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SUPERIOR COURT OF CALIFORNIA
FOR THE COUNTY OF SACRAMENTO

SHIELA KEE and SILBIA GUTIERREZ and
BELINDA LECHUGA, individually and on
behalf of all other similarly situated
employees,

Plaintiffs,

vs.

DR. JEFFREY A. SALADIN, DENTAL
CORPORATION (D/B/A CHILDREN'S
CHOICE PEDIATRIC DENTAL CARE), a
California Corporation; CC AMULET
MANAGEMENT, LLC, a Delaware Limited
Liability Company; and DOES 1 to 100,
inclusive,

Defendants.

Case No. 34-2020-00290072

CLASS ACTION

*Assigned for All Purposes to Hon. Lauri A. Damrell,
Department 28*

**MEMORANDUM OF POINTS & AUTHORITIES
IN SUPPORT OF PLAINTIFFS' MOTION FOR
PRELIMINARY APPROVAL OF CLASS
ACTION AND PAGA SETTLEMENT**

Reservation No. 2662199

Date: September 16, 2022

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Trial Date: None Set

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1 **I. INTRODUCTION AND OPENING SUMMARY OF ARGUMENT**

2 This Motion is brought seeking preliminary approval of a wage and hour class action settlement
3 in the gross amount of \$675,000.00. *See generally* Exhibit A (Joint Stipulation Regarding Class Action
4 and PAGA Settlement and Release). Plaintiffs Shiela Kee, Silbia Gutierrez, and Belinda Lechuga
5 (“Plaintiffs”) brought this class action individually and on behalf of other similarly situated employees
6 employed by Defendants Dr. Jeffrey A. Saladin, Dental Corporation (D/B/A Children's Choice Pediatric
7 Dental Care), and CC Amulet Management, LLC, (“Defendants”). Plaintiffs worked for Defendants
8 during the Class Period as non-exempt employees and were subject to all the same policies and practices
9 that are alleged to be unlawful in this litigation. *See generally* Exhibit B (Plaintiffs' Operative
10 Complaint); Declaration of Shiela Kee (“Decl. Kee”) ¶ 2; Declaration of Silbia Gutierrez (“Decl.
11 Gutierrez”) ¶ 2; Declaration of and Belinda Lechuga (“Decl. Lechuga”), ¶ 2.

12 Plaintiffs have alleged that Defendants failed to pay overtime wages, failed to pay minimum
13 wages, failed to provide meal and rest periods or pay premiums in lieu thereof, failed to provide
14 accurate wage statements, incurred waiting time penalties, failed to reimburse expenses, and engaged in
15 unfair competition. *See generally* Exhibit B. Plaintiffs have also alleged Defendants are liable for a
16 civil penalties under the Private Attorneys General Act (“PAGA”) based on these violations. *See id.*;
17 Exhibit C (Plaintiffs' Ltr. to the Labor and Workforce Development Agency [“LWDA”] Regarding
18 PAGA Claims). These violations primarily stem from Plaintiffs' allegations that Defendants violated
19 California law by 1) failing to properly pay overtime and premium pay due to Defendants’ failure to
20 incorporate non-discretionary remuneration (bonuses) into the Regular Rate of Pay (“RROP”); 2)
21 failing to provide rest periods and pay adequate premiums in lieu thereof; 3) failing to provide all meal
22 periods and pay adequate premiums in lieu thereof; 4) failing to pay employees for all hours worked
23 due their failure to pay for time employees spent waiting to clock into work; 5) failing to pay
24 reimbursements for business-related cell phone use and/or mileage; and 6) failing to accurately itemize
25 the hours and wages earned on paystubs issued to class members. *See* Exhibit B. Plaintiffs have
26 contended that this is a meritorious class action lawsuit and that this case is appropriate for class
27 certification for settlement purposes as the requisites for class certification in this case can be satisfied.
28 *See* Exhibit B.

1 Defendants have denied all of Plaintiffs' allegations in their entirety and any liability or
2 wrongdoing of any kind. *See* Declaration of Justin P. Rodriguez ("Decl. Rodriguez"), ¶ 5. Defendants
3 have denied that this case is appropriate for class certification other than for purposes of settlement and
4 that Plaintiffs would have difficulty proving class certification is proper here. *See id.* However, subject
5 to approval by the Court, the parties have been able to compromise and settle all asserted claims for
6 monetary compensation as a result of extensive investigations, informal document and data exchanges,
7 and extended negotiations relating to all aspects of the asserted claims. *See* Exhibit A. Plaintiffs'
8 counsel is convinced that the proposed settlement is in the best interest of the putative class based on
9 the discovery, investigations, negotiations, and a detailed knowledge of the issues in this case. *See*
10 Decl. Rodriguez, ¶¶ 3, 6-10. The prospect of potential class certification issues and the uncertainty of
11 class certification, difficulties of complex litigation, the lengthy process of establishing specific
12 damages and various possible delays and appeals were carefully considered by Plaintiffs and Plaintiffs'
13 counsel in agreeing to the proposed settlement. *See id.*

14 It is well within the discretion of this Court to grant preliminary and conditional approval of the
15 Agreement, which satisfies all of the criteria for preliminary settlement approval under California law.
16 Accordingly, Plaintiffs request that the Court: (1) provisionally and conditionally certify the proposed
17 settlement class; (2) grant preliminary and conditional approval of the proposed Agreement (Exhibit
18 A); (3) set dates for and direct distribution to the class of the Notice of Settlement (Exhibit F), which
19 provides Class Members information regarding the settlement, including information regarding the
20 opportunity to opt-out of, or object to, the settlement and notifies each class member of their expected
21 pro rata share of the settlement; and (4) adopt the implementation schedule contained in the proposed
22 order and schedule a final approval hearing.

