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SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN DIEGO

CHRIS FARLEY, IRENE IMSON, SHELBY WARD, and DARLENE GRIFFITH, individuals, on behalf of themselves and on behalf of all persons similarly situated, Plaintiff, vs. SHARP MEMORIAL HOSPITAL, a California Corporation; and DOES 1 through 50, inclusive, Defendants.	CASE NO.: **37-2021-00006007-CU-OE-CTL** [Consolidated with Case No. 37-2021- 00047190-CU-OE-CTL] **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR FINAL APPROVAL OF CLASS SETTLEMENT AND AWARD OF ATTORNEYS' FEES, COSTS AND SERVICE AWARDS** Hearing Date: April 19, 2024 Hearing Time: 8:30 a.m. [*Hearing scheduled by Minute Order dated December 1, 2023*] Judge: Hon. Robert Longstreth Dept: 65 Action Filed: February 9, 2021 Trial Date: Not set

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I. INTRODUCTION

The parties to this action have reached a Settlement and the Court preliminarily approved the Class Action and PAGA Settlement Agreement (the "Agreement"), a true and correct copy of which is attached as Exhibit #2 to the Declaration of Norman Blumenthal ("Blumenthal Decl.").[1] In accordance with the Preliminary Approval Order dated December 1, 2023 ("Preliminary Approval Order"), the approved Class Notice has been disseminated to the Class.[2]

The purpose of this hearing is to determine whether the proposed settlement of the litigation should be finally approved. Plaintiffs the Estate of Chris Farley, Shelby Ward, Darlene Griffith, and Irene Imson ("Plaintiffs") respectfully submit this memorandum in support of the unopposed motion for final approval and the proposed entry of the Final Approval Order and Judgment, submitted herewith. The settlement represents an excellent result for the Class and avoids the delays, risks, and costs of further litigation. After disseminating the notice to the members of the Class, there were **no objections and only ten (10) requests for exclusion**, which means that almost the entire Class has elected to participate in the Settlement. Blumenthal Decl. ¶4. This is a positive response from the Class evidencing their collective approval of the settlement. As a result, Plaintiffs respectfully submit that the class settlement should be finally approved for the same reasons that the Court preliminarily approved the settlement as fair, reasonable, and adequate.

II. THE SETTLEMENT BEFORE THE COURT

Plaintiffs and Defendant Sharp Memorial Hospital ("Defendant") reached a full and final settlement of the above-captioned action, which is embodied in the Agreement filed concurrently with the Court. As consideration for this Settlement, the Gross Settlement Amount is Four Million Sixty Thousand Dollars ($4,060,000). (Agreement at ¶ 1.22.) Under the Settlement, the Gross Settlement Amount consists of the following elements: (i) all Individual Class Payments and Individual PAGA Payments; (ii) the LWDA PAGA Payment; (iii) the Class Counsel Fees Payment and the Class Counsel

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[1] Capitalized terms are defined in the Agreement.

[2] The "Class" is defined as "all individuals who are or previously were employed by Defendant in California who were classified as non-exempt employees during the Class Period." The "Class Period" is defined as "February 9, 2017 through April 23, 2023." (Agreement at ¶¶ 1.5, 1.13.)

Litigation Expenses Payment; (iv) the Class Representative Service Payments; and (v) the Administration Expenses Payment. (Agreement at ¶ 1.22.) Blumenthal Decl. ¶3(a). The Gross Settlement Amount does not include Defendant's share of payroll taxes. (Agreement at ¶ 3.1.) The Gross Settlement Amount shall be all-in with no reversion to Defendant. (Agreement at ¶ 3.1.) Blumenthal Decl. ¶3(b). The following is a table of the key financial terms of the Settlement and the proposed deductions:

$4,060,000 (Gross Settlement Amount)
- $40,000 (Plaintiffs' proposed service awards - not to exceed $10,000 each)
- $48,000 (Class Counsel Litigation Expenses Payment - not to exceed amount)
- $1,353,333 (Class Counsel Fees Payment - not to exceed one-third of settlement)
- $125,000 (PAGA Penalties - 75% to LWDA / 25% to Aggrieved Employees)
- $60,000 (Administration Expenses Payment - not to exceed amount)

$2,433,667 (Net Settlement Amount)

The specific details of the Settlement were discussed in the Motion for Preliminary Approval and are set forth again in the Declaration of Blumenthal at ¶¶ 3(c)-3(i).

