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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

CONSUELO ANDRADE, individually and on
behalf of all others similarly situated,

Plaintiff,
vs.

NOVACAP, LLC a Delaware Limited
Liability Company; and DOES 1 through 50,
inclusive,

Defendants.

Case No. 20STCV21805

*Assigned For All Purposes to the Hon.
William F. Highberger, Dept. 10*

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

Date: April 29, 2021
Time: 1:30 p.m.
Location: 10

1 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

2 **PLEASE TAKE NOTICE** that on April 29, 2021 at 1:30 p.m. or as soon thereafter as the
3 matter may be heard, before the Honorable William F. Highberger, judge presiding, in Department
4 10 of the above referenced Court located at 312 North Spring Street, Los Angeles, California
5 90012, Plaintiff CONSUELO ANDRADE (“Class Representative” or “Plaintiff”) will seek an
6 Order: (1) preliminarily approving the Joint Stipulation and Class Action Settlement Agreement
7 and Release (“Settlement Agreement” or “Settlement”); (2) conditionally certifying the following
8 Class for settlement purposes only: “All current and former non-exempt California employees of
9 Defendant who earned overtime wages and non-discretionary incentive pay, including without
10 limitation, “Goal” incentives, in the same workweek at any time during the period of time from
11 April 6, 2016, through December 31, 2019”; (3) appointing Plaintiff as the Class Representative
12 and Larry W. Lee of Diversity Law Group, P.C., Edward W. Choi of Law Offices of Choi &
13 Associates, and David Lee of David Lee Law as Class Counsel; (4) preliminarily approving the
14 Settlement and the Gross Settlement Sum of \$125,000.00; (5) finding on a preliminary basis that
15 the Settlement Agreement appears to be within the range of reasonableness of a settlement,
16 including the amount of the PAGA penalties, Class Representative Service Award, Class
17 Counsel’s fees and costs, the settlement administration fees, and the allocation of payments to
18 Class Members, that could ultimately be given final approval by this Court; (6) approving the
19 Notice of Class Action Settlement (“Class Notice”) to be sent to Class Members, which is attached
20 as an exhibit to the Settlement Agreement; (7) approving the distribution of the Class Notice to
21 Class Members substantially in the manner and form set forth in the Settlement Agreement; (8)
22 appointing Phoenix Settlement Administrators as the Settlement Administrator; and (9) setting the
23 matter for a Final Fairness and Final Approval hearing.

24 This Motion is made pursuant to Rule 3.769 of the California Rules of Court, which
25 provides for court approval of the settlement of a purported class action and allows the Court to
26 preliminarily certify a class for settlement purposes.

27 The basis for this Motion, filed without any opposition from Defendant NOVACAP, LLC
28 (“Defendant”), is that the proposed settlement is fair, adequate, and reasonable and the procedures
proposed by the Parties are adequate to ensure the opportunity of class members to participate in,

1 opt-out of, or object to the settlement.

2 This Motion will be based on the attached Memorandum of Points and Authorities, the
3 Settlement Agreement, the proposed Class Notice, and the supporting Declarations of Edward W.
4 Choi, Larry W. Lee, David Lee, and Plaintiff Consuelo Andrade, and upon the oral arguments of
5 counsel (should there be any) and on the complete records and file herein.

6
7 DATED: March 24, 2021

LAW OFFICES OF CHOI AND ASSOCIATES

8
9 By: 

Edward W. Choi

Attorneys for PLAINTIFF and the CLASS

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 On June 5, 2020, Plaintiff Consuelo Andrade (“Plaintiff”), on behalf of herself and others
4 similarly situated, filed her Class Action Complaint against Defendant NOVACAP, LLC
5 (“Defendant”) (Plaintiff and Defendant shall collectively be referred to as the “Parties”) in the
6 Superior Court of California for the County of Los Angeles. (Declaration of Edward W. Choi
7 (“Choi Decl.”) at ¶2). The Complaint asserted claims for (1) Violation of Labor Code § 226; (2)
8 Violation of Labor Code §§ 510 and 1194; and (3) Violation of Business and Professions Code §
9 17200, *et seq.* (*Id.* at ¶3). On July 16, 2020, Plaintiff filed a First Amended Complaint, which
10 alleged an additional cause of action against Defendant for Violation of Labor Code §2698, *et*
11 *seq.*, the PAGA (“Operative Complaint”). (*Id.* at ¶4).

12 Since the filing of this case, the Parties engaged in an extensive meet and confer process
13 and informally exchanged documents, information and data. (*Id.* at ¶5). On or about February 16,
14 2021, the Parties engaged in mediation with well-respected mediator, Gig Kyriacou, which
15 ultimately led to this settlement. (*Id.* at ¶6). The Parties executed a Joint Stipulation and Class
16 Action Settlement Agreement and Release (“Settlement Agreement”) which is attached to the
17 Notice of Lodging Joint Stipulation and Class Action Settlement Agreement and Release, which is
18 being concurrently filed with this Motion.

19 The terms of the settlement provide that Defendants shall pay a gross settlement fund of
20 One Hundred Twenty-Five Thousand Dollars and Zero Cents (\$125,000.00) which will be
21 distributed to the class on a **non-reversionary** basis without the need to submit claim forms. (*See*
22 Notice of Lodging Joint Stipulation and Class Action Settlement Agreement and Release
23 (“Settlement Agreement”) at ¶¶4.1, 1.15.). Thus, the entire settlement amount will be distributed
24 and no remaining amounts, i.e. unclaimed funds, will revert back to Defendants. (Settlement
25 Agreement at ¶5.1.).

