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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

**AMADO HARO and ROCHELLE
ORTEGA, On Behalf of Themselves and
All Others Similarly Situated,**

Plaintiff,

v.

WALMART, INC.,

Defendant.

§ Case No. 1:21-CV-00239-NODJ-SKO
§
§ **PLAINTIFFS' MOTION FOR**
§ **PRELIMINARY APPROVAL OF**
§ **CLASS ACTION SETTLEMENT**
§
§ **Hearing Date: January 24, 2024**
§ **Time: 9:30 a.m.**
§ **Courtroom: 7**
§ **Floor: 6**
§ **Judge: Hon. Sheila K. Oberto**
§
§
§

NOTICE OF MOTION

PLEASE TAKE NOTICE that on January 24, 2024 at 9:30 a.m., or as soon thereafter as the matter may be heard, in Courtroom 7, Sixth Floor, before the Honorable Sheila K. Oberto, Plaintiffs Amado Haro and Rochelle Ortego (“Plaintiffs”) will move this Court for an Order: (1) preliminarily approving a proposed settlement of this action (the “Settlement”) and staying all other activity in this action; (2) approving the form and manner of giving notice to the Class (“Notice”); (3) approving the Parties’ agreed-upon deadlines for Class Members to exercise their rights in connection with the proposed Settlement; and (4) scheduling a hearing before the Court to determine whether the proposed Settlement, Plaintiffs’ Fees and Costs Application, and Service Award Application (as defined below) should be given final approval (“Preliminary Approval Order”). The proposed Settlement creates fund of Five Million Two Hundred Thousand Dollars (\$5,200,000.00) to be paid by Defendant for the benefit of the proposed Class Members. If approved, the proposed Settlement would resolve all of the claims raised in this lawsuit.

The grounds for this Motion are that: (1) the proposed Settlement is fair, reasonable, and adequate such that Notice should be disseminated to members of the certified Classes; and (2) the proposed Notices adequately apprise the California Class Members and the FLSA Class Members about the terms of the Settlement and their rights with respect to it.

This motion is based on the Memorandum of Points and Authorities submitted below, the accompanying Declaration of Don Foty (“Foty Declaration”), and the Settlement Agreement executed by the Parties.

Respectfully submitted,

Dated: December 15, 2023

HODGES & FOTY, LLP

By: /s/ Don J. Foty
Don Foty
Attorneys for Plaintiffs and Class Members

TABLE OF CONTENTS

I.	INTRODUCTION	4
II.	FACTUAL BACKGROUND	6
III.	PROCEDURAL HISTORY	7
IV.	MEDIATION	9
V.	SETTLEMENT TERMS	9
VI.	THE COURT SHOULD PRELIMINARILY APPROVE THE SETTLEMENT	11
A.	The Settlement Agreement Resulted from Arm’s-Length Negotiations and Is Not the Product of Collusion.	12
B.	The Settlement Has No Obvious Deficiencies and Falls Well Within the Range for Approval.	14
1.	The time spent waiting in line and completing the COVID-19 screening is compensable under California law.....	15
2.	The time spent by the Plaintiffs and Class Members after they completed the COVID-19 screenings but before they clocked-in is compensable under California law.....	17
3.	The amount of time spent off-the-clock was greater than five minutes.	18
C.	The Settlement Meets the Requirements for Preliminary Approval.....	19
D.	The Proposed Notice Plan Meets All Requirements.....	20
E.	CAFA Notice.	20
F.	Schedule for Final Approval Proceedings.	21
VII.	CONDITIONAL CLASS CERTIFICATION IS APPROPRIATE	21

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiffs submit this motion for preliminary approval of the proposed class settlement that resolves this lawsuit for \$5,200,000.00. If the Court approves this settlement, the Class Members will each receive a monetary payment that is proportionally based on their dates of employment and weeks worked. It includes no claims procedure, and no reversion to Walmart for uncashed checks issued to the Class Members. A copy of the Settlement Agreement is attached as Exhibit 1. Plaintiffs seek: (1) preliminary approval of the terms of the Settlement and a stay of all non-settlement related activity in this case; (2) approval of the Notice to be sent to the Class Members; (3) approval of the Parties' agreed-upon deadlines for the Class Members to exercise their rights in connection with the proposed Settlement; and (4) entry of a Preliminary Approval Order setting a Final Approval Hearing and directing the Notice to be sent to the Class Members.