23 **II. PROCEDURAL AND LITIGATION HISTORY**

24 Plaintiffs filed a class action complaint on approximately December 8, 2020, in Sacramento
25 County Superior Court against Defendants. Plaintiffs exhausted administrative remedies under the
26 PAGA by providing notice of the claims and violations to the LWDA. *See* Exhibit C; Cal. Lab. Code §
27 2699.3(a), (c); Decl. Rodriguez, ¶ 3. Then, Plaintiffs filed a First Amended Class Action Complaint on
28

1 approximately March 2, 2021, to include a PAGA claim. *See id.*; Exhibit B. There is no date set for a
2 motion for certification or trial in this matter. *See* Decl. Rodriguez, ¶ 4.

3 **III. INVESTIGATION AND DISCOVERY CONDUCTED**

4 Plaintiffs thoroughly investigated issues affecting certification, the merits of the class claims,
5 and potential damages for such claims. *See id.* Plaintiffs worked during the time all of Defendants'
6 policies and practices at issue in the Complaint were in effect and provided information regarding these
7 policies and practices, enabling pre-filing investigations to take place. *See* Decl. Kee, ¶¶ 3, 5; Decl.
8 Gutierrez, ¶¶ 3, 5; Decl. Lechuga, ¶¶ 3, 5. The parties engaged in informal discovery and exchange of
9 documents, including a representative sampling of employee data, such as timecards, paystubs, payroll
10 data and relevant policies for the entirety of the statute of limitations applicable to the alleged claims.
11 The discovery covered all aspects of the asserted claims, including certification issues, merits issues,
12 damages, the scope and configuration of Class Members, the content and implementation of the wage
13 and hour policies at issue, issues relating to manageability concerns at trial, among other relevant areas.
14 *See* Decl. Rodriguez, ¶ 7. The information allowed Plaintiffs to determine the extent and frequency of
15 any violations in accordance with Plaintiffs' contentions and create an accurate damages model to
16 assess the reasonableness of any settlement. *See id.*

17 **IV. NEGOTIATION AND PROPOSED SETTLEMENT**

18 **a. Plaintiffs and Defendants Engaged in Extensive Arm's Length Negotiations**

19 The final settlement occurred only after extended, and sometimes contentious, arm's length
20 negotiations. Over the course of approximately nineteen (19) months, Plaintiffs have been
21 investigating the claims and discussing with Defendants' counsel the merits of the claims and
22 certification issues present in this case. *See id.* at ¶¶ 6-10. The parties exchanged substantial amounts
23 of information and legal analysis regarding the asserted claims. *See id.* Then, only after nineteen (19)
24 months of litigation and negotiation, which included a full day mediation and several months of follow
25 up discussions and negotiations with Kelly A. Knight, Esq., the parties able to reach a mutually
26 agreeable settlement. *See id.* at ¶ 8. In light of the claims and defenses at issue, the parties agreed to a
27 Gross Settlement Amount of \$675,000.00. *See* Exhibit A.

28 //

1 **b. The Terms of the Settlement**

2 Under the Agreement, Defendants have agreed to the following:

3 1. The following groups of individuals are covered by the Settlement (See Exhibit A, ¶¶
4 1.2, 1.8):

5 All non-exempt employees who have worked, or continue to work, for
6 Defendants in California from September 30, 2019, up to either (i) the
Preliminary Approval Date; or (ii) August 30, 2022, whichever is earlier.

7 All non-exempt employees who have worked, or continue to work, for
8 Defendants in California From December 8, 2016, through either (i) the
Preliminary Approval Date; or (ii) August 30, 2022, whichever is earlier.

9 2. Pay Gross Settlement Amount of \$675,000.00, exclusive of the employer's share of
10 payroll taxes, to resolve and release the claims alleged in the Complaint. *See id.* at ¶¶ 5.1, 5.2. No
11 portion of the Gross Settlement Amount will revert to Defendants. *See id.* at ¶ 5.6. Aggrieved
12 Employees will still be paid their share of the PAGA Payment regardless of whether they opt out of
13 being Class Members. *See id.* at 7.5.1.

14 3. The parties agree that up to \$15,000, each, for Plaintiffs Shiela Kee, Silbia Gutierrez,
15 and Belinda Lechuga will be paid as a Class Representative Enhancement Payment. This amount will
16 be in addition to any amount Plaintiffs may be entitled to under the Agreement. *See id.* at ¶ 5.4.