26 The Parties believe that this amount is fair, adequate, and reasonable, especially given the
27 substantial risks and uncertainty of class certification and liability on the merits. Although
28 Plaintiff and her counsel have always believed that they can prevail on class certification, as well

1 as on the merits, they recognize the inherent risk in further drawn-out litigation and the specific
2 risks that a class might not be certified and/or that Plaintiff could fail to establish liability. Based
3 on their own independent investigation and evaluation, the Parties and their respective counsel are
4 of the opinion that settlement for the consideration and on the terms set forth in the Settlement
5 Agreement is fair, reasonable, and adequate and is in the best interests of the Class and Defendants
6 in light of all known facts and circumstances and the expenses and risks inherent in litigation.

7 Therefore, the Parties respectfully request that the Court grant this Motion for Preliminary
8 Approval of Class Action Settlement.

9 **II. DISCUSSION**

10 Any settlement of a class action lawsuit must be reviewed and approved by the Court.
11 This is done in two steps: (1) an early (preliminary) review by the trial court, and (2) a final review
12 after notice has been distributed to the class members for their comment or objections. The
13 Manual for Complex Litigation (Third) § 30.41 states:

14 Approval of class action settlements involves a two-step process. First, counsel
15 submits the proposed terms of settlement and the court makes a preliminary
16 fairness evaluation. If the preliminary evaluation of the proposed settlement does
17 not disclose grounds to doubt its fairness or other obvious deficiencies, such as
18 unduly preferential treatment of class representatives or of segments of the class, or
19 excessive compensation for attorneys, and appears to fall within the range of
possible approval, the court should direct that notice ... be given to the class
members of a formal fairness hearing, at which arguments and evidence may be
presented in support of and in opposition to the settlement.

20 Thus, the preliminary approval by the trial court is simply a conditional finding that the
21 settlement appears to be within the range of acceptable settlements. As Professor Newberg
22 comments, “[t]he strength of the findings made by a judge at a preliminary hearing or conference
23 concerning a tentative settlement proposal may vary. The court may find that the settlement
24 proposal contains some merit, is within the range of reasonableness required for a settlement offer,
25 or is presumptively valid subject only to any objections that may be raised at a final hearing.” 4
26 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions*, § 11.26 (4th ed. 2002).

27 The procedures for the parties’ submission of a proposed settlement for preliminary
28 approval by the court also are discussed in 4 *Newberg on Class Actions*:

1 When the parties to an action reach a monetary settlement, they will usually prepare
2 and execute a joint stipulation of settlement, which is submitted to the court for
3 preliminary approval. The stipulation should set forth the central terms of the
4 agreement, including but not limited to, the amount of settlement, form of payment,
5 manner of determining the effective date of settlement and any recapture clause.
6 *Id.* at § 11.24.

7 Here, the Parties have reached such an agreement. The Settlement Agreement sets forth all
8 terms of the agreement reached by the Parties, which include, among other things, the method for
9 calculating the Class Members' Individual Settlement Amount.

10 The parties also may, at the preliminary approval stage, request that the court provisionally
11 approve certification of the class – conditional upon final approval of the settlement. “[P]re-
12 certification settlements are routinely approved if found to be fair and reasonable.” *Wershba v.*
13 *Apple Computer, Inc.*, 91 Cal. App. 4th 224, 240 (2001). *Accord Dunk v. Ford Motor Co.*, 48 Cal.
14 App. 4th 1794, 1803 (1996) (although the settlement was reached before any “adversary
15 certification,” the court was satisfied that it was “fair, adequate and reasonable”); *In re Baldwin-*
16 *United Corp.*, 105 F.R.D. 475, 478 (S.D.N.Y. 1984) (“many courts have employed this practice in
17 the name of judicial efficiency in order to facilitate apparently beneficial settlement proposals”).
18 As further explained by Professor Newberg:

19 The strength of the findings made by a judge at a preliminary hearing or conference
20 concerning a tentative settlement proposal. . . . may be set out in conditional orders
21 granting tentative approval to the various items submitted to the court. Three basic
22 rulings are often conditionally entered at this preliminary hearing. These
23 conditional rulings may approve a temporary settlement class, the proposed
24 settlement, and the class counsel's application for fees and expenses.

25 4 Newberg on Class Actions, at §11.26

26 In addition to such terms as class identification, settlement amount and payment
27 procedures, the Settlement Agreement reached among the Parties contains a provision pursuant to
28 which the Parties stipulate to the Court's provisional certification of the Class, but do so for the
purposes of this settlement only.

29 **A. PROPOSED CLASS DEFINITION**

30 The current settlement is being settled on behalf of:

31 “All current and former non-exempt California employees of Defendant
32 who earned overtime wages and non-discretionary incentive pay,

1 including without limitation, “Goal” incentives, in the same workweek at
2 any time during the period of time from April 6, 2016, through December
3 31, 2019 (“Class”).”

4 (Settlement Agreement ¶1.2).

5 The Class Period is from April 6, 2016 through the date of Preliminary Approval.
6 (Settlement Agreement ¶1.8). The reason for the difference in the Class membership and the
7 Class Period is because Defendant has stopped issuing “Goal Incentives” as of December 31,
8 2019, but a Class Member that was employed through December 31, 2019 could have been
9 employed beyond December 31, 2019 and even through the date of the Preliminary Approval.
10 (Choi Decl. ¶16). Thus, only Class Members that received “Goal Incentives” would be able to
11 participate in this settlement, but would release their claims predicated on Goal Incentives through
12 the date of preliminary approval. (*Id.*).

13 **B. NUMEROSITY**

14 Courts generally find that numerosity is satisfied if the class includes forty or more
15 members. (*See Villalpando v. Excel Direct Inc.* (N.D. Cal. 2014) 303 F.R.D. 588, 605-606; *see*
16 *also Jordan v. L.A. County* (9th Cir. 1982) 669 F.2d 1311, 1320 (noting, in dicta, that the court
17 “would be inclined to find the numerosity requirement...satisfied solely on the basis of [39]
18 ascertained class members”), *vacated on other grounds*, 459 U.S. 810 (1982); *Ark. Educ. Ass’n v.*
19 *Bd. of Educ. of the Portland* (8th Cir. 1971) 446 F.2d 763, 765-66 (approving class of 20
20 members).)