Plaintiffs believe that the proposed settlement is fair and reasonable and will provide a benefit to the Class Members. This is especially true because Walmart previously paid the Class Members five minutes of pay for each shift worked during the COVID pandemic. While the Parties have different views on the availability of class certification, the merits of the case, and the damages at issue, the Settlement provides additional money to the Class Members on top of the five minutes of pay per shift that they already received. Walmart claims that even though it paid five minutes per shift worked from April 2020 to March 2023, its employees did not necessarily undergo a COVID screening each shift. The Settlement provides for a recovery that is approximately 98% of the amount of unpaid wages owed to the Class Members at nearly one minute of additional time worked off-the-clock as a result of the COVID screenings, assuming unpaid time on every other shift. That is the Settlement allows the Class Members to keep the five minutes that Walmart previously paid them plus additional pay.

Under the Settlement, each Class Member who does not properly opt-out will receive a settlement award that corresponds to his/her dates of employment and weeks worked. If approved by the Court, each Class Member will receive their proportionate share of the Net Settlement Fund. That is, hypothetically, if a putative Class Member worked 2% of the aggregate pay periods

1 worked by all Class Members, his/her proportionate share of the settlement would be two percent
2 (2%) of the Net Settlement Fund.

3 The Court should grant this Motion because the Settlement complies with the requirements
4 for preliminary approval. At the preliminary approval stage, “the settlement need only be
5 potentially fair.” *Kang v. Credit Bureau Conn., Inc.*, No. 1:18-cv-01359-SKO, 2023 U.S. Dist.
6 LEXIS 95641, at *15 (E.D. Cal. June 1, 2023) (quoting *Acosta v. Trans Union, LLC*, 243 F.R.D.
7 377, 386 (C.D. Cal. May 31, 2007)). “Preliminary approval of a settlement has both a procedural
8 and substantive component.” *Martinez v. Knight Transp., Inc.*, No. 1:16-cv-01730-SKO, 2023
9 U.S. Dist. LEXIS 51757, at *27 (E.D. Cal. Mar. 24, 2023) (quotation omitted). Preliminary
10 approval is thus appropriate where the proposed settlement (1) appears to be the product of serious,
11 informed, non-collusive negotiations, and (2) falls within the range of possible approval, has no
12 obvious deficiencies, and does not improperly grant preferential treatment to class representatives
13 or segments of the class. *Id.*; see also *Cashon v. Encompass Health Rehab. Hosp. of Modesto,*
14 *LLC*, No. 1:19-cv-00671-SKO, 2023 U.S. Dist. LEXIS 169355, at *9-10 (E.D. Cal. Sep. 21, 2023)
15 (“Federal courts generally find preliminary approval of the settlement and notice to the
16 proposed class appropriate if “the proposed settlement appears to be the product of
17 serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly
18 grant preferential treatment to class representatives or segments of the class, and falls within the
19 range of possible approval.”).

20 Here, the Settlement satisfies these requirements as (1) the release narrowly covers only
21 those claims asserted in this lawsuit; (2) the Parties have not agreed to any limit on a potential fee
22 award or litigation costs award;¹ (3) the Class Members can easily opt out; (4) there is no claims
23 process to receive a payment; (5) there is no reversion to Defendant; and (6) all Class Members
24 who do not timely opt-out will receive a payment. Furthermore, the Parties reached a settlement
25 following arm’s-length negotiations with an experienced mediator, Antonio Piazza, who made a
26 mediator’s proposal to reach a deal that was ultimately accepted by both sides.

27
28 ¹ Class Counsel intends to later file Plaintiffs’ Fees and Costs Application and Service Award
Application.