The Settlement is fair, adequate and reasonable to the class and should be finally approved for the same reasons the Court granted preliminary approval of the Settlement, agreeing that the settlement is "fair and reasonable". (Preliminary Approval Order at ¶ 2.) In sum, the Settlement valued at $4,060,000 is an excellent result for the Class. This result is particularly favorable in light of the fact that liability and class certification in this case were far from certain in light of the defenses asserted by Defendant. Given the complexities of this case, the defenses asserted, the uncertainty of class certification, along with the uncertainties of proof at trial and appeal, the proposed settlement is fair, reasonable and adequate, and should be finally approved. Blumenthal Decl. ¶3(j).

III. GENERAL STANDARDS APPLICABLE TO JUDICIAL REVIEW AND APPROVAL OF CLASS ACTION SETTLEMENTS

Settlements of disputed claims are favored by the courts. *Huens v. Tatum*, 52 Cal. App. 4th 259, 265 (1997). In evaluating settlements, the courts have long recognized that compromise is particularly appropriate since such litigation is difficult and notoriously uncertain. *7-Eleven Owners for Fair Fran. v. Southland Corp.*, 85 Cal. App. 4th 1135, 1151 (2000) ("[V]oluntary conciliation and settlement are the preferred means of dispute resolution. This is especially true in complex class action litigation.")

The court must decide whether the proposed settlement falls within the range of reasonable settlements, taking into account that settlements are compromises between the parties reflecting subjective, unquantifiable judgments concerning the risks and possible outcomes of litigation. *See Wershba v. Apple Computer*, 91 Cal. App. 4th 224, 246 (2001) ("The proposed settlement is not to be judged against a hypothetical or speculative measure of what might have been achieved had plaintiffs prevailed at trial.") In *Wershba*, the Court explained that "the merits of the underlying class claims are not a basis for upsetting the settlement of a class action." *Id.*; *see also 7-Eleven*, *supra*, at 1150.

In these cases, courts have repeatedly emphasized that there is a strong initial presumption that the compromise is fair and reasonable. *Wershba*, 91 Cal. App. 4th at 245. Courts should not substitute their judgment for that of the parties who negotiated the settlement. *Id.* at 246. The presumption of fairness exists where: (1) investigation and discovery are sufficient to allow counsel and the court to act intelligently; (2) the settlement is reached through arm's-length bargaining; (3) counsel is experienced in similar litigation; and (4) the percentage of objectors is small. *Dunk*, 48 Cal. App. 4th at 1801. Here, the facts and circumstances compel the conclusion that the proposed settlement satisfies that standard and the presumption applies.

IV. THE SETTLEMENT IS FAIR, REASONABLE AND ADEQUATE

The Court must determine whether the settlement is fair, adequate, and reasonable. *Dunk v. Ford Motor Co.*, 48 Cal.App.4th 1794, 1801 (1996); *see also Officers for Justice v. Civil Service Com'n*, 688 F.2d 615, 625 (9th Cir. 1982). The trial court has broad discretion to determine whether the settlement is fair. *Cellphone Termination Fee Cases*, 180 Cal. App. 4th 1110, 1117 (2009). "The well-recognized factors that the trial court should consider in evaluating the reasonableness of a class action settlement agreement include 'the strength of plaintiffs' case, the risk, expense, complexity and likely duration of further litigation, the risk of maintaining class action status through trial, the amount offered in settlement, the extent of discovery completed and the stage of the proceedings, the experience and views of counsel, the presence of a governmental participant, and the reaction of the class members to the proposed settlement.'" *Kullar v. Foot Locker Retail, Inc.*, 168 Cal. App. 4th 116, 128 (2008) (internal citations omitted); see also *Munoz v. BCI Coca-Cola Bottling Co. of L. A.*, 186 Cal. App. 4th 399, 408 (2010).

The list of factors is not exhaustive and should be tailored to each case. *Dunk*, *supra*, at 1801. Due regard should be given to what is otherwise a private consensual agreement between the parties. *Id.*

The inquiry "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." *Id*. "Ultimately, the [trial] court's determination is nothing more than 'an amalgam of delicate balancing, gross approximations and rough justice.' [Citation omitted.]" *Id.*

These factors are analyzed seriatim below, and all support final approval of the class action settlement before this Court, consistent with this Court's Preliminary Approval Order.

A. The Settlement Satisfies the California Test for Fairness

1. <u>The Investigation and Analysis of Documents are Sufficient to Allow Counsel and the Court to Act Intelligently</u>

Over the course of more than three years of litigation, the Parties engaged in the investigation of the claims, including the production of documents, class data, and other information, allowing for the full and complete analysis of liabilities and defenses to the claims in this Action. The procedural history and investigation performed was detailed at length in support of the motion for preliminary approval. The Settlement was the product of arms-length and contentious negotiations through an all-day mediation presided over by Tripper Ortman, Esq., a respected and experience mediator of wage and hour class actions. The details of the litigation are set forth in the Blumenthal Decl. at ¶¶ 6(a)-6(h).