17 4. The parties agree that the cost of administering this class action settlement shall be paid
18 from the settlement proceeds. Subject to Court approval, the parties have selected ILYM Group, LLC
19 to act as the Claims Administrator, who has provided a maximum cost estimate of \$11,500 to
20 administer the class settlement. *See Exhibit D (ILYM Group, LLC Quote).* The difference between
21 any actual administration costs and the \$30,000 allocated under the Agreement, if any, will be added to
22 the Net Settlement Amount and paid to Class Members on a pro rata basis. *See Decl. Rodriguez, ¶ 19.*

23 5. The parties agree that \$10,000 of the Gross Settlement Amount shall be allocated to
24 resolving claims under the PAGA. Seventy-Five percent (75%) of the PAGA Payment will be paid to
25 the LWDA and Twenty-Five percent (25%) will be paid to Aggrieved Employees. *See Exhibit A, ¶*
26 *5.5.*

27 6. The parties agree that up to thirty-five percent (35%) of the Gross Settlement Amount
28 (\$236,250) will be paid for Plaintiffs' attorneys' fees incurred in the litigation of this case. Defendants

1 will not oppose any application for attorneys' fees so long as it is within this threshold. *See id.* at ¶ 5.2.
2 Additionally, the parties agree that Plaintiffs will also be entitled to the actual litigation costs as
3 approved by the Court in an amount not to exceed \$15,000.00. *See id.* The difference between any
4 actual costs and the \$15,000.00 will be redistributed to Class Members on a pro rata basis. *See* Exhibit
5 A, ¶ 5.2. The proposed notice to be sent to Class Members will state this information. *See* Exhibit F.

6 7. Any Claims Administrator Costs, any amounts paid for attorneys' fees and costs, the
7 Class Representative Enhancement Payments, and PAGA Payment will be paid out from the Gross
8 Settlement Amount, not in addition to the Gross Settlement Amount. *See* Exhibit A, ¶¶ 5.1-5.5.

9 8. In consideration for the value received in the Agreement, Class Members who fail to
10 timely opt-out of this settlement will waive all Qualified Claimant's Released Claims as set forth in the
11 Agreement. *See* Exhibit A, ¶¶ 1.30-1.31. Aggrieved Employees will waive all Released PAGA Claims
12 as set forth in the Agreement regardless of whether they opt out of being a Class Member. *See id.* at
13 1.33, 7.5.1.

14 9. For any portion of the Net Settlement Amount or PAGA Payment allocated to Qualified
15 Claimants and/or Aggrieved Employees that is not claimed by them by cashing their respective
16 settlement checks within 120 days, the remaining amount shall be paid 50/50 to Capital Pro Bono, Inc.,
17 and the Center for Workers' Rights under the doctrine of *cy pres*. *See* Exhibit A, ¶ 5.6.

18 **c. Allocation of Settlement Funds**

19 Payment to Qualified Claimants and Aggrieved Employees of their Claim Amount will not
20 require the submission of a claim form. A Net Settlement Amount will be determined by subtracting
21 from the Gross Settlement Amount any amounts for approved attorneys' fees and costs, any
22 Enhancement Payment to the Class Representatives, the Claims Administrator Costs, and the PAGA
23 Payment. Each Class Member's share will be determined by dividing their total weeks worked within
24 the Class Period by the total weeks worked by all Class Members within the Class Period. That
25 fraction will then be multiplied by the Net Settlement Amount to arrive at the Class Member's
26 individual share of the Net Settlement Amount. Each Aggrieved Employee's share of the 25% portion
27 of the PAGA Payment will be determined by dividing their total weeks worked within the PAGA
28 Claim Period by the total weeks worked by all Aggrieved Employees within the PAGA Claim Period.

That fraction will then be multiplied by the 25% portion of the PAGA Payment to arrive at the Aggrieved Employee's individual share. See Exhibit A, at ¶ 5.8.

V. ARGUMENT

a. Class Action Settlements are Subject to Court Review and Approval Under the California Rules of Court

A class action may not be dismissed, compromised, or settled without Court approval and the decision to approve or reject a settlement is committed to the Court's sound discretion. See Cal. Rules of Court, Rule 3.769; Fed. R. Civ. Proc., Rule 23(e)¹; *Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 234-35 (2001); see also Cal. Lab. Code §§ 2699(1)(2) (requiring Court review of PAGA settlements). However, courts should give "proper deference to the private consensual decision of the parties," since "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 that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1027 (9th Cir. 1998). Where a settlement is reached on terms agreeable to all parties, a court should disapprove of the settlement "only with considerable circumspection." *Jamison v. Butcher & Sherrerd*, 68 F.R.D. 479, 481 (E.D. Pa. 1975). The law favors settlement of lawsuits, particularly class actions and other complex cases where substantial resources can be conserved by avoiding the time, expense, and rigors of formal litigation. See *Neary v. Regents of Univ. of Cal.*, 3 Cal. 4th 273, 277-81 (1992).

b. The Terms of The Settlement Are Fair and Within the Range of Reasonableness

The purpose of the Court's preliminary evaluation of a proposed class action settlement is to determine only whether the proposed settlement is within the range of possible approval and whether notice to the class of its terms and conditions and the scheduling of a formal fairness hearing is warranted. See *Wershba*, 91 Cal. App. 4th at 234-35. If the Court finds a proposed settlement falls within "the range of reasonableness," it should grant preliminary approval of the class action settlement.