Therefore, the Parties believe that the Settlement is fair, reasonable, and adequate and therefore, the Preliminary Approval Order should be entered and the Notice disseminated to Class Members.

II. FACTUAL BACKGROUND

Following the outbreak of the Coronavirus, Walmart implemented a company-wide policy requiring all hourly paid employees to pass a COVID-19 health screening (hereinafter the “screening”) in order to work for the day.² This policy was not limited to certain locations or particular workers.³ Instead, every Walmart store in California conducted the screening and every hourly employee in California was required to complete the screening each shift.⁴ Walmart’s written policy states: “Every associate must screen every day at the start of their shifts – there are no exceptions.”⁵ The policy further states that if any employee refuses, they will be sent home on a “Level 1 leave.”⁶ Level 1 leave is leave without pay.⁷

The process for conducting the screening was the same across all Walmart stores.⁸ Under Walmart’s company-wide policy, every hourly employee was required to (1) report to a designated location at a Walmart store, (2) possibly wait in line standing six feet apart from other employees, (3) answer the same questions about whether they had any signs or symptoms of the Coronavirus, (4) have their temperature taken, (5) wear a Walmart approved mask, and (6) pass the health examination *before* clocking-in for the day.⁹ Walmart’s policy states: “After the health screening,

² Dkt. 42 - Ex. “22” – Deposition of Brandy Jordan at 47:14 – 48:6; Dkt. 42 - Ex. “25” – Deposition of Mark Hegarty at 80:5-11; Dkt. 42- Ex. “26” – Deposition of Steve Tapp at 62:21 – 63:9; Dkt. 42 - Exs. “30,” “33,” & “37.”

³ *Id.*

⁴ Dkt. 13 at ¶ 22 (“Walmart admits that, after the outbreak of the coronavirus, it implement a policy requiring its hourly, non-exempt employees to pass through COVID-19s screening on each shift.”); Dkt. 42 - Ex. “22” at 48:2 – 49:24, 50:10-13.

⁵ Dkt. 42 - Ex. “31.”

⁶ *Id.*

⁷ Dkt. 42 - Ex. “25” at 62:21-25; Dkt. 42 - Ex. “27” – Deposition of Tonya Halliburton at 80:21-24.

⁸ Dkt. 42 - Ex. “22” at 48:20 – 49:4, 65:18-21; Dkt. 42 - Ex. “25” at 191:23 – 192:6; Dkt. 42 - Ex. “26” at 71:2-16, 88:21 – 89:6; Dkt. 42 - Ex. “30.”

⁹ Dkt. 42 - Ex. “22” at 47:14 – 48:6; Dkt. 42 - Ex. “25” at 80:5-11; Dkt. 42 - Exs. “31,” “33,” “36,” & “37.”

associates should clock in as normal.”¹⁰ The policy further states: “Associates are still expected to clock in (after their screening) on time.”¹¹

After passing the screening, employees at Walmart were required under Walmart’s policy to “clock-in as normal.”¹² The time clocks at the Walmart stores were located at different distances from the screening area, with some being hundreds of feet away.¹³ Therefore, the screening process involved the same three steps. Employees were to: (1) report to the designated location and wait in line, (2) complete the screening process, and (3) walk from the designated location to the time clocks.¹⁴

Walmart claims that it automatically paid five minutes per shift to each employee. Plaintiff contend this pay was to only compensate for (1) the time spent waiting in line, and (2) the time spent in the screening.¹⁵ Plaintiffs argued that when adding the time spent off-the-clock for walking from the screening area to the time clock, a five minute payment was insufficient.¹⁶ Walmart counters that the time spent walking to the time clocks is not compensable. Even if it is compensable, Walmart asserts that five minutes was more than sufficient and that if it was not, any employee of Walmart could have reported the additional time to Walmart and receive payment for that time.