2. <u>The Settlement was Reached Through Arm's Length Bargaining</u>

This Settlement is the result of extensive and hard-fought litigation as well as negotiations before an experienced and well-respected mediator. Defendant has expressly denied and continues to deny any wrongdoing or legal liability arising out of the conduct alleged in the Action. Plaintiffs and Class Counsel have determined that it is desirable and beneficial to the Class to resolve the Released Class Claims in accordance with this Settlement. Class Counsel are experienced and qualified to evaluate the class claims, the viability of the defenses asserted, and the risks and benefits of trial and settlement, and Class Counsel are experienced in wage and hour class actions, as Class Counsel has previously litigated and certified similar claims against other employers. Blumenthal Decl. ¶7(a).

The Parties attended an arms-length mediation session with Tripper Ortman. In preparation for the mediation, Defendant provided Class Counsel with necessary information for the members of the

Class, including time punch data, payroll data and data concerning the composition of the Class. Plaintiffs analyzed the data with the assistance of damages expert, Berger Consulting, and prepared and submitted a mediation brief and damage valuation to the Mediator. Following this all-day mediation, the Parties agreed to this Settlement, which was memorialized in the form of a Memorandum of Understanding. Blumenthal Decl. ¶7(b).

The fact that the settlement was negotiated with the assistance of an experienced mediator supports approval. *Alberto v. GMRI, Inc.*, 252 F.R.D. 652, 666 (E.D. Cal. Jun 24, 2008); *Glass v. UBS Fin. Servs.*, 2007 U.S. Dist. LEXIS 8476; 15 Wage & Hour Cas. 2d (BNA) 1330, at *15 (N.D. Cal. 2007) ("The settlement was negotiated and approved by experienced counsel on both sides of the litigation, with the assistance of a well-respected mediator with substantial experience in employment litigation[, and] this factor supports approval of the settlement").

From March of 2023 to June of 2023, the Agreement and exhibits thereto were finalized and executed, and then presented by motion to this Court for preliminary approval. On December 1, 2023, the Court issued its Minute Order granting preliminary approved of the settlement as fair and reasonable to the Class. Blumenthal Decl. ¶7(c).

3. Class Counsel is Experienced in Similar Litigation

Class Counsel in this matter has extensive class action experience and has represented thousands of persons in class actions including employment litigation and wage and hour actions. Class Counsel has previously litigated wage and hour class actions involving employees and claims similar to this case and have been approved as experienced class counsel during contested motions in state and federal courts throughout California. As such, Class Counsel is experienced and knowledgeable in this area of law. Blumenthal Decl. at ¶ 2; Declaration of Launa Adolph at ¶¶ 5-13. Class Counsel have participated in every aspect of the settlement discussions and have concluded the settlement is fair, adequate and reasonable and in the best interests of the Class. Blumenthal Decl. ¶ 3(j).

4. There Are No Objections and Only Ten (10) Requests for Exclusion

The reaction of the Class unequivocally supports approval of the Settlement. On January 4, 2024, the Administrator mailed the Court-approved Class Notice to the Class Members, which provided each class member with the terms of the Settlement, including notice of the claims at issue and the financial terms of the settlement, including the attorneys' fees, costs, and service award that were being sought, how individual settlement awards would be calculated, and the specific, estimated payment amount to that individual. See Declaration of Nicole Bench ("Bench Decl.") ¶7, Exh. A. In disseminating the notice, the Administrator followed the notice procedures authorized by the Court in its Preliminary Approval Order. Significantly, there have been no objections and only ten (10) requests for exclusion. Bench Decl. ¶¶11-14. As such, almost the entire Class will participate in the Settlement and will be sent a settlement check. Blumenthal Decl. ¶4.

The absence of any objector strongly supports the fairness, reasonableness and adequacy of the Settlement. *See In re Austrian & German Bank Holocaust Litigation*, 80 F. Supp. 2d 164, 175 (S.D.N.Y. 2000) ("If only a small number of objections are received, that fact can be viewed as indicative of the adequacy of the settlement."); *Stoetzner v. U.S. Steel Corp.*, 897 F.2d 115, 118-119 (3d. Cir. 1990) (29 objections out of 281 member class "strongly favors settlement"); *Laskey v. Int'l Union*, 638 F.2d 954 (6th Cir. 1981) (The fact that 7 out of 109 class members objected to the proposed settlement should be considered when determining fairness of settlement). Here, where there are no objections, the approval of the class is evident.