21 In this case, there are approximately a total of 193 class members, and therefore,
22 numerosity is satisfied. (Choi Decl. at ¶9).

23 **C. ASCERTAINABILITY**

24 Class members are ascertainable where they may be “readily identified without
25 unreasonable expense or time by reference to official records.” (*Lee v. Dynamex, Inc.* (2008) 166
26 Cal. App. 4th 1325, 1334; *see also Faulkinbury v. Boyd & Assocs., Inc.* (2013) 216 Cal. App. 4th
27 220, 240.)

28 Here, Defendant provided data to ascertain the identity of class members based on

1 Defendant's payroll records.

2 **D. TYPICALITY AND ADEQUACY OF REPRESENTATION**

3 **1. Class Representative's Claims are Typical of the Class**

4 The commonality requirement is met when there are questions of law and fact common to
5 the class. *See Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (1998) ("The existence of shared
6 legal issues with divergent legal factual predicates is sufficient, as is a common core of salient
7 facts couple with disparate legal remedies within the class"). Commonality requires only that
8 some common legal or factual questions exist; the plaintiff need not show that all issues in the
9 litigation are identical. *See Richmond v. Dart Industries, Inc.*, 29 Cal. 3d 462, 473 (1981).
10 Defendant's conduct is central to the commonality inquiry. *See City of San Jose v. Superior*
11 *Court*, 12 Cal. 3d 447, 460 (1974); *Vasquez v. Superior Court*, 4 Cal. 3d 800, 812-13 (1971).
12 Where the employer's conduct is uniformly directed at a class of employees, as it is here, the class
13 wide impact of the Defendants' policies satisfies the commonality requirement. *See Stephens v.*
14 *Montgomery Ward & Co.*, 193 Cal. App. 3d 411, 421 (1987).

15 The central and only class issue in this matter is whether Defendant's calculation of
16 overtime wages when overtime wages and non-discretionary incentive pay, including without
17 limitation, "Goal" incentives, earned in the same workweek is a violation of Labor Code §§510,
18 1194, and 226 that would lead to Labor Code §203 penalties and derivative PAGA penalties.

19 Like all other class members, Plaintiff was paid overtime wages during the work weeks
20 where she also earned additional non-discretionary remuneration, including without limitation, the
21 "Goal" incentives. (Declaration of Consuelo Andrade ("Andrade Decl.") ¶4.) Plaintiff does not
22 have any interests adverse to the class, nor has any such issues been raised or presented. (*Id.* at
23 ¶5). Plaintiff has taken all necessary steps to represent the interests of the Class, by providing
24 information and documents. (*Id.* at ¶¶ 6-7). For such reasons, Plaintiff has adequately represented
25 the class members and will continue to do so.

26 **2. Class Counsel Have Adequately Represented the Class and Has**
27 **Experience with Wage and Hour Class Actions**

28 From the inception of the case, Class Counsel have adequately represented the class. For

1 example, class counsel also engaged in numerous meet and confers with opposing counsel to
2 obtain all of the class data. (Choi Decl. ¶5, 8) The settlement was also obtained for the benefit of
3 the class, not for the individual Plaintiff. Finally, Class counsel have been approved as class
4 counsel on a number of prior cases and are competent to represent the class. (Choi Decl. ¶¶ 23,
5 25; Declaration of Larry W. Lee ("L. Lee Decl.") ¶ 6; Declaration of David Lee ("D. Lee Decl.") ¶
6 8).

7 **E. SUPERIORITY**

8 Class treatment is clearly superior to any other method of resolving Plaintiff's claims. (*Sav-*
9 *on Drug Stores, Inc., supra*, 34 Cal. 4th 319 at p. 326.) In employment actions, class actions are in
10 fact encouraged. (*Jaimez v. DAIOHS USA, Inc.* (2010) 181 Cal. App. 4th 1286, 1308 ("In light of
11 the numerous common issues of fact and law that predominate in this lawsuit, we conclude that
12 proceeding by way of class action is the superior method of adjudication. Doing so would further
13 judicial economy by avoiding repetitious suits, would unify what would otherwise be a series of
14 small claims so as to enhance the class members' access to redress...").)

15 Here, Plaintiff's claims are based on the system-wide policies, procedures, and practices
16 that apply to all class members and can be most efficiently litigated on a class-wide basis. The
17 alternative would be the unrealistic filing of numerous individual claims. Since the putative class
18 members are employees with relatively modest individual claims and limited resources, there is a
19 strong likelihood that individual claims would never be brought. (*See Local Joint Exec. Bd. of*
20 *Culinary/Bartender Trust Fund* (9th Cir. 2001) 244 F.3d 1152, 1163 (superiority requirement met
21 where class members would recover, at most, about \$1,330); *see also Gentry v. Sup. Ct.* (2007) 42
22 Cal. 4th 443, 462.)

23 **F. SUMMARY OF THE CASE, INVESTIGATION AND DISCOVERY AND** 24 **REASONABLE ESTIMATE OF THE NATURE AND AMOUNT OF** 25 **RECOVERY**

26 As discussed above, Plaintiff alleges that she and the putative class members did not
27 receive the correct overtime rate of pay when they earned overtime wages and non-discretionary
28 incentive pay, including without limitation, "Goal" incentives, in the same workweek and thus, did

1 not receive all overtime pay as required by law. After the filing of the lawsuit, Plaintiff engaged in
2 extensive meet and confers, obtained the putative class members' data and analyzed such data in
3 connection with mediation, and extensively researched and litigated the substantive issues in this
4 case. (Choi Decl. ¶¶ 5, 8-12). Thereafter, the parties ultimately resulted in this settlement. (Choi
5 Decl. ¶6).