III. PROCEDURAL HISTORY

On February 23, 2021, Plaintiffs filed this action alleging that Walmart (1) failed to pay them for all hours worked, (2) failed to pay them overtime wages, (3) provided to them invalid wage statements, and (4) a derivative violation of California Business & Professions Code §§ 17200, *et seq.* (through violation of California Labor Code § 2802 and/or California Labor Code § 226). (See Dkt. 1.). Plaintiffs filed this lawsuit as a collective action under the Fair Labor

¹⁰ Dkt. 42 - Ex. “31.”

¹¹ *Id.*

¹² Dkt. 42 - Ex. “29” at 133:9 – 134:7; Dkt. 42 - Ex. “35” – Walmart’s Punctuality Policy.

¹³ Dkt. 42 - Ex. “43.”

¹⁴ Dkt. 42 - Ex. “26” at 117:15 – 118:3; Dkt. 42 - Ex. “27” at 71:22 – 72:25, Dkt. 42 - Ex. “28” at 84:9-17, 85:7-19, 106:5-13, 107:14 – 108:3.

¹⁵ Dkt. 42 - Ex. “22” at 114:6-16; Dkt. 42 - Ex. “26” at 117:5 – 118:25; Dkt. 42 - Ex. “29” at 186:15 – 187:17, 187:24-188:2, 190:7-11.

¹⁶ Dkt. 42 - Ex. “4” at p 2, 11.

Standards Act, 29 U.S.C. § 201, et seq. and as a Rule 23 Class Action under the California Labor Code. *Id.* Plaintiffs sought damages on their behalf and on behalf of the putative classes. *Id.*

Since the inception of this case, the Parties have engaged in extensive merits-based and class discovery and both sides have vigorously litigated this case. Both sides served initial disclosures, document requests and interrogatories. Specifically, (i) the Parties have conducted 31 depositions, (ii) Plaintiffs have propounded 29 interrogatories, six requests for admission, and 42 requests for production, (iii) Defendant has propounded 48 requests for production and 23 interrogatories to Plaintiff Haro and 48 requests for production and 23 interrogatories to Plaintiff Ortega, and (iv) Defendant has produced thousands of pages of information, including both traditional and electronic discovery. (Exhibit “2” - Foty Declaration at ¶ 12). The Parties also produced six expert reports addressing the merits of the case, damages, and class certification. (*Id.*) Plaintiffs produced expert reports from Liesl Fox, Ph.D., Richard Drogin, Ph.D., and Steve Hopper. (*Id.*) Walmart produced expert reports from Nathan Woods, Ph.D., Brian Grieser, and Robert Crandall. The Parties also deposed each side’s experts. (*Id.*)

In addition to the significant discovery that was completed, the Parties also engaged in extensive motion practice. (*Id.*) Defendant filed a motion for summary judgment on June 28, 2022. (Dkt. 31). Plaintiffs filed a substantive response to the motion for summary judgment, (Dkt. 36), and a motion to continue the motion for summary judgment. (Dkt. 34). Plaintiffs filed a motion to certify a class under Rule 23, (Dkt. 43), and a motion for conditional certification under the Fair Labor Standards Act. (Dkt. 41). Defendant opposed the motion for conditional certification. (Dkt. 59). Defendant also opposed the motion for class certification. (Dkt. 58). Additionally, Defendant filed a motion to strike the expert declaration of Dr. Drogin. (Dkt. 60). Plaintiffs moved to strike the expert declaration of Dr. Woods, (Dkt. 99), and a motion to strike the declarations submitted by Defendant in opposition to Plaintiffs’ motion for class certification. (Dkt. 109). Plaintiffs’ Counsel also moved to be appointed by the Court as interim class counsel. (Dkt. 72). Findings and Recommendations granting the motion for appointment as interim class counsel were issued on February 27, 2023. (Dkt. 91). This procedural history demonstrates that significant issues

1 pertaining to liability, damages, and class certification were fully developed and explored prior to
2 reaching this Settlement.