¹The California Supreme Court has authorized California's trial courts to rely on these federal resources to decide class certification issues. See *Green v. Obledo*, 29 Cal.3d 126, 145-46 (1981).

1 *See, e.g., North County Contr. 's Assn., Inc. v. Touchstone Ins. Svcs.*, 27 Cal. App. 4th 1085, 1089-90
2 (1994); *Kullar v. Foot Locker Retail, Inc.*, 168 Cal. App. 4th 116, 133 (2008). To make the fairness
3 determination, the Court must consider several factors, including:

4 the strength of the Plaintiff's case, the risk, expense, complexity and likely
5 duration of further litigation, the risk of maintaining class action status
6 through trial, the amount offered in settlement, the extent of discovery
7 completed and the stage of the proceedings, the experience and views of
8 counsel, the presence of a governmental participant, and the reaction of the
9 class members to the proposed settlement.

10 *Dunk v. Ford Motor Co.*, 48 Cal. App. 4th 1794, 1801 (1996). However, this Court should
11 begin its analysis with a presumption that the proposed settlement is fair. "A presumption of fairness
12 exists where: (1) the settlement is reached through arm's length bargaining; (2) investigation and
13 discovery are sufficient to allow counsel and the court to act intelligently; (3) counsel is experienced in
14 similar litigation; and (4) the percentage of objectors is small." *Id.* at 1802; *see also In re Heritage*
15 *Bond Litig.*, 2005 WL 1594403, at *10 (C.D. Cal. June 10, 2005) ("It is established that the absence of
16 a large number of objectors to a proposed class action settlement raises a strong presumption that the
17 terms of a proposed class settlement action are favorable to the class members").

18 **i. The Settlement is a Result of Extensive, Non-Collusive Arm's Length**
19 **Negotiations Between the Parties**

20 Settlement in this case was reached only after litigation and extensive arm's length negotiations
21 lasting nineteen (19) months, which included a full day mediation with Kelly A. Knight, Esq. *See Decl.*
22 *Rodriguez*, ¶¶ 6-10. At all times, the negotiations were adversarial and contentious, although still
23 professional in nature. *See id.* Further, while Plaintiffs contend they would ultimately prevail on the
24 claims and the issue of certification, this is not a certainty and there is substantial risk in proceeding to
25 further litigation. *See id.* at ¶¶ 6-10. The ability to secure a guaranteed settlement now and ensure Class
26 Members receive some compensation, rather than proceed to further litigation and potentially recover
27 nothing, was a motivating factor in reaching this settlement. *See id.*

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1 **ii. The Extent of Investigation and Discovery Completed Provided Ample**
2 **Information to Enter Into an Informed and Reasonable Settlement**

3 The parties were in possession of all necessary information during the negotiations. The parties
4 engaged in substantial informal discovery and exchange of documents, including a representative
5 sampling of employee data, such as timecards, paystubs, payroll data and relevant policies for the
6 entirety of the statute of limitations applicable to the alleged claims, which covered all aspects of the
7 class claims and helped thoroughly vet the extent of Plaintiffs' claims against Defendants and create an
8 accurate damages model. *See id.* at ¶ 6-10. Plaintiffs were in possession of this information prior to
9 calculating the potential damages in this case. *See id.* As a result, Plaintiffs were able to make a
10 reasonable estimation of Defendants' potential liability. *See id.* For these reasons, the settlement now
11 before the Court was reached at a stage where “the parties certainly have a clear view of the strengths
12 and weaknesses of their cases” sufficient to support the settlement. *Boyd v. Bechtel Corp.*, 485 F.Supp.
13 610, 617 (N.D. Cal. 1979).

14 **iii. Plaintiffs' Counsel are Experienced in Similar Litigation**

15 Plaintiffs' counsel has considerable experience in class and PAGA actions and wage and hour
16 litigation. Plaintiffs' counsel has brought and are currently bringing several wage and hour class and/or
17 PAGA actions. Thus, Plaintiffs' counsel are qualified to evaluate the class claims, value of settlement
18 versus moving for certification and going to trial, and the viability of possible affirmative defenses. *See*
19 *Decl. Rodriguez*, ¶¶ 11-17. Plaintiffs' counsel believes that the settlement is fair and reasonable in light
20 of the complexities of the case, the uncertainties of class certification and litigation, and the secured
21 benefit to the class. *See id.* at ¶ 6.