5. The Strength of Plaintiffs' Case

The Action generally alleges that Plaintiffs and other Class Members were not properly paid all regular and overtime wages for hours worked, were not provided meal and rest periods, were not timely paid earned wages, were not provided reimbursement for required expenses, were not provided accurate itemized wage statements, were not paid all wages at the time of termination. The Action seeks unpaid wages, penalties, attorney fees, litigation costs, and any other equitable or legal relief allegedly due and owing to Plaintiffs and the other Class Members by virtue of the foregoing claims. Blumenthal Decl. ¶5.

Where both sides face significant uncertainty, the attendant risks favor settlement. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998). Here, a number of defenses asserted by Defendant present serious threats to the claims of the Plaintiffs and the other Class Members. Defendant asserted that Defendant's practices complied with all applicable Labor laws. Defendant argued that all work time was properly recorded and paid for all time actually worked and that their neutral rounding actually overpaid the employees so that there were no unpaid wages. Defendant argues that there was no underpayment of wages due to the alleged miscalculation of the regular rate. Defendant at all times took the position that it correctly calculated and paid the regular rate for overtime, sick pay and premiums. Defendant contends that its meal and rest period policies fully complied with California law and Defendant did not fail to provide the opportunity for legally required meal and rest breaks. In addition, Defendant argued that Plaintiffs failed to consider that most of the employees signed meal period waivers that are applicable to employees in the healthcare field who can waive one of their two meal periods, and/or otherwise waived their meal periods, that meal period premiums were automatically paid based on a facially non-compliant meal period based on an employee's waiver, and that employees could put into be paid a "no break" premium if not authorized and permitted to take a legally required break, and did so every pay period. Defendant could argue that its payment of significant meal period premiums was evidence of their lawful practices. As to expense reimbursement, Defendant contended that it did not fail to provide reimbursement for necessary business expenses and that claimed cellphone expenses were incurred voluntarily and/or for the convenience of employees and is therefore not required reimbursement. Defendant further provided evidence and argued that hospital phones were provided to employees to use in order for them to perform their job duties. Defendant argued that the decisions in *Brinker v. Superior Court*, 53 Cal. 4th 1004 (2012), *Lockheed Martin Corp. v. Superior Ct.*, 29 Cal. 4th 1096, 1108 (2003), and *Salazar v. See's Candy Shops Inc.*, 64 Cal.App.5th 85 (2021), weakened Plaintiffs' claims, on liability, value, and class certifiability as to the meal and rest period claims. Defendant also argues that based on its facially lawful practices, it acted in good faith and without willfulness, which if accepted would negate the claims for waiting time penalties and/or inaccurate wage statements. If successful, Defendant's defenses could eliminate or substantially reduce any recovery to the Class. While Plaintiffs believe that these defenses could be overcome, Defendant maintains these defenses have merit and therefore present a serious risk to recovery by the Class. Blumenthal Decl. ¶8(a).

In a similar wage and hour case, the federal district court in *Hopson v. Hanesbrands Inc.*, 2009 U.S. Dist. LEXIS 33900 (N.D. Cal. 2009), explained in approving an overtime class action settlement:

> Plaintiffs may have a strong case, but the risks inherent in continued litigation are great. Defendants strongly deny liability for Plaintiffs' principal claim that full-time Service Associates were misclassified as exempt. In addition to the uncertainties raised by

> Defendants at the preliminary stage regarding Plaintiffs' chance of success in this case, Defendants notes that the question of an employer's duty to provide rest and meal periods is an open one, signaling even less certainty for Plaintiffs. [...T]he gross settlement amount and the Class Members' expected net recovery, after fees and other costs are deducted, appear to be a reasonable compromise, in light of the risks of litigation.

2009 U.S. Dist. LEXIS 33900 at *19-20 (N.D. Cal. 2009); *see also Browning v. Yahoo!, Inc.*, 2007 U.S. Dist. LEXIS 86266, at *30 (N.D. Cal. 2007) ("In considering the strength of Plaintiff's case, legal uncertainties at the time of settlement - particularly those which go to fundamental legal issues - favor approval."). As recognized in a federal decision approving settlement of an overtime wage class action:

> The potential complexity and possible duration of trial also weigh in favor of granting final approval. Plaintiffs acknowledge the difficulties of proving damages, recognize the uncertainty of outcome, and believe defendant would appeal in the event of adverse judgment. A post-judgment appeal would require many years to resolve and delay payment to class members. Plaintiffs believe the benefits of a guaranteed recovery today outweigh an uncertain future result. Accordingly, plaintiffs argue, and the Court agrees, the actual recovery confers substantial benefits on the class that outweigh the potential recovery through full adjudication.

Barcia v. Contain-A-Way, Inc., 2009 U.S. Dist. LEXIS 17118, *9 (S.D. Cal. 2009); *see also Louie v. Kaiser Foundation Health Plan, Inc.*, 2008 U.S. Dist. LEXIS 78314, *14 (S.D. Cal. 2008).