6 Based on their own independent investigations and evaluations, the Parties and their
7 respective counsel are of the opinion that settlement for the consideration and on the terms set
8 forth in the Settlement Agreement is fair, reasonable, and adequate and is in the best interests of
9 the Class and Defendants in light of all known facts and circumstances and the expenses and risks
10 inherent in litigation. (Choi Decl. ¶14).

11 As explained by the Court of Appeal in *Kullar v. Foot Locker Retail, Inc.*, 168 Cal. App.
12 4th 116, 130, 133 (2008), a class action settlement should be approved when the plaintiff has
13 conducted sufficient discovery and the settlement is reasonable in light of the strengths of the
14 plaintiff's claims. As discussed herein, Plaintiff's counsel has conducted extensive investigation
15 and, in light of the strength and weaknesses of Plaintiff's claims, Plaintiff's attorneys submit that
16 this settlement is fair pursuant to *Kullar*.

17 In anticipation of mediation, Defendant provided the number of violative statements
18 furnished to the settlement members during the relevant time period. (Choi Decl. ¶9). This data
19 allowed Plaintiff's counsel to calculate the maximum exposure in Labor Code penalties in
20 preparation for mediation. (*Id.*) There were 193 class members that earned overtime wages and
21 non-discretionary incentive pay, including without limitation, "Goal" incentives, in the same
22 workweek in the data set provided. (*Id.*) The average rate of pay for these individuals was
23 \$13.55. (*Id.*)

24 Plaintiff estimates that the total exposure for Labor Code §§ 510 and 1194 for unpaid
25 overtime wages amounts to \$17,970.57. Further, Labor Code § 203 amounts to \$169,104.00 (52
26 former employees X \$13.55 X 8 X 30). In addition, the Labor Code § 226 penalty amounts to
27 \$16,950.00 [(245 pay periods X \$100 – (151 employees X \$50)]. (Choi Decl. ¶10).

28 Plaintiff further estimates the maximum derivative PAGA penalties predicated on (1)

1 violation of Labor Code § 510 and 1194 amounts to \$24,500.00 (245 pay periods X \$100); (2)
2 violation of Labor Code § 203 amounts to \$1,900.00 (19 pay periods X \$100); (3) violation of
3 Labor Code § 226 amounts to \$61,250.00 (245 pay periods X \$250). (Choi Decl. ¶11). Thus, the
4 total class-wide damages and PAGA exposure is estimated at approximately \$291,674.57. (*Id.*).
5 Therefore, the Gross Settlement Amount is approximately 42.86% of the total exposure
6 (\$125,000.00 divided by \$291,674.57). (*Id.* at ¶12).

7 Numerous courts have held that **gross** settlements approximating between only 8 and 25%
8 of the defendants' potential exposure are fair and reasonable. *See, e.g., In re Mego Fin. Corp.*
9 *Secs. Litig.*, 213 F.3d 454, 459 (9th Cir.2000) (holding that class action settlement recovering 16%
10 of potential exposure was fair and reasonable; "[i]t is well-settled law that a cash settlement
11 amounting to only a fraction of the potential recovery does not per se render the settlement
12 inadequate or unfair. Rather, the fairness and the adequacy of the settlement should be assessed
13 relative to risks of pursuing the litigation to judgment"; noting that whether the settlement is fair
14 and adequate depends on the "the difficulties in proving the case"); *Bellinghausen v. Tractor*
15 *Supply Co.*, No. 13-CV-02377-JSC, 2015 WL 1289342, at *6 (N.D. Cal. Mar. 20, 2015) (holding
16 that class action settlement recovering between 8.5% and 25% of the defendants' potential
17 exposure was fair); *Van Ba Ma v. Covidien Holding Inc.*, U.S. Dist. Ct. Case No. 8:12-cv-02161
18 (C.D. Cal. 2014) (court granted preliminary approval of wage and hour class settlement which
19 obtained **only 9.1%** of projected damages, given the risks of continued litigation) *Villegas v. J.P.*
20 *Morgan Chase & Co.*, No. CV 09-00261 SBA EMC, 2012 WL 5878390, at *6 (N.D. Cal. Nov.
21 21, 2012) (holding that gross class action settlement of approximately 15% of the potential
22 recovery was fair and reasonable); *Greko v. Diesel U.S.A., Inc.*, No. 10-cv-02576 NC, 2013 WL
23 1789602, at *5 (N.D. Cal. Apr. 26, 2013) (24 percent was reasonable).

24 In the present case, the total amount of the settlement is well above the acceptable range
25 when compared to the total exposure.

26 **G. SETTLEMENT WAS NEGOTIATED AT ARMS-LENGTH AND IS NOT**
27 **COLLUSIVE**

28 Courts presume the absence of fraud or collusion in the negotiation of settlement unless

1 evidence to the contrary is offered. *Priddy v. Edelman*, 883 F.2d 438, 447 (6th Cir. 1989); *Mars*
2 *Steel Corp. v. Continental Illinois Nat'l Bank & Trust Co.*, 834 F.2d 677, 682 (7th Cir. 1987); *In*
3 *re Chicken Antitrust Litig.*, 560 F. Supp. 957, 962 (N.D. Ga. 1980). Courts do not substitute their
4 judgment for that of the proponents, particularly where, as here, settlement has been reached with
5 the participation of experienced counsel familiar with the litigation. *Nat'l Rural Telecomms.*
6 *Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 528 (C.D. Cal. 2004); *Hammon v. Barry*, 752 F. Supp.
7 1087 (D.D.C. 1990); *Steinberg v. Carey*, 470 F. Supp. 471 (S.D.N.Y. 1979); *In re Armored Car*
8 *Antitrust Litig.*, 472 F. Supp. 1357 (N.D. Ga. 1979); *Sommers v. Abraham Lincoln Federal Sav. &*
9 *Loan Ass'n*, 79 F.R.D. 571 (E.D. Pa. 1978).