22 **iv. The Settlement is Fair and Reasonable Based on the Strength of Plaintiffs' Case**
23 **and the Risks and Costs of Further Litigation**

24 A review of the Agreement's terms does not give rise to any doubts about its fairness. Based on
25 the records and facts of this case, Plaintiffs have secured a gross recovery of approximately 8% and a
26 net recovery of approximately 4% of the claims' maximum likely value. *See id.* at ¶¶ 9-10.
27 Additionally, the average net award per class member is approximately **\$375.41**. *See id.* This
28 settlement is a reasonable compromise of the class and PAGA claims, and is within the percentile

1 ranges of the total available damages that have been approved in other class settlements. *See Wershba*,
2 91 Cal. App. 4th at 246, 250; *Rebney v. Wells Fargo Bank*, 220 Cal.App.3d 1117, 1139 (1990); *Officers*
3 *for Justice v. Civil Serv. Comm’n*, 688 F.2d 615, 628 (9th Cir. 1982); *see also In re Omnivision*
4 *Technologies, Inc.*, 559 F.Supp.2d 1036, 1042 (2007) (noting that certainty of recovery in settlement of
5 6% of maximum potential recovery after reduction for attorney’s fees was higher than median
6 percentage for recoveries in shareholder class action settlements, averaging 2.2%-3% from 2000
7 through 2002); *Bravo v. Gale Triangle, Inc.*, 2017 U.S. Dist. LEXIS 77714 (C.D. Cal. 2017) (approving
8 a settlement where the net recovery to class members was approximately 7.5% of the projected
9 maximum recovery amount); *Avila v. Cold Spring Granite Co.*, 2017 U.S. Dist. LEXIS 130878 (E.D.
10 Cal. 2017): (approving a settlement with a gross recovery of 11% of the projected maximum damages
11 available and a net recovery of approximately 6.7% of the projected maximum recovery);
12 *Bellinghausen v. Tractor Supply Co.*, 306 F.R.D. 245 (N.D. Cal 2015) (approving a settlement where
13 the gross recovery was approximately 8.5% of the projected maximum recovery).

14 **v. The Proposed Settlement is a Reasonable Compromise of Claims**

15 The case of *Kullar v. Foot Locker Retail, Inc.*, 168 Cal. App. 4th 116 (2008) requires additional
16 information be presented to the Court, acting as a fiduciary for the absent class members “to ensure that
17 the recovery represents a reasonable compromise, given the magnitude and apparent merit of the claims
18 being released, discounted by the risks and expenses of attempting to establish and collect on those
19 claims by pursuing the litigation” *Id.* at 129. *Munoz v. BCI Coca-Cola Bottling Co. of Los*
20 *Angeles*, 186 Cal. App. 4th 399 (2010), clarified that a *Kullar* showing does not require the parties to
21 submit an illusory prediction of the outer reaches of exposure without taking into account the actual
22 risks of certification, decertification, dispositive motions, and trial. *Kullar* also does not require an
23 explicit statement of the maximum amount the plaintiff class could recover if it prevailed on all its
24 claims provided there is a record that allows “an understanding of the amount that is in controversy and
25 the realistic range of outcomes of the litigation.” *Id.* at 409. The *Munoz* Court found that the record
26 before the trial court was sufficient, having included the number of class members, payroll data,
27 declarations describing hours and overtime worked, as well as variances in duties and rest and meal
28 period experience, and a companion action alleging less than \$5,000,000 in damages. This information

1 constituted “an adequate basis from which to garner a reasonably adequate understanding of the amount
2 that is in controversy within the meaning of *Kullar*.” *Id.*

3 Plaintiffs similarly relied upon payroll data and Class Members’ data to determine the realistic
4 potential damages suffered by the class as a whole. *See* Decl. Rodriguez, ¶¶ 6-10. This analysis
5 allowed Plaintiffs to determine the extent and frequency of potential violations on all claims as to all
6 Class Members. *See id.* Ultimately, Plaintiffs secured a percentage of the total demand for the putative
7 class that is within the range of what has been found to be sufficient in several other cases. *See, supra*,
8 Section V.c.iv; *see also, e.g., In re Omnivision Technologies, Inc.*, 559 F.Supp.2d at 1042; *Reed v. 1-*
9 *800 Contacts, Inc.*, 2014 U.S. Dist. LEXIS 255 (S.D. Cal. 2014) (approving a settlement of \$11.7
10 million where the maximum range of damages was \$5,000 for each of the alleged 300,000 instances of
11 unlawful recording violations (\$1.5 billion), equaling approximately .78% of the total demand and
12 approximately \$800 per class member). This settlement represents a reasonable compromise given the
13 percentage of the total demand that was secured, the average recovery per class member, the Court’s
14 ability and discretion to cut PAGA penalties, and the uncertainty of class certification. *See* Decl.
15 Rodriguez, ¶¶ 9-10.

16 **vi. The Enhancement Payment to the Named Plaintiffs for Plaintiffs' Services to the**
17 **Putative Class Is Reasonable and Routinely Awarded by Courts**

18 The Enhancement Payment to the named Plaintiffs is intended to recognize the time and effort
19 expended on behalf of the class. Indeed, Courts routinely approve enhancement payments to
20 compensate named plaintiffs for the services they provide and the risks they incurred during the course
21 of the class action litigation. *See Ingram v. The Coca Cola Co.*, 200 F.R.D. 685, 694 (N.D. Ga. 2001).
22 In *Ingram*, the Court approved enhancement payments of \$300,000.00 to each named plaintiff in
23 recognition of the services they provided to the class by responding to discovery, participating in the
24 mediation process, and taking the risk of stepping forward on behalf of the class. *See Id.* at 694; *see*
25 *also Van Vranken v. Atlantic Richfield Co.*, 901 F.Supp. 294 (N.D. Cal. 1995) (approving a \$50,000.00
26 enhancement payment).