There was also a significant risk that, if the Action was not settled, Plaintiffs would be unable to obtain class certification and thereby not recover on behalf of any employees other than themselves. Defendant argued that the individual experience of each putative class member varied with respect to the claims. Defendant could also contest class certification by arguing injury and good faith were case-by-case determinations that precluded class certification. Plaintiffs are aware of other cases where class certification of similar claims was denied. *See e.g. Cacho v. Eurostar, Inc.*, 43 Cal. App. 5th 885 (2019) (denying certification of rest break claims). Finally, even if class certification was successful, as demonstrated by the California Supreme Court decision in *Duran v. U.S. Bank National Assn.*, 59 Cal. 4th 1 (2014), there are significant hurdles to overcome for a class wide recovery even where the class has been certified. While other cases have approved class certification in wage and hour claims, class certification in this action would have been hotly disputed and was by no means a foregone conclusion. Blumenthal Decl. ¶8(b).

In sum, the Settlement is a fair and reasonable result, and provides the Class with a significant recovery, particularly when viewed in light of the fact that the Defendant asserted serious and substantial defenses both to liability and to class certification. Currently, the maximum and average class member allocations are $865.43 and $365.14, respectively. Bench Decl. at ¶18. Given the complexities of this case, the defenses, along with the uncertainties of proof and appeal, the proposed Settlement is fair, reasonable and adequate, and should be finally approved. Blumenthal Decl. at ¶8(e).

6. <u>The Risk, Expense, Complexity, and Likely Duration of Further Litigation</u>

As demonstrated by the decision in *Duran*, the complexities and duration of further litigation cannot be overstated. There is little doubt that Defendant would post a bond and appeal in the event of an adverse judgment. A post-judgment appeal by Defendant would have required many more years to resolve, assuming the judgment was affirmed. If the judgment was not affirmed in total, then the case could have dragged on for years after the appeal. The benefits of a guaranteed recovery today outweigh an uncertain result three or more years in the future. Blumenthal Decl. ¶8(c).

Plaintiffs and Class Counsel recognize the expense and length of a trial against Defendant through possible appeals which could take at least another two or three years. Class Counsel also have taken into account the uncertain outcome, the risk of litigation, especially in complex actions such as this one. Class Counsel are also mindful of and recognize the inherent problems of proof under, and alleged defenses to, the claims asserted in the Action. Moreover, post-trial motions and appeals would have been inevitable. Costs would have mounted and recovery would have been delayed if not denied, thereby reducing the benefits of an ultimate victory. Plaintiffs and Class Counsel believe that the Settlement confers substantial benefits upon the Class. Based upon their evaluation, Plaintiffs and Class Counsel have determined that the Settlement set forth in the Agreement is in the best interest of the Class. Blumenthal Decl. ¶8(c).

Although Plaintiffs and Class Counsel believe that their case has merit, which Defendant continues to vigorously deny, they recognized the potential risks both sides would face if litigation of these Actions continued. As the federal court held in *Glass*, where the parties faced uncertainties similar to those in this litigation:

> In light of the above-referenced uncertainty in the law, the risk, expense, complexity, and likely duration of further litigation likewise favors the settlement. Regardless of how this Court might have ruled on the merits of the legal issues, the losing party likely would have appealed, and the parties would have faced the expense and uncertainty of litigating an appeal. "The expense and possible duration of the litigation should be considered in

> evaluating the reasonableness of [a] settlement." See *In re Mego Financial Corp. Securities Litigation*, 213 F.3d 454, 458 (9th Cir. 2000). Here, the risk of further litigation is substantial.

Id. at *12.

7. The Amount Offered in Settlement

The Settlement in this case is fair, reasonable and adequate considering Defendant's defenses to Plaintiffs' claims. As set forth in the Declaration of Nordrehaug in support of preliminary approval which discussed the value of the class claims in detail, the Gross Settlement Amount compares favorably to the value of the claims. The calculations to compensate for the amount due to the Class Members at the time this Settlement was negotiated were calculated by Plaintiffs' expert, Berger Consulting, in advance of mediation. Class Counsel analyzed the data for putative class members and determined the potential maximum damages for the class claims. For the Class, the maximum value of the claim for unpaid wages based on the alleged regular rate miscalculation for meal period premiums and sick pay was $157,351, the maximum value of the claim for unpaid minimum and overtime wages due to alleged rounding practices was $1,717,608, the maximum potential unpaid meal period wages were estimated to be $23,279,949, the maximum potential rest period damages were estimated to be $15,192,523, and the maximum potential damages for failure to provide expense reimbursement were calculated to be $1,011,565. In total, the damages for the Class were calculated to have a maximum potential total value of $41,358,996. In addition, Plaintiff calculated that the maximum value of the potential waiting time penalties were between $1,847,760 and $11,821,894 and the maximum value of the potential wage statement penalties were between $3,501,150 and $12,394,250, both ranges depending on the predicate violation giving rise to the penalty.[3] Defendant contends that these valuations grossly overstate the damages (and therefore the resulting penalties) because they do not account for the fact that rounding overpaid employees and the existence of meal period waivers. Blumenthal Decl. ¶8(d).

