely contingent basis.

A 2.39 multiplier is reasonable and less than used in other cases. Multipliers may range “from 2 to 4 or even higher.” *Wershba v. Apple Computer, Inc., supra*, 91 Cal. App. at 255. *In re Linerboard Antitrust Litig., No. MDL 1261*, 2004 U.S. Dist. LEXIS 10532, *16 (E.D. Pa. June 2, 2004) (finding from 2001 to 2003, a 4.35 average multiplier in common fund cases). See *McGrath v. Wyndham Resort Dev. Corp.*, 2018 U.S. Dist. LEXIS 16095, *24 (S.D. Cal. 2017) (Class counsel Cohelan Khoury & Singer awarded 4.8 multiplier).

In *Lealao*, the Court held a trial court’s refusal to enhance the lodestar was an abuse of discretion, opining a multiplier more than 3.5 was reasonable and not ruling out the original request for 8.0. *Lealao, supra*, 82 Cal. App. 4th at 24, 52. See *SternwestCorp. v. Ash*, 183 Cal.App.3d 74, 76 (1986) (case remanded with directions “to enhance the lodestar award by such factor (two, three, four or otherwise) that the court, in its discretion shall deem proper”); *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1051 (9th Cir. 2002) (multiplier of 3.65); *Keith v. Volpe*, 501 F.Supp.403, 414 (C.D. Cal. 1980) (multiplier of 3.5).

To the extent a lodestar could be used to set the fee, a multiplier is supported by the difficulty of the questions involved, the skill displayed by Class Counsel in addressing them, and the contingent nature of any recovery. Class Counsel displayed creativity in identifying and pursuing claims for misclassification of a unique workforce, although in many weeks, and for certain types of employees, Wrike may have had strong or complete defenses. Wrike also made strong arguments that differences among employees, and factual inquiries

1 in general, would limit class size or defeat certification. Wrike was well funded and
2 employed experienced counsel to aggressively defend it. This posed special challenges as
3 counsel developed and advanced class certification and liability theories which were
4 ultimately able to persuade a Defendant that could easily mount a prolonged defense through
5 certification, trial, and appeal if necessary, to commit to a substantial settlement.

6 Most importantly, the excellent result achieved for the Class supports a significant
7 multiplier. Without the risk and delay of litigation, the Class is receiving a substantial
8 percentage of the value of its claims, and average individual payments over \$4,000 with a
9 highest payment over \$13,000. Perhaps more importantly, after pursuing the lawsuit for six
10 months, nearly all Sales Positions were reclassified as non-exempt, ensuring eligibility for
11 overtime wages and meal and rest breaks. Preliminary Approval Motion, at 1:22-25.

12 **H. Litigation Expenses Are Reasonable**

13 The Settlement allows Class Counsel to request up to \$12,500.00 in costs. Counsel seeks
14 reimbursement of actual costs of \$10,657.85. These costs were reasonable and necessary. Geraci
15 Decl. ¶42 Exh. 3 - Itemized Costs; Lebe Dec. ¶10, Exh. B – Itemized Expenses.

16 **IX. THE PROPOSED PAGA PAYMENT IS REASONABLE**

17 The settlement of PAGA penalties for \$50,000, of which \$37,500 (75%) will be paid to the
18 LWDA and \$12,500 (25%) to aggrieved employees, is reasonable and appropriate. The Parties
19 negotiated a good faith amount for PAGA penalties, which was not the result of self-interest at the
20 expense of Class Members. Geraci Decl. ¶43. Where a “good faith amount” is negotiated and
21 “there is no indication that this amount was the result of self-interest at the expense of other Class
22 Members,” it is generally considered reasonable. *Hopson v. Hanesbrands Inc.*, No. CV-08-0844
23 EDL, 2009 U.S. Dist. LEXIS 33900, at *25 (N.D. Cal. Apr. 3, 2009).

24 The amount allocated to PAGA is within the range, or higher, than other settlements. See
25 *Magadia v. Wal-Mart Assocs.*, 384 F. Supp. 3d at 1101, citing, among others, *Ceja-Corona v. CVS*
26 *Pharm., Inc.*, 2015 U.S. Dist. LEXIS 5118 (E.D. Cal. Jan. 14, 2015) (\$10,000 PAGA penalties in
27 settlement of \$900,000), recommendation adopted, 2015 U.S. Dist. LEXIS 25730 (E.D. Cal. Mar.
28 3, 2015); *Nen Thio v. Genji, LLC*, 14 F. Supp. 3d 1324, 1330 (N.D. Cal. 2014) (\$10,000

1 PAGA penalties, \$1.25m settlement); *Franco v. Ruiz Food Prods.*, 2012 U.S. Dist. LEXIS 169057,
2 *5-6 (E.D. Cal. Nov. 27, 2012) (\$10,000 PAGA penalties, \$2.5m settlement); *Garcia v. Gordon*
3 *Trucking*, 2012 U.S. Dist. LEXIS 160052 (E.D. Cal. 2012) (\$10,000 PAGA, \$3.7m settlement).

4 Class Counsel provided the LWDA with the Motion for Preliminary Approval and the
5 fully-executed Agreement. The LWDA raised no objection. Geraci Decl. ¶44, Exh. 5 – LWDA
6 October 26, 2021 Confirmation of Receipt. The LWDA was served with this Final Approval
7 Motion when filed. Geraci Decl. ¶45, Exh. 6 – LWDA Confirmation.

8 **X. THE SERVICE AWARDS ARE REASONABLE AND SHOULD BE AWARDED**

9 Service awards “are fairly typical in class action[s],” “to compensate class representatives
10 for work done on behalf of the class, to make up for financial or reputational risk undertaken in
11 bringing the action.” *Cellphone Termination Fee Cases* (2010) 186 Cal.App.4th 1380, 1394. The
12 Court preliminarily granted service awards to each Plaintiff, but expressed concern that \$10,000
13 for each may be slightly high.