27 In this case, Plaintiffs provided and explained documents, being available at all times to discuss
28 the case with Plaintiffs' counsel. *See* Decl. Rodriguez, ¶ 7; Decl. Kee, ¶ 5; Decl. Gutierrez, ¶ 5; Decl.

1 Lechuga, ¶ 5. Plaintiffs spent a significant amount of time pursuing this litigation for the benefit of all
2 Class Members. *See id.* Plaintiffs brought this action knowing there would be a delay in any payment
3 as the litigation progressed, rather than proceeding on individual claims in front of the California Labor
4 Commissioner. *See id.* Payment of \$15,000, each, to Plaintiffs is appropriate given the risk, assistance,
5 time required in bringing this case and resolution of this case.

6 **vii. Awarding Attorneys’ Fees as a Percentage of the Common Fund Is Reasonable**
7 **and Customarily Approved by Courts**

8 California state and federal courts have recognized that when a litigant’s efforts create or
9 preserve a fund from which others derive benefits, the Court may spread litigation costs proportionally
10 among all the beneficiaries to compensate those who created the fund. *See Boeing Co. v. Van Gemert*,
11 444 U.S. 472, 477-478 (1980) (“A lawyer who recovers a common fund for the benefit of persons other
12 than . . . her client is entitled to a reasonable attorney’s fee from the fund as a whole.”); *Vincent v.*
13 *Hughes Air West, Inc.*, 557 F.2d 759, 769 (9th Cir. 1977); *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375
14 (1970); *Waters v. Intern. Precious Metals Corp.*, 190 F.3d 1291 (11th Cir. 1999); *see also Serrano v.*
15 *Priest*, 20 Cal.3d 25, 34-35 (1977); *Laffitte v. Robert Half Internat., Inc.*, 1 Cal.5th 480, 506 (2016).
16 The purpose of this equitable doctrine is to avoid unjust enrichment of counsel and to “spread litigation
17 costs proportionally among all the beneficiaries so that the active beneficiary does not bear the entire
18 burden alone.” *Vincent*, 557 F.2d at 769; *Williams v. MGM-Pathe Communications Co.*, 129 F.3d 1026,
19 1027 (9th Cir. 1977). California state courts have approved use of a percentage of the fund to calculate
20 reasonable attorney fee awards where the amount of the settlement is certain or is an easily calculable
21 sum of money. *See Dunk*, 48 Cal. App. 4th at 1808.

22 The Ninth Circuit has also held that the common fund doctrine applies when: (1) the class of
23 beneficiaries is sufficiently identifiable; (2) the benefits can be accurately traced; and (3) the fee can be
24 shifted with some exactitude to those benefitting. *See Paul, Johnson, Alston & Hunt v. Graulity*, 886
25 F.2d 268, 271 (9th Cir. 1989). These criteria are “easily met” when “each member of a certified class
26 has an undisputed and mathematically ascertainable claim to part of a lump-sum settlement recovered
27 on her behalf.” *Id.* at 271 (citations omitted). Under the three (3) factors set forth in *Paul, Johnson,*
28 *Alston & Hunt*, the common fund doctrine applies in this case because there is a sufficiently identifiable

1 class of beneficiaries (*e.g.* the settlement class), the benefits can be accurately traced to the settlement
2 Plaintiffs and Plaintiffs' counsel were able to negotiate on behalf of the class, and the fee can be shifted
3 with exactitude to those benefiting as the fee request is a specific, lump-sum percentage of the common
4 fund. As set forth in the fee award examples provided below for the Court's reference, it is an accepted
5 practice in wage and hour class action settlements to award attorneys' fees based on a percentage of the
6 common fund. *See, e.g., Staton v. Boeing Co.*, 327 F.3d 938, 967-972 (9th Cir. 2003); *Sanders v. City*
7 *of Los Angeles*, 3 Cal.3d 252, 261, 263 (1970); *Wershba*, 91 Cal. App. 4th at 254; *Bell v. Farmers Ins.*
8 *Exchange*, 115 Cal. App. 4th 715, 726, 765 (2004).

9 Historically, attorneys' fee awards in common fund cases in general range from 20% to 50% of
10 the fund, depending on the circumstances of the case. *See Newberg on Class Actions*, (3rd Ed.), 1992,
11 §14.03 (finding 50% to be the upper limit). Awards ranging between 30% and 40% of the fund are
12 generally approved as reasonable in wage and hour settlements below \$10 million:

13 More particularly, courts may award attorneys fees in the 30-40% range in wage and hour
14 class actions that result in recovery of a common fund under \$10 million. *See Vasquez v.*
15 *Coast Valley Roofing, Inc.*, 266 F.R.D. 482, 491-492 (E.D. Ca. 2010) (citing to five
16 recent wage and hour class actions where federal district courts approved attorney fee
17 awards ranging from 30 to 33%); *Singer v. Becton Dickenson and Co.*, 2010 U.S. Dist.
18 LEXIS 53416, 2010 WL 2196104, *8 (S.D. Ca. June 1, 2010) (approving attorney fee
award of 33.33% of the common fund and holding that award was similar to awards in
three other wage and hour class action cases where fees ranged from 33% to 40%);
Romero v. Producers Dairy Foods, Inc., 2007 U.S. Dist. LEXIS 86270, 2007 WL
3492841 (E.D. Ca. Nov. 14, 2007).