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[3] While Plaintiffs alleged claims for statutory penalties pursuant to Labor Code Sections 203 and 226, at mediation Plaintiffs recognized that these claims were subject to additional, separate defenses asserted by Defendant, including, a good faith dispute defense as to whether any premium wages for meal or rest periods or other wages were owed given Defendant's position that Plaintiff and Class Members were properly compensated. *See Nordstrom Commission Cases*, 186 Cal. App. 4th 576, 584 (2010) ("There is no willful failure to pay wages if the employer and employee have a good faith dispute as to whether and when the wages were due.").

Consequently, the Gross Settlement Amount represents more than 9.8% of the potential maximum damages at issue for the Class in this case, assuming these amounts could all be proven in full at trial.[4] The above maximum calculations should then be adjusted in consideration for both the risk of class certification and the risk of establishing class-wide liability on all claims. Given the amount of the Settlement as compared to the potential value of the claims, the Settlement is most certainly fair and reasonable.[5] Clearly, the goal of this litigation has been met. Blumenthal Decl. ¶8(d).

V. THE REQUESTED ATTORNEYS' FEES, COSTS AND SERVICE AWARDS SHOULD BE APPROVED

A. The Attorneys' Fees are Reasonable and Supported by the Percentage of the Fund Method

Class Counsel seeks a fee award calculated at one-third (1/3) of the total value of the settlement for the successful prosecution and resolution of this action. California state and federal courts have recognized that an appropriate method for determining award of attorneys' fees is based on a percentage of the total value of benefits to class members by the settlement. *Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 254 (2001); *Serrano v. Priest*, 20 Cal. 3d 25, 34 (Cal. 1977); *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); *Vincent v. Hughes Air West, Inc.*, 557 F.2d 759, 769 (9th Cir. 1997). The purpose of this equitable doctrine is to avoid unjust enrichment to the Class and to "spread litigation costs proportionally among all the beneficiaries so that the active beneficiary does not bear the entire burden alone." *Vincent*, 557 F.2d at 769.

The California Supreme Court has provided guidance regarding the award of attorneys' fees in wage and hour class action settlements. Under California law, the award of attorneys' fees in common

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[4] Because the PAGA claim does not provide a recovery to the Class, Plaintiffs did not included the PAGA claim in this discussion of the class claim valuation. The PAGA claim was addressed in the Motion for Preliminary Approval in the Declaration of Nordrehaug at ¶ 33.

[5] *See Dunleavy v. Nadler (In re Mego Fin. Corp. Sec. Litig.)*, 213 F.3d 454, 459 (9th Cir. 2000) approving settlement which represented "roughly one-sixth of the potential recovery"); *Stovall-Gusman v. W.W. Granger, Inc.*, 2015 U.S. Dist. LEXIS 78671, at *12 (N.D. Cal. 2015) (granting final approval where "the proposed Total Settlement Amount represents approximately 10% of what class might have been awarded had they succeeded at trial."); *Viceral v. Mistras Grp., Inc.*, 2016 WL 5907869 (N.D. Cal. 2016) (approving wage and hour class action settlement amounting to 8.1% of full verdict value); *Ma v. Covidien Holding, Inc.*, 2014 WL 2472316, (C.D. Cal. 2014) (approving wage and hour class action settlement worth "somewhere between 9% and 18%" of full verdict value).

fund wage and hour class action settlements should start with the percentage method. See *Laffitte v. Robert Half Int'l*, 1 Cal. 5th 480, 503 (2016) ("We join the overwhelming majority of federal and state courts in holding that when class action litigation establishes a monetary fund for the benefit of the class members, and the trial court in its equitable powers awards class counsel a fee out of that fund, the court may determine the amount of a reasonable fee by choosing an appropriate percentage of the fund created"). Under the percentage of the fund method, a court's objective remains to "mimic the market" in fixing a reasonable fee. See *Gaskill v. Gordon*, 160 F.3d 361, 363 (7th Cir. 1998).