3 **IV. MEDIATION**

4 On September 11, 2023, the Parties attended a full-day mediation with experienced
5 mediator Antonio Piazza. Mr. Piazza is a well-regarded mediator who has mediated hundreds of
6 class action cases. Based on the extensive discovery and investigation undertaken, Plaintiffs were
7 able to engage in well-informed settlement negotiations with Defendant. Negotiations between
8 the Parties were rigorous and conducted at arms-length. Mr. Piazza played an active role in the
9 settlement negotiations, including identifying each side's strengths, weaknesses, and risks. Mr.
10 Piazza also had the benefit of detailed briefs, dozens of exhibits (including statistical modeling and
11 deposition excerpts), and hours of in-person discussions with the Parties and their counsel. This
12 process culminated in Mr. Piazza making a neutral and informed mediator's proposal, which both
13 sides accepted.

14 **V. SETTLEMENT TERMS**

15 The Settlement provides for additional monetary relief to the Class Members, on top of the
16 five minutes of pay per shift they have already received. The Settlement is for \$5,200,000.00 to
17 be divided amongst the Class Members proportionally based on their dates of employment and
18 weeks worked. Defendant also agrees to pay the employer's share of the applicable payroll taxes
19 in addition to the gross settlement amount. There will be no claims process because the Claims
20 Administrator will process checks for everyone who does not properly request to be excluded.

21 The fees and costs associated with retaining a third-party administrator to administer the
22 terms of the Settlement will be deducted from the Settlement. (Ex. "1"). Plaintiffs have obtained
23 settlement administration quotes from several vendors and ultimately selected Rust to administer
24 the Settlement because it provided the lowest bid. (Ex. "2" at ¶ 16). In administering the
25 Settlement, the Parties have agreed to use their best efforts to keep the costs as low as possible,
26 including by sending the Notice via electronic mail. (*Id.*)

27 The Settlement provides for an enhancement award of \$10,000 each to the two named
28 Plaintiffs. The award is to compensate the Plaintiffs for the time, expense, and risks they incurred

1 in litigating this action on behalf of the Class Members. Plaintiffs will file an application for the
2 service award in connection with moving for final approval of the Settlement.

3 Further, Plaintiffs' Counsel will move the Court for an award of reasonable attorneys' fees
4 of up to one-third of the Settlement as well as reimbursement of litigation costs. Plaintiffs will file
5 an application for approval of the attorneys' fees and costs in connection with moving for final
6 approval of the Settlement. *See, e.g., Hudson v. Libre Tech., Inc.*, 2019 U.S. Dist. LEXIS 196964,
7 *34 (S.D. Cal. Nov. 13, 2019) ("At the preliminary approval stage, the Court does not need to
8 determine attorney's fees."). Any amount of the requested fee and costs award not approved by
9 the Court will be included in the distribution to the Class.

10 In consideration for the above relief, the Class Members who do not opt out of the
11 Settlement will release the California law claims alleged in this action based on Plaintiffs' claim
12 that Walmart failed to pay its non-exempt hourly workers for the time they spent completing
13 COVID-19 screenings through the date of final approval of the Settlement.¹⁷ Additionally, the
14 Settlement at issue provides for a resolution of the claims raised under PAGA. The PAGA claims
15 raised in this lawsuit will be released by all Class Members.

16 In addition, Class Members who opt into the settlement of the FLSA claims will release
17 the FLSA claims alleged in this action through the date of final approval of the Settlement. The
18 Opt-in Plaintiffs—individuals who filed consent forms before the mediation—who do not opt out
19 of the Settlement will also release the FLSA claims alleged in this action through the date of final
20 approval of the Settlement.¹⁸

21
22 ¹⁷ The Release at issue also covers Plaintiffs' claims under California Labor Code 226 for invalid
23 wage statements. This claim was based primarily on the assertion that Walmart identified the hours
24 worked inaccurately on the wage statements by not including the amount of time spent in the
25 COVID screenings. The Settlement at issue takes into consideration the fact that this wage
26 statement claim is a derivative claim from the underlying wage claim and that there were risks to
pursuing this claim given that Walmart argued that there was a good faith dispute as to whether
the additional time was worked by the Class Members and should have been listed on the wage
statements at all.