14 “Modern society seems increasingly to expose men to . . . group injuries for which
15 individually they are in a poor position to seek legal redress, either because they do not know
16 enough or because such redress is disproportionately expensive. If each is left to assert his rights
17 alone if and when he can, there will at best be a random and fragmentary enforcement, if there is
18 any at all. This result is not only unfortunate in the particular case, but it will operate seriously to
19 impair the deterrent effect of the sanctions which underlie much contemporary law. The problem
20 of fashioning an effective and inclusive group remedy is thus a major one.” *Vasquez v. Superior*
21 *Court*, 4 Cal. 3d 800, 807 (1971).

22 Enforcement of laws protecting California employees would be “random and fragmentary,”
23 or non-existent, if no one was willing to come forward and spend time to work on behalf of others,
24 and perhaps most importantly, take risks those others do not bear.

25 Courts have concluded class action plaintiffs, not class members, take the risk of a
26 judgment for defendant’s costs. “Those who choose to take the risks of litigation should be the
27 ones who bear the cost when they are unsuccessful.” *Earley v. Superior Court*, 79 Cal.App.4th
28 1420, 1433 (2000). The *Early* court contended this risk was balanced by potential reward.

1 “While imposition of the entire cost burden on the named plaintiffs may have a chilling
2 effect on the willingness of plaintiffs to bring class action suits, this effect easily may be
3 outweighed by the potential recovery.” *Id.* The potential recovery for a plaintiff in any class action
4 will always be less than could be recovered in an individual action, and take much longer to obtain,
5 with no potential for early settlement, even before being forced to file a public complaint.

6 So, if “[t]hose who choose to take the risks of litigation should be the ones who bear the
7 cost when they are unsuccessful,” how can that risk be offset? *Id.* An adequate Service Award.

8 The risk of judgment for Defendant’s costs, alone, is sufficient to support Class
9 Representative Service Awards of \$10,000 each to Plaintiffs Kebede, Tsai, and Pazmino.

10 More important than when *Early* was decided, is the reputational risk certain class action
11 plaintiffs accept. Plaintiffs Kebede, Tsai, and Pazmino work in high technology sales and account
12 management. It is reasonable to conclude they will look for work more times in their careers than
13 employees in other, more traditional occupations, and that when they do, it is more likely such a
14 prospective employer will take the few seconds needed to see if these candidates have sued a
15 company before, alleging it failed to pay its employees properly.

16 It is impossible to know, and intervene, each time a class action plaintiff loses an
17 employment opportunity, making it essential to compensate them adequately at final approval, the
18 only time that risk can be at least slightly offset and they can be rewarded for their contribution.

19 The Class received notice Plaintiffs would each request \$10,000 for “work and efforts in
20 prosecuting this case, for undertaking the risks of payment of costs [] and a general release of all
21 claims.” *Simpluris Decl.* ¶8, Exh. A, ¶7. No Class Member objected. *Id.* at ¶14. The Class’
22 endorsement of the Award is not surprising. Class Members will receive an average of \$4,654
23 with a highest payment of nearly \$14,000, without any effort, not even submitting a claim
24 form. *Id.* at ¶12. Nearly half the Class would have received only \$2,000 and waived any other
25 recovery if Plaintiffs had not accepted personal risk to pursue claims on their behalf.

26 Equitable benefits were also achieved, for Class Members and non-members, when
27 nearly all Sales Positions were reclassified as non-exempt, ensuring eligibility for overtime
28 wages and meal and rest breaks, after the lawsuit was filed.

Class Representatives have received \$10,000 for achieving less than Plaintiffs did here. *Loomis v. Slendertone Distrib.*, 2021 U.S. Dist. LEXIS 44047, *35 (S.D. Cal. March 8, 2021) (incentive award of \$10,000 paid from \$175,000 Common Fund); *McNeal v. RCM Techs. (USA), Inc.*, 2017 U.S. Dist. LEXIS 112137, *2 (C.D. Cal. July 12, 2017) (\$10,000 service award for each of two plaintiffs, average class recovery of \$1,952); *Pagh v. Wyndham Vacation Ownership, Inc.*, 2021 U.S. Dist. LEXIS 56040, *12-13 (\$10,000 for each plaintiff in \$1.5 million settlement).

“[T]he requested service award falls within the range of incentive payments typically awarded to class representatives in similar wage and hour class actions. *See, e.g., Howell v. Advantage RN, LLC*, 2020 U.S. Dist. LEXIS 182505, 2020 WL 5847565, at *5 (S.D. Cal. Oct. 1, 2020) (approving \$10,000 service award in wage and hour class action); *Bond v. Ferguson Enterprises, Inc.*, 2011 U.S. Dist. LEXIS 70390, 2011 WL 2648879, at *2 (E.D. Cal. June 30, 2011) (approving \$11,250 service award to each of the two class representatives); *Garner v. State Farm Mut. Auto. Ins. Co.*, 2010 U.S. Dist. LEXIS 49477, 2010 WL 1687832, at *17 n.8 (N.D. Cal. Apr. 22, 2010) (observing that ‘[n]umerous courts in the Ninth Circuit and elsewhere have approved incentive awards of \$20,000 or more,’ and collecting those cases).” *Pagh v. Wyndham Vacation Ownership, Inc.*, at *12-13.

XI. CONCLUSION

The Settlement favorably resolves what would otherwise be uncertain litigation. Class Counsel respectfully requests the Court grant final approval of the proposed Settlement, approve the Service Awards, attorneys’ fees and costs, and administration expenses as requested.

Respectfully submitted,

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Dated: April 8, 2022

By: _____


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