First, the fee award representing one-third of the fund clearly falls within that range and is consistent with other rulings of other courts and comprehensive surveys of class action settlements and fee awards. Attorneys' fees awards of one-third of the fund are within the expected range in the market in legal services. See Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Award*, 7 J. Empirical Leg. Stud. 811, 833 (2010) (analyzing 444 cases between 2006-2007 and concluding that "[m]ost fee awards were between 25 percent and 35 percent"). In *Laffitte*, the Court expressly approved a one-third fee award. Such similar awards by other Courts are set forth in the Blumenthal Decl. ¶11.

Second, the results delivered by Class Counsel also support the requested percentage of the fund. Here, Plaintiffs and their counsel secured a $4,060,000 settlement for the benefit of the Class. The Settlement was possible only because Class Counsel was able to convince Defendant that Plaintiffs could potentially prevail on the contested issues regarding liability, maintain class certification, overcome difficulties in proof as to monetary relief and take the case to trial if need be. Blumenthal Decl. ¶10(f). In successfully navigating these hurdles Class Counsel displayed the necessary skills in both wage and hour and class action litigation. Moreover, as discussed above, there were significant risks to the contingent litigation. See *Barbosa v. Cargill Meat Solutions Corp.*, 297 F.R.D. 431, 449 (E.D. Cal. 2013) ("**Like this case, where recovery is uncertain, an award of one-third of the common fund as attorneys' fees has been found to be appropriate**.")

Third, "the response of the class members to attorneys' fee notice, though not decisive, is relevant to the … reasonable determination" regarding fees. *Swedish Hospital v. Shalala*, 1 F.3d 1261, 1272 (D.C. Cir. 1993). A positive response rate tends to suggest that the court's "approximation of the market" for fees is well supported. *Id.* at 1269. Here, the Class Notice specifically notified the Class that Class

Counsel would be seeking a one-third fee award. Again, there were no objections.

Fourth, it is recognized that one of the primary factors justifying an enhanced attorney's fees reward is the attendant risks inherent in the litigation. As observed in *City of Detroit v. Grinnell Corp.*:

> No one expects a lawyer whose compensation is contingent upon his success to charge, when successful, as little as he would charge a client who had agreed to pay for his services, regardless of success. Nor, particularly in complicated cases producing large recoveries, is it just to make a fee depend solely on the reasonable amount of time expended.

495 F.2d 448, 470 (2d Cir. 1974). Here, it is clear that a settlement fund of $4,060,000 has been created. For Class Counsel, the fees here were wholly contingent in nature and the case presented far more risk than the usual contingent fee case. Among the risks was the cost inherent in class action litigation, as well as a long battle with a corporate Defendant who had retained a premier and highly experienced defense firm. **Counsel retained on a contingency fee basis, whether in private matters or in class action litigation, is entitled to a premium above their hourly rate in order to compensate for both the risks and the delay in payment.** *See e.g. Stanger v. China Elec. Motor, Inc.*, 812 F.3d 734, 741 (9th Cir. 2016) (courts "must" apply a risk enhancement); *Stetson v. Grissom*, 821 F.3d 1157, 1166 (9th Cir. 2016) (abuse of discretion not to apply risk multiplier).

Fifth, the requested fee award is supported by the lodestar cross-check. The reasonableness of the requested attorneys' fee of one-third equal to $1,353,333 is also established by reference to Class Counsel's lodestar in this matter. The contemporaneous billing records for Class Counsel evidence that through March 25, 2024, Class Counsel's total lodestar is $523,769.17, with additional fees still to be incurred to complete final approval and the settlement process. (Blumenthal Decl. at ¶12 and Exhibits #3 and 4 [lodestar of $421,694.17]; Declaration of Launa Adolph at ¶19 [lodestar of $102,075].) The requested fee award is therefore currently equivalent to Class Counsel's total lodestar with a reasonable multiplier of less than 2.6, and there will be additional lodestar incurred by Class Counsel to complete the settlement process and manage the settlement distribution. (Blumenthal Decl. at ¶12.) Such a multiplier is well within the range of positive multipliers approved in other cases such as *Laffitte* and *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1051 (9th Cir. 2002).[6]

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[6] See *Laffitte*, *supra*, 1 Cal. 5th at 487 (approving 1/3 fee award with multiplier of 2.13); *Vizcaino supra*, at 1051(3.65 multiplier approved); *Pellegrino v. Robert Half Intern., Inc.*, 182 Cal.App.4th 278

For such reasons, Class Counsel's request for attorneys' fees in the amount of one-third of the common fund is fair and reasonable and should be approved.