10 While the recommendations of counsel proposing the settlement are not conclusive, the
11 Court can properly take them into account, particularly where, as here, they have been involved in
12 formal and informal discovery and negotiations for some period of time, appear to be competent,
13 have experience with this type of litigation, and have exchanged substantial evidence from the
14 opposing party. *See Newberg on Class Actions, supra*, at § 11.47; *Nat'l Rural Telecomms. Coop.*,
15 221 F.R.D. at 528 (quoting *In re Paine Webber Ltd. P'ships Litig.*, 171 F.R.D. 104, 125 (S.D.N.Y.
16 1997) (“[s]o long as the integrity of the arm’s length negotiation process is preserved, however, a
17 strong initial presumption of fairness attaches to the proposed settlement . . . [citations] and ‘great
18 weight’ is accorded to the recommendations of counsel, who are most closely acquainted with the
19 facts of the underlying litigation”)).

20 Here, both Plaintiff’s and Defendant’s counsel have a great deal of experience in wage and
21 hour class action litigation. Plaintiff’s counsel have been approved as class counsel in a number of
22 wage and hour class actions and have extensive litigation experience. (L. Lee Decl. at ¶6; Choi
23 Decl. at ¶¶ 23, 25; D. Lee Decl. at ¶8). Moreover, as discussed above, Plaintiff’s counsel
24 conducted a very extensive investigation of the allegations involved in this case since the
25 inception. Each side has apprised the other of their respective factual contentions, legal theories
26 and defenses, resulting in extensive arms’ length negotiations taking place among the Parties.

27 The settlement for each participating Class Member is fair, reasonable and adequate, given
28 the inherent risks of litigation, including the substantial risks relative to class certification, and the

1 costs of pursuing such litigation. The settlement is the result of extensive arms' length
2 negotiations between the Parties and their counsel, which was achieved after a full day of
3 mediation before a highly regarded mediator.

4 Although Plaintiff believes that a class can be certified, Plaintiff also believes in the
5 fairness of the settlement that is based on factoring in the uncertainty and risks to Plaintiff
6 involved in not prevailing on one or more of the causes of action or theories alleged in the
7 Operative Complaint, the possibility of non-certification and potential for appeals. (Choi Decl. at
8 ¶13). Despite the asserted fairness of the settlement terms, as set forth in the Class Notice, should
9 any Class Member wish to pursue his or her own case for the claims being released herein, each
10 Class Member has the right to submit a request for exclusion (*i.e.*, Opt-Out) from the settlement.
11 Moreover, as set forth in the Class Notice, Class Members are advised of their right to attend the
12 final approval hearing and object to any of the terms contained in the proposed Settlement
13 Agreement.

14 **H. SETTLEMENT TERMS AND EVALUATION**

15 **1. Proposed Terms of the Settlement**

16 This is a non-reversionary settlement wherein Class Members will be automatically paid
17 out of the settlement if he/she does not opt-out of the settlement. The key terms of the settlement
18 are as follows.

19 The Settlement Agreement provides for a Gross Settlement Sum of One Hundred Twenty-
20 Five Thousand Dollars and Zero Cents (\$125,000.00). (Settlement Agreement ¶1.15). Attorney's
21 fees of up to one-third of the Gross Settlement Sum or \$41,666.67 will be paid to Class Counsel
22 along with costs of up to \$15,000.00. (*Id.* at ¶6) The Class Representative Service Award will be
23 up to \$10,000.00. (*Id.* at ¶7). The Settlement Administrator will be paid up to \$10,000.00 for
24 costs of administering this settlement. (Settlement Agreement ¶9). The PAGA Allocation is
25 allocated as \$10,000.00 of which 75% shall be paid to the LWDA and 25% will be part of the Net
26 Settlement Amount available for distribution to Settlement Class Members. (*Id.* at ¶8). After
27 deduction of the foregoing, the Settlement Class Awards will be distributed to each Settlement
28 Class Member who does not opt-out of the Settlement Agreement. (*Id.* at ¶5).

1 **2. Nature of Any Injunctive Relief**

2 The Settlement Agreement does not provide for any injunctive relief.

3 **3. Amount and Manner of Distribution of the Compensation to be**
4 **Provided to Class Members Including the Amount, or an Estimate, of**
5 **What Each Class Member Will Receive**

6 The Net Settlement Amount (calculated after deduction of attorneys' fees, costs, class
7 representative service payment, LWDA payment, and claims administration costs) shall be paid to
8 all Settlement Class Members who do not opt out of the settlement. (Settlement Agreement
9 ¶¶1.31, 5.1). Each Settlement Class Member's Class Member Payment will be calculated by
10 dividing the number of Goal Payments received by the Settlement Class Member during the Class
11 Period ("Goal Payments") by all Goal Payments received by all Settlement Class Members,
12 multiplied by the Net Settlement Amount. (Settlement Agreement ¶ 5.1.1.1). Each Settlement
13 Class Member will receive a share of the Net Settlement Amount. (Settlement Agreement ¶ 5.1).
14 The reason for such allocation is so that the Settlement Class Members who suffered higher
15 damages will be allocated greater recovery. Class Members may request for exclusion from the
16 Settlement if they so choose. (Settlement Agreement ¶16.1). Based on the Net Settlement
17 Amount, on a pure raw average, each class member will receive approximately \$211.57. (Choi
18 Dec. ¶20). Such amounts for each person could increase or decrease depending on a number of
19 factors, including the amount of Goal Payments received by each Settlement Class Member during
20 the class period. The approximate amount each person will be entitled to will not be known until
21 the class data is transferred to the Settlement Administrator for processing.