19 *See Martin v. Ameripride Servs.*, 2011 U.S. Dist. LEXIS 61796 at *22-23 (S.D. Cal. 2011). Plaintiffs'
20 request of thirty-five percent (35%) of the settlement sum for attorneys' fees is within established rates
21 for fee awards in class settlements pursuant to the common fund doctrine, especially in light of the
22 excellent results achieved in this case. *See In re Activision Sec. Litigation*, 723 F.Supp. 1373, 1379
23 (N.D. Cal. 1989); *Watson v. Raytheon Company*, USDC Southern District, Case No. 3:10-cv-00634;
24 *Dirienzo v. Dunbar Armored, Inc.*, USDC Southern District, Case No. 3:09-cv-02745; *Green, et al. v.*
25 *Penske Logistics, L.L.C., et al.*, USDC Southern District, Case No. 3:09-cv-00069; *Benitez et al. v.*
26 *Wilbur*, USDC Eastern District, Case No. 1:08-cv-01122; *Chavez et al. v. Petrissans et al.*, USDC
27 Eastern District, Case No. 1:08-cv-00122; *Willis et al. v. Cal-Western Transport*, USDC Eastern
28 District, Case No. 1:00-cv-05695. To determine whether a percentage is reasonable, a court should

consider: (1) the percentage that would likely be negotiated between parties in a similar case; (2) the percentage applied in other class actions; (3) the quality of class counsel; (4) the size of the award; and (5) whether there are any objections by class members. *See In re Ikon Office Solutions, Inc. Secur. Litig.*, 194 F.R.D. 166, 193 (E.D. Pa. 2000); *In re Heritage Bond Litig.*, 2005 WL 1594403, at *21 (C.D. Cal. June 10, 2005) (“the absence of objections or disapproval by class members to class counsel’s fee request further supports finding the fee request reasonable”).

These factors support Plaintiffs' request for reasonable attorneys' fees. The typical percentage negotiated between parties ranges from thirty-five to forty percent (35% to 40%) in individual litigation depending on the complexity of the case. In class action litigation, the typical percentage negotiated between parties ranges from thirty to forty percent (30% to 40%) based on the same factors. Plaintiffs' request of 35% falls within these typical fee arrangements. *See Decl. Rodriguez*, ¶ 18. The quality of counsel and the average size of settlement payments to Class Members and Aggrieved Employees (\$375.41) also support the fee request when compared to other settlements courts have considered as good results. *See Schiller v. David's Bridal, Inc.*, 2012 U.S. Dist. LEXIS 80776 at *48 (E.D. Cal. 2012) (“Class Members will receive an average of approximately \$198.70, with the highest payment to a Class Member being \$695.78 . . . Overall, the Court finds that the results achieved are good, which is highlighted by the fact that there was no objection to the settlement amount or the attorneys' fees requested.”); *Gardner v. GC Servs., LP*, 2012 U.S. Dist. LEXIS 47043, 18 (S.D. Cal. 2012) (“the results achieved in this case were very favorable. Class members are provided with immediate monetary relief, with an average award of around several hundred dollars and a minimum award of \$50”).

c. Provisional Certification of the Class is Appropriate

Class certification is appropriate when (1) the class is ascertainable and (2) there is “a well-defined community of interest in the questions of law and fact involved affecting the parties to be represented.” *Dunk*, 48 Cal. App. 4th at 1806. The “community of interest” element “embodies three factors: (1) common questions of law or fact predominate; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class.” *Id.* Here, the parties agree that, for the purposes of settlement, these prerequisites are met. *See Exhibit A.*

1 **i. The Proposed Settlement Class is Ascertainable and Sufficiently Numerous**

2 The proposed settlement class is ascertainable because all putative class members can be readily
3 identified through employee personnel and payroll files. *See Noel v. Thrifty Payless, Inc.*, 7 Cal.5th
4 955, 980 (2019); *Rose v. City of Hayward*, 126 Cal.App.3d 926, 932 (1981); *Lee v. Dynamex, Inc.*, 166
5 Cal. App. 4th 1325, 1334 (2008). The numerosity requirement is met because there are 909 individuals
6 who fall within the definition of Class Member, which makes joinder of all members impracticable.
7 *See Gay v. Waiters' & Dairy Lunchmen's Union*, 489 F.Supp. 282 (N.D. Cal. 1980), *aff'd* 694 F.2d 531
8 (9th Cir. 1982); *Hebbard v. Calgrove*, 28 Cal. App. 3d 1017, 1030 (1972) (noting no set minimum to
9 meet the numerosity prerequisite, but a class as few as twenty-eight (28) members is acceptable). Thus,
10 these requirements are satisfied.