B. The Reimbursement of Litigation Expenses

The Agreement provides at paragraph 3.2(b), that Class Counsel may seek a "Class Counsel Litigation Expenses Payment of not more than $48,000." Class Counsel requests reimbursement for incurred litigation expenses and costs in the amount of $46,591.32 based upon counsel's billing records which evidence total expenses of $46,591.32. The requested expense reimbursement is equal to the actual expenses incurred, with the difference to be retained in the Net Settlement Amount to be distributed to the Class. These litigation expenses include the expenses incurred for filing fees, mediation expenses, expert fees (Berger Consulting Group and Econ One), deposition transcript charges, attorney service charges (Knox, One Legal), docket document downloading charges, Lexis research charges, all of which are costs normally billed to and paid by the client.[7] The details of the litigation expenses incurred are set forth the Blumenthal Decl. at ¶13 and Exhibits #3 and 4 [expenses of $41,877.10], and Declaration of Launa Adolph at ¶23 and Exhibit A [expenses of $4,714.22]. These costs were reasonably incurred in the prosecution of the Action (Blumenthal Decl. at ¶13; Adolph Dec., ¶23).

C. The Service Award Is Reasonable and Should be Approved

Plaintiffs respectfully submit that for their service as the class representatives, Plaintiffs should be awarded the agreed service award of $10,000 each, in accordance with the Agreement for their time, risk and effort expended on behalf of the Class. (Agreement at ¶ 3.2(a).) Defendant has agreed to this payment and there have been no objections to the requested service awards. The Blumenthal Decl., at

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(2010) (in class actions reasonable multipliers of 2.0 to 4.0 are often applied); *Wershba v. Apple Computer*, 91 Cal. App. 4th 224, 255 (2001) ("multipliers can range from 2 to 4 or even higher."); *In re Sutter Health Uninsured Pricing Cases*,171 Cal.App.4th 495, 512 (2009) (affirming multiplier of 2.52 as "fair and reasonable); *Chavez v. Netflix, Inc.*, 162 Cal.App.4th 43, 66 (2008) (affirming multiplier of 2.53 as well within the approved range of 2 to 4); *Taylor v. Fedex Freight, Inc.*, 2016 U.S. Dist. LEXIS 142202 (E.D. Cal. 2016) (2.26 multiplier).

[7] Nontaxable costs are properly awarded where authorized by the parties' agreement. *Stetson*, 821 F.3d at 1165. Accordingly, "[e]xpenses such as reimbursement for travel, meals, lodging, photocopying, long-distance telephone calls, computer legal research, postage, courier service, mediation, exhibits, documents scanning, and visual equipment are typically recoverable." *Rutti v. Lojack Corp., Inc.*, 2012 WL 3151077, at *12 (C.D. Cal. 2012).

¶14, provides a long list of equivalent service awards approved in California in similar cases, which further supports the request in this case. The Declarations of the Plaintiffs are submitted in support of this request and are attached as Exhibits #6, 7, 8 and 9 to the Blumenthal Decl.

As the representatives of the Class, Plaintiffs performed their duty to the Class admirably and without exception. Plaintiffs worked extensively with Class Counsel during the course of the litigation, responding to numerous requests, searching for documents, working with counsel, and reviewing the settlement documentation. (Blumenthal Decl. at ¶ 14.) As set forth in the Agreement, the Plaintiffs are also providing a comprehensive release as part of the Settlement, far beyond the class release. The Declaration of the Plaintiffs detail the involvement, stress and risks they undertook as a result of this Action. Plaintiffs also assumed the serious risk that she might possibly be liable for costs and fees to Defendant, as well as the reputational risk of being "blacklisted" by other future employers for having filed a class action on behalf of fellow former employees. (Blumenthal Decl. at ¶15.) Without the Plaintiffs' participation, cooperation and information, no other employees would be receiving any benefit. (Blumenthal Decl. at ¶¶ 15-16).

The payment of service awards to successful class representatives is appropriate and the amount of $10,000 is well within the currently awarded range for similar settlements. *See e.g. Mathein v. Pier 1 Imps.*, 2018 U.S. Dist. LEXIS 71386, 168 Lab. Cas. (CCH) P36,620 (E.D. Cal. 2018) (approving two service awards of $12,500 each); *Holman v. Experian Info. Solutions, Inc.*, 2014 U.S. Dist. LEXIS 173698 (approving $10,000 service award where class member recovery was $375); *Bellinghausen v. Tractor Supply Co.*, 306 F.R.D. 245, 268 (N.D. Cal. 2015) (approving $10,000 award). Accordingly, Class Counsel respectfully request approval of the requested award in accordance with the Agreement.

VI. CONCLUSION

Plaintiffs respectfully submit that the proposed settlement satisfies the standard of fairness established in California law and should therefore be finally approved as fair, reasonable and adequate and requests entry of the Final Approval Order and Judgment, submitted herewith.

Dated: March 25, 2024 **BLUMENTHAL NORDREHAUG BHOWMIK DE BLOUW LLP**

By: */s/ Kyle Nordrehaug*

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