22 **4. Whether, and Under What Circumstances, Amounts May Revert to**
23 **Defendants**

24 This is a non-reversionary settlement as the entirety of the settlement amount will be fully
25 paid out. (Settlement Agreement ¶¶4.1, 5.1). Class Member Payment checks not negotiated
26 within 180 calendar days from the date initially mailed by the Settlement Administrator will
27 escheat to the State Controller to be deposited in the Unclaimed Property Fund. (Settlement
28 Agreement ¶10.3).

1 **5. Scope of the Release of Class Members' Claims**

2 The scope of the release, as listed below, is identified in the Settlement Agreement at
3 paragraph 13.3, as well as in each of the Notices that will be sent to Class Members.

4 “Upon funding of the GSA, all Class Members who did not opt out
5 of this Action by filing a timely, valid Request for Exclusion (i.e.
6 Settlement Class Members) hereby release and discharge, for the
7 time period from April 6, 2016, to the date of preliminary approval
8 or Defendant and all of its former, present, or future parents,
9 subsidiaries, affiliates, partners, officers, employees, owners,
10 agents, shareholders, and the predecessors and successors, assigns,
11 and legal representatives of all such entities and individuals, and
12 any profit sharing, savings, health and other employee benefit
13 plans of any nature, the successors of such plans and those plans’
14 respective trustees, administrators, agents, employees, fiduciaries,
15 and other persons acting on their behalf, and each of them, and the
16 predecessors and successors, assigns and legal representatives of
17 all such entities and individuals (collectively, the “Released
18 Parties) from any and all claims, debts, liabilities, demands,
19 obligations, guarantees, costs, expenses, attorney’s fees, damages,
20 action or causes of action contingent or accrued for, or which relate
21 to the allegations and claims asserted in the Andrade complaint,
22 First Amended Complaint as set forth herein, including without
23 limitation to, the California Labor Code or Business & Professions
24 Code (including Section 17200); the Private Attorneys General
25 Act, the Fair Labor Standards Act, any IWC Wage Order; claims
for restitution, liquidated damages, overtime, interest, failure to
pay the regular rate, inaccurate pay stubs, meal and rest period
penalties, waiting time penalties, penalties of any nature
whatsoever, any other benefit claimed on account of the allegations
asserted in the operative Andrade complaint. This release shall not
include unrelated, non wage and hour claims like discrimination,
workers compensation, or ERISA claim. The cashing of the
settlement check by class members shall be deemed to be an opt-in
for purposes of the FLSA claims referred in the Released Claims.
The Settlement Administrator shall include a legend on the
settlement check stating “By cashing this check, I am opting into
Andrade v. Novacap LLC, Case No. 20STCV21805 under FLSA,
29 U.S.C. § 216(b), and releasing the Released Claims described in
the Settlement Agreement.”

26 As shown, the scope of the release is narrow and is limited by the claims asserted in the
27 Operative Complaint. Further, the Scope of the Release does not waive Civil Code §1542 for
28 Settlement Class Members.

1 **6. Tax Treatment of Settlement Amounts**

2 All Settlement Class Awards are allocated as follows: one-third (1/3) of each Class
3 Member Payment shall constitute wages for the purposes of IRS reporting, while two-thirds (2/3)
4 shall constitute payments for penalties and interest. (Settlement Agreement ¶11.1) The wage-
5 portion shall be reported to the IRS pursuant to form W-2 and non-wage portion via form 1099 as
6 applicable for penalties, interest, and nonwage reimbursements. (*Id.*) Employer payroll taxes on
7 the wage-portion of each Class Member Payment shall be paid by Defendant separately and in
8 addition to the GSA. (Settlement Agreement ¶11.2).

9 **I. SUBMISSION OF CLAIMS/EXCLUSIONS/OBJECTIONS**

10 Class Members will not be required to submit a claim form to receive compensation.
11 (Settlement Agreement ¶¶4.1, 5.1). Thus, this substantially decreases the amount of burden each
12 Class Member must bear in order to receive their settlement share. If a Class Member does not
13 wish to take part in this settlement and be bound by the release, he/she must submit an exclusion
14 request. Such obligations are thoroughly identified in each class member's Class Notices.
15 (Settlement Agreement ¶16.1 and Exhibit A).

16 Class Members will be provided 45 calendar days from the mailing of the Class Notice to
17 opt out of the settlement. (Settlement Agreement ¶16.1 and Exhibit A). Any Class Member who
18 does not opt-out of the settlement will be automatically issued his/her share of the settlement
19 proceeds. Given that this is a non-reversionary settlement, the parties believe that 45 calendar
20 days is sufficient time for class members to opt-out of the settlement.

21 Finally, with respect to objections, Class Members may either submit a written objection
22 within 45 calendar days of the mailing of the Class Notices, or appear at the Final Approval
23 Hearing to voice their objections even if they did not submit a written objection. (Settlement
24 Agreement ¶15).

25 **J. UNCASHED CHECKS**

26 Class Payment checks not negotiated within 180 calendar days from the date initially
27 mailed by the Settlement Administrator will escheat to the State Controller to be deposited in the
28 Unclaimed Property Fund. (Settlement Agreement ¶10.3.).