27 ¹⁸ The Settlement at issue resolves the FLSA claims of all California Class Members who opt-into
28 this lawsuit rather than a national FLSA claim. The Settlement takes into consideration that
Walmart argued that its hourly employees who worked outside of California did not regularly work

1 All Class Members will receive a Notice of the proposed Settlement in the form attached
 2 as Exhibit A to the Settlement Agreement. (See Ex. “1-A”). Individuals who wish to opt out of
 3 the Settlement may mail a Request for Exclusion to the Settlement administrator within 60 days
 4 from the mailing of the Class Notice (the “Response Deadline”). Further, individuals who wish to
 5 object to the Settlement are to submit the objection within the Response Deadline identifying the
 6 objector, including his or her contact information, and stating the basis for the objection. The
 7 procedures for opting out of, and objecting to, the Settlement are clearly and simply explained in
 8 the Notice.

9 VI. THE COURT SHOULD PRELIMINARILY APPROVE THE SETTLEMENT

10 Approval of a proposed class settlement is within the broad authority of the district court.
 11 See *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1025 (9th Cir. 1998); *City P’ship Co. v. Atlantic*
 12 *Acquisition Ltd. P’ship*, 100 F.3d 1041, 1044 (1st Cir. 1996) (“Great deference is given to the trial
 13 court [regarding its decision to approve a class action settlement].”). The district court’s decision,
 14 however, is “restrained by ‘the clear policy in favor of encouraging settlements.’” *Durrett v.*
 15 *Housing Auth. of Providence*, 896 F.2d 600, 604 (1st Cir. 1990) (citation omitted). Indeed, “there
 16 is a strong judicial policy that favors settlements, particularly where complex class action litigation
 17 is concerned.” *Allen v. Bedolla*, 787 F.3d 1218, 1223 (9th Cir. 2015) (citation omitted).

18 “A district court may approve a proposed settlement in a class action only if the
 19 compromise is fundamentally fair, adequate, and reasonable.” *In re Heritage Bond Litig.*, 546 F.3d
 20 667, 674-75 (9th Cir. 2008) (citing Fed. R. Civ. P. 23(e)). In determining whether a proposed
 21 settlement should be preliminarily approved, the court considers both procedural and substantive
 22 factors:

23 As noted in the Manual for Complex Litigation, Second, [sic] “[i]f the proposed
 24 settlement appears to be the product of serious, informed, non-collusive
 25 negotiations, has no obvious deficiencies, does not improperly grant preferential
 26 treatment to class representatives or segments of the class, and falls within the
 27 range of possible approval, then the court should direct that the notice be given to

28 overtime. Under the FLSA, a cause of action only exists when an employee works more than 40
 hours in a week or was not paid at least \$7.25 per hour. Additionally, some courts have found that
 there is no viable claim for COVID screening time under the FLSA. See, e.g., *Pipich v. O’Reilly*
Auto Enters., No. Civ. A. 21-CV-1120-L-LL, 2022 WL 788671 (S.D. Cal. Mar. 15, 2022).

the class members of a formal fairness hearing * * *.” Manual for Complex Litigation, Second §30.44 (1985). In addition, “[t]he court may find that the settlement proposal contains some merit, is within the range of reasonableness required for a settlement offer, or is presumptively valid.” Newberg on Class Actions §11.25 (1992).”

In re Portal Software, Inc. Sec. Litig., No. C-03-5138 VRW, 2007 WL 1991529, at *5 (N.D. Cal. June 30, 2007) (quoting *Schwartz v. Dallas Cowboys Football Club Ltd.*, 157 F. Supp. 2d 561, 570 n.12 (E.D. Pa. 2001)).

Under these criteria, Plaintiffs respectfully submit that preliminary approval of the proposed Settlement should be granted and dissemination of the Notice should be ordered.