11 **ii. The Commonality, Predominance, and Typicality Requirements are Met**

12 The commonality requirement is met when there are questions of law or fact regarding the class
13 as a whole. *See Hanlon*, 150 F.3d at 1019. Commonality requires only that some common legal or
14 factual questions exist; Plaintiffs need not show that all issues in the litigation are identical. *See*
15 *Richmond v. Dart Ind., Inc.*, 29 Cal.3d 462, 473 (1981); *City of San Jose v. Superior Court*, 12 Cal.3d
16 447, 460 (1974). Common questions of law or fact must also predominate over individual questions
17 and class-wide treatment of a dispute must be superior to individual litigation.² *See Richmond*, 29
18 Cal.3d at 469. Predominance requires a putative class be sufficiently cohesive to warrant adjudication
19 by representation. *See Hanlon*, 150 F.3d at 1022. The typicality requirement is met when claims of the
20 named representative are typical of those of the class, though “they need not be substantially identical.”
21 *Id.* at 1020; *Classen v. Weller*, 145 Cal. App. 3d 27, 46-47 (1983).

22 The common questions of law and fact in this case stem from Plaintiffs' contention that
23 Defendants 1) failing to properly pay overtime and premium pay due to Defendants' failure to
24 incorporate non-discretionary remuneration (bonuses) into the Regular Rate of Pay (“RROP”); 2)
25 failing to provide rest periods and pay adequate premiums in lieu thereof; 3) failing to provide all meal
26 periods and pay adequate premiums in lieu thereof; 4) failing to pay employees for all hours worked

27 _____
28 ²When assessing predominance and superiority, a court may consider that the class will be certified for settlement purposes only and that manageability of trial is therefore irrelevant. *See Amchem Products v. Windsor*, 521 U.S. 591 (1997).

1 due their failure to pay for time employees spent waiting to clock into work; 5) failing to pay
2 reimbursements for business-related cell phone use and/or mileage; and 6) failing to accurately itemize
3 the hours and wages earned on paystubs issued to class members. *See* Exhibit B. The waiting time
4 penalties, unfair competition, and PAGA claims are derivative of these violations. *See id.* Plaintiffs
5 and the Class Members seek the same remedies under state law. Under these specific circumstances,
6 the commonality and predominance requirements are satisfied. Regarding the typicality requirement,
7 Plaintiffs contends they suffered from the same unlawful policies, treatment, and circumstances as
8 Class Members did, will request the same remedies, and will rely on the same methods of proof to
9 establish liability and damages. *See id.* Thus, the typicality requirement is also satisfied for settlement
10 purposes.

11 **iii. The Adequacy Requirement is Met**

12 The adequacy of representation requirement is met if the named representative and counsel have
13 no interests adverse to those of the putative class members and are committed to vigorously prosecuting
14 the case on behalf of the class. *See Hanlon*, 150 F.3d at 1020; *McGhee v. Bank of America*, 60
15 Cal.App.3d 442, 450-51 (1976). Those standards are met here. Under the proposed settlement,
16 Plaintiffs and the putative Class Members will receive a pro rata share of the settlement based on the
17 number of workweeks they worked for Defendants. *See* Exhibit A. Finally, any settlement class
18 member who wishes to opt-out of the settlement may do so, and he or she may also dispute the number
19 of workweeks stated in the Notice of Settlement (Exhibit F).

20 There is no conflict of interest between Plaintiffs and Class Members. Plaintiffs and Plaintiffs'
21 counsel have pursued the claims made in the operative Complaint vigorously on behalf of the class.
22 Plaintiffs' counsel, with Plaintiffs' assistance, thoroughly investigated the claims made in this case by
23 speaking with Plaintiffs and reviewing substantial amounts of documents. Plaintiffs' counsel thereafter
24 engaged Defendants' counsel in settlement discussions over the course of approximately nineteen (19)
25 months. Moreover, Plaintiffs' counsel has experience defending and bringing wage and hour claims.
26 Because Plaintiffs' counsel has vigorously pursued Plaintiffs' and the Class Members' claims, the
27 adequacy requirement is met. *See generally* Decl. Rodriguez.

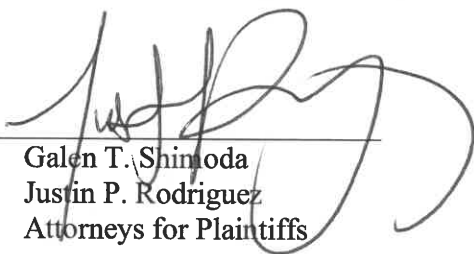
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1 **VI. CONCLUSION**

2 For all of the foregoing reasons, Plaintiffs respectfully request that this Court preliminarily and
3 conditionally certify the class for settlement purposes; grant preliminary and conditional approval to the
4 proposed settlement, including the Plaintiffs' Class Representative Enhancement Payments, the
5 payment to the LWDA under PAGA, and Class Counsel's application for reasonable attorneys' fees
6 and costs; approve the Notice of Settlement, including the proposed deadlines for opting-out of and
7 objecting to the settlement; and schedule the final settlement approval hearing. A copy of Plaintiffs'
8 proposed order is being filed concurrently herewith.

9
10 Dated: August 8, 2022

Shimoda & Rodriguez Law, PC

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12 By: 

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14 Justin P. Rodriguez
15 Attorneys for Plaintiffs
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