1 **K. NOTICE TO CLASS MEMBERS**

2 The Notice will be sent in English and Spanish (Choi Decl. ¶19). Within seven (7)
3 calendar days of the latter of preliminary approval of this settlement or court approval of
4 settlement notice to the class, Defendant will provide the Settlement Administrator Class
5 members. (Settlement Agreement ¶14.2). After receiving the information from Defendant, the
6 Settlement Administrator will promptly provide the Notice Packet by first class mail, forwarding
7 requested, to the Class Members using the most current, known mailing addresses identified in the
8 Class List. (*Id.* at ¶14.2.3). Prior to mailing, the Settlement Administrator will perform a search
9 based on the National Change of Address Database for information to update and correct for any
10 known or identifiable address changes. (*Id.* at ¶14.2.2). If a Notice is returned as undeliverable
11 within ten (10) calendar days after the date of initial mailing or where the National Change of
12 Address Database indicates that the last known address of any Class Member is invalid or
13 otherwise undeliverable, the Settlement Administrator will perform one skip-trace procedure. (*Id.*
14 at ¶ 14.2.4). Such skip-trace procedure shall be performed within two (2) business days of the
15 date on which the Settlement Administrator is informed that a Notice Packet is undeliverable.
16 (*Id.*) If this procedure reveals a new address, the Settlement Administrator shall within five (5)
17 business days thereafter re-mail the Notice Packet to the new address. (*Id.*)

18 Based on the foregoing, the notice procedures fully comply with California Rules of Court
19 Rule 3.766 (d) & (e).

20 **L. COSTS AND FEES**

21 **1. Attorneys' Fees and Costs**

22 California state and federal courts have recognized that an appropriate method for
23 determining award of attorneys' fees is based on a percentage of the total value of benefits to
24 Class Members by the settlement. *Wershba v. Apple Computer, Inc.*, 91 Cal.App.4th 224, 254
25 (2001); *Serrano v. Priest*, 20 Cal. 3d 25, 34 (1977) ("*Serrano III*"); *Boeing Co. v. Van Gemert*,
26 444 U.S. 472, 478 (1980); *Vincent v. Hughes Air West, Inc.*, 557 F. 2d 759, 769 (9th Cir. 1997).
27 The purpose of this equitable doctrine is to avoid unjust enrichment of counsel and to "spread
28 litigation costs proportionally among all the beneficiaries so that the active beneficiary does not

1 bear the entire burden alone.” *Vincent*, 557 F. 2d at 769.

2 Under California law, the award of attorneys’ fees in common fund wage and hour class
3 action settlements should start with the percentage method. *See Laffitte v. Robert Half Int’l*, 1 Cal.
4 5th 480, 503 (Aug. 11, 2016) (“We join the overwhelming majority of federal and state courts in
5 holding that when class action litigation establishes a monetary fund for the benefit of the class
6 members, and the trial court in its equitable powers awards class counsel a fee out of that fund, the
7 court may determine the amount of a reasonable fee by choosing an appropriate percentage of the
8 fund created.”). Under the percentage of the fund method, the Court’s objective remains to “mimic
9 the market” in fixing a reasonable fee. *See Gaskill v. Gordon*, 160 F.3d 361, 363 (7th Cir. 1998)
10 (J. Posner) (“When a fee is set by a court rather than by contract, the object is to set it at a level
11 that will approximate what the market will set... The judge, in other words, is trying to mimic the
12 market in legal services.”).

13 An award of 33% of the fund in attorneys’ fees mimics the marketplace as it “is supported
14 by the fact that typical contingency fee agreements provide that class counsel will recover 33% if
15 the case is resolved before trial and 40% if the case is tried.” *Fernandez v. Victoria Secret Stores*
16 *LLC*, 2008 WL 8150856, *16 n. 59 (C.D. Cal. July 21, 2008) (citing Brickman, *Effective Hourly*
17 *Rates of Contingency-Fee Lawyers: Competing Data and Non-Competitive Fees* (Fall 2003) 81
18 Wash U. L. Q. 653, 659 n. 11). Indeed, “empirical studies [that] show that . . . fee awards in class
19 actions average around one-third of the recovery.” *Chavez v. Netflix, Inc.*, 162 Cal. App. 4th 43, 66
20 n.11 (2008).

21 The California Supreme Court in *Laffitte* affirmed a fee award representing 33 1/3 percent
22 of the fund. *Laffitte*, 1 Cal. 5th at 506. And this was based on a lodestar amount that required a
23 multiplier of 2.13. *Id.* at 487. As the Court held, only when the multiplier is “extraordinarily high
24 or low [should] the trial court [] consider whether the percentage method should be adjusted so as
25 to bring the imputed multiplier within a justifiable range.” *Id.* at 505.

26 Moreover, in the *Laffitte* intermediate court decision, the court observed that “33 1/3
27 percent of the common fund is consistent with, and in the range of, awards in other class action
28 lawsuits.” *Laffitte v. Robert Half Int’l*, 231 Cal. App. 4th 860, 871 (2014). Here, the fee award

1 representing 33 1/3% of the fund clearly falls within that range, and is consistent with other
2 comprehensive surveys of class action settlements and fee awards. See Fitzpatrick, *An Empirical*
3 *Study of Class Action Settlements and Their Fee Award*, 7 J. Empirical Leg. Stud. 811, 833 (2010)
4 (analyzing 444 cases between 2006-2007 and concluding that “[m]ost fee awards were between 25
5 percent and 35 percent, with almost no awards more than 35 percent.”); Eisenberg & Miller,
6 *Attorney Fees in Class Action Settlements: An Empirical Study: 1993-2008*, 7 J. of Empirical Leg.
7 Stud. 248, 262, fn.16 (2010) (independent studies of class action litigation nationwide conclude
8 that fees representing one-third of the total recovery is consistent with market rates).