A. The Settlement Agreement Resulted from Arm’s-Length Negotiations and Is Not the Product of Collusion.

The Court should look to whether the proposed settlement appears to be the product of collusion among the negotiating parties. *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 458 (9th Cir. 2000), as amended (June 19, 2000). In applying this factor, courts give substantial weight to the experience of the attorneys who prosecuted the case and negotiated the settlement. *See In re Tableware Antitrust Litig.*, 484 F. Supp. 2d 1078, 1080 (N.D. Cal. 2007); *see also Hanlon*, 150 F.3d at 1027 (courts are deferential “to the private consensual decisions of the parties.”) (citing *Officers for Justice v. Civil Serv. Comm’n.*, 688 F.2d 615, 625 (9th Cir. 1982)). Indeed, when a settlement is negotiated at ‘arm’s-length by experienced counsel, there is a presumption that it is fair and reasonable. *See Tableware*, 484 F. Supp. 2d at 1080; *City P’ship*, 100 F.3d at 1043 (“When sufficient discovery has been provided and the parties have bargained at arm’s-length, there is a presumption in favor of the settlement.”).

To that end, the courts have recognized “[t]he assistance of an experienced mediator in the settlement process confirms that the settlement is non-collusive.” *Satchell v. Fed. Express Corp.*, No. C03-cv-2659 SI, 2007 WL 1114010, at *4 (N.D. Cal. Apr. 13, 2007); *In re Immune Response Sec. Litig.*, 497 F. Supp. 2d 1166, 1171 (S.D. Cal. 2007).

Here, the Parties only attended mediation after significant discovery and motion practice was completed. Briefing on class certification, conditional certification, and expert challenges

1 were completed before the Parties attended mediation. By that point in time, the record had been
2 well-developed through fact and expert discovery.

3 The proposed Settlement here is the product of extensive, arm's-length negotiations, which
4 included an all-day mediation session with Antonio Piazza -- a private mediator experienced in
5 class action matters. (Ex. "2" at ¶ 14). Counsel were thus able to make informed assessments
6 regarding the merits of their claims and defenses. *See In re Charles Schwab Corp. Sec. Litig.*, No.
7 C 08-01510 WHA, 2011 WL 1481424, at *5 (N.D. Cal. Apr. 19, 2011) ("the class settlements
8 were reached on the eve of trial when class counsel had completed discovery and had conducted
9 extensive motion practice and were thus well aware of the issues and attendant risks involved in
10 going to trial as well as the adequacy of the amount of the class settlement."). The negotiations
11 were informed by the knowledge Plaintiffs' Counsel gained through discovery, with the aid of a
12 statistics expert who calculated an estimate of the amount owed. Based on their familiarity with
13 the factual and legal issues, and armed with a thorough understanding of the strength and
14 weaknesses of the claims at issue, the Parties were able to negotiate a fair settlement, taking into
15 account the costs and risks of continued litigation. The negotiations were at all times hard-fought
16 and have produced a result that the Parties believe to be in their respective interests. (Ex. "2" at ¶
17 14). In fact, when it appeared that the Parties were unable to reach an agreement, Mr. Piazza made
18 a mediator's proposal, which both sides accepted. (*Id.* at ¶¶ 14, 22); *see also Zynga, Inc.*, 2015
19 WL 6471171, at *9 ("The use of a mediator and the presence of discovery 'support the conclusion
20 that the Plaintiff was appropriately informed in negotiating a settlement.'").

21 Additionally, Plaintiffs' Counsel carefully evaluated the merits of the case, concluding that
22 they have a strong case and that there is sufficient evidence to proceed to a jury. Plaintiffs' Counsel,
23 however, recognize that there exist challenges in this litigation that could pose significant risks
24 regarding their ability to prevail and the scope of damages if the case were to proceed to trial, and
25 thereafter, an appeal before the Ninth Circuit. Even if Plaintiffs emerged victorious after appeal,
26 there can be no doubt that the appeal would be lengthy and costly for all sides. *Charles Schwab*
27 *Corp. Sec. Litig.*, 2011 WL 1481424, *5 (approving settlement; "prosecuting these claims through
28

1 trial and subsequent appeals would have involved significant risk, expense, and delay to any
 2 potential recovery”). As such, Plaintiffs’ Counsel