9 The results delivered by Plaintiff's Counsel also support the requested percentage of the
10 fund. Here, the Parties have agreed to a payment of a maximum of one-third of the settlement
11 (\$41,666.67) for payment to Class Counsel as attorneys' fees. (Choi Decl. at ¶21; Settlement
12 Agreement ¶ 6). Pursuant to a previously signed agreement by Plaintiff's counsel and the Plaintiff,
13 attorney's fees will be split as follows: 40% to Diversity Law Group, P.C., 40% to Law Offices of
14 Choi & Associates, P.C., and 20% to David Lee Law. (Choi Decl. ¶21; L. Lee Decl. at ¶7; D. Lee
15 Decl. at ¶10; Andrade Decl. at ¶9) Plaintiff's Counsel will submit respective cost requests in the
16 Motion for Final Approval. (Choi Decl. ¶21; L. Lee Decl. at ¶7; D. Lee Decl. at ¶10).

17 Further, the parties have agreed to reimbursement of class counsel's litigation costs of up
18 to \$15,000.00. (*Id.*). Class counsel have, at their own risk, expended costs, for example, to file this
19 instant action, service of process, payment of mediation fees, expert witness fees and other
20 litigation related costs and will be submitting detailed cost sheets for the respective costs incurred
21 prior to the Motion for Final Approval. Based on the foregoing, the court should preliminarily
22 approve the attorney's fees and costs being requested by the parties.

23 2. Proposed Payment to Class Representative

24 Plaintiff requests a modest enhancement of \$10,000.00. (Andrade Decl. ¶2; Settlement
25 Agreement ¶ 7). Plaintiff personally met with Class Counsel on various occasions to discuss the
26 case, provide documents and information to Class Counsel, such as reviewing the settlement
27 agreement and this declaration. (Andrade Decl. ¶¶ 6-7).

28 Given that future employers are much less likely to hire individuals who have filed suit

1 against their prior employer, particularly cases of this nature, Plaintiff may face prejudice in the
2 future from other potential employers. Plaintiff took this risk upon herself and the whole class
3 benefited from these risks taken by Plaintiff. Class members did not have to file individual
4 lawsuits and bear the risks of payment of fees and costs if they did not prevail, nor did they have
5 to face the potential for retaliation and not getting future employment had they filed a public
6 lawsuit.

7 Notably, courts have routinely granted approval of representative enhancements for far
8 greater amounts than the \$10,000.00 sought by Plaintiff in this case. *See, e.g., Van Vranken v.*
9 *Atlantic Richfield Co.*, 901 F. Supp. 294, 299-300 (N.D. Cal. 1995) (incentive award of \$50,000);
10 *In re Dun & Bradstreet Credit Servs. Customer Litig.*, 130 F.R.D. 366, 374 (S.D. Ohio 1990) (two
11 incentive awards of \$ 55,000, and three incentive awards of \$ 35,000); *Brotherton v. Cleveland*,
12 141 F. Supp. 2d 907, 913-14 (S.D. Ohio 2001) (granting a \$50,000 incentive award); *Enter.*
13 *Energy Corp. v. Columbia Gas Transmission Corp.*, 137 F.R.D. 240, 251-52 (S.D. Ohio 1991)
14 (\$50,000 awarded to each class representative); *Glass v. UBS Fin. Servs.*, No. C-06-4068, 2007
15 U.S. Dist. LEXIS 8476, at *51-52 (N.D. Cal. Jan. 27, 2007) (awarding \$25,000 incentive award in
16 FLSA overtime wages class action); *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998)
17 (affirming \$25,000 Incentive award to class representative in ERISA case). Here, Plaintiff
18 requests a modest enhancement of \$10,000.00, which is “presumptively reasonable” and
19 consistent with case law.

20 **3. Class Administration Fees**

21 The parties have agreed to payment of a maximum of \$10,000.00 to the Settlement
22 Administrator, Phoenix Settlement Administrators, for administering this Settlement, including,
23 but not limited to, printing, distributing, and tracking documents for this Settlement, tax reporting,
24 distributing the Maximum Settlement Amount, and providing necessary reports and declarations,
25 as requested by the Parties. (Settlement Agreement ¶ 9). Phoenix Settlement Administrators is a
26 well-recognized class action Settlement Administrator. The parties believe that the administration
27 fee is reasonable and should be approved.

28 ///

1 **III. LWDA HAS BEEN PROVIDED WITH NOTICE OF THIS MOTION**

2 On March 24, 2021, Plaintiff provided notice of this Motion to the LWDA. (Choi Decl.
3 ¶26).

4 **IV. PROPOSED SCHEDULE FOR CLASS NOTICE, OBJECTION, OPT OUT AND**
5 **MOTION FOR APPROVAL, ATTORNEY'S FEES AND FINAL ACCOUNTING**

6

Description	Date	Details	Settlement Agreement
Preliminary Approval Date	April 29, 2021		
Class List to Administrator	May 6, 2021	7 calendar days	¶14.2.1
Class Notice Distribution	May 20, 2021		
Opt Out/Objection Deadline	July 5, 2021	45 days from Notice Mailing	¶15, 16
Final Approval	September 2, 2021		
Compliance Hearing/Final Distribution	September	12 months after Final Approval	

13

14 **V. CONCLUSION AND ACTION REQUESTED AS PART OF THE MOTION FOR**
15 **PRELIMINARY APPROVAL**

16 Here, the proposed settlement is fair, adequate, and reasonable. It will result in both
17 substantial monetary benefits to class members; it is non-collusive; and it was achieved as the
18 result of informed, extensive, and arms' length negotiations conducted by counsel for respective
19 parties who are experienced in wage and hour class action litigation. For the foregoing reasons,
20 Plaintiff respectfully requests that the Court grant preliminary approval of the proposed settlement,
21 sign the proposed Order, approve and authorize mailing of the proposed Class Notice, and set a
22 date for a final approval hearing on September 2, 2021 or a later date that is convenient for the
23 Court.

24
25 DATED: March 24, 2021

LAW OFFICES OF CHOI AND ASSOCIATES

26
27 By: _____

Edward W. Choi
Attorneys for PLAINTIFF and the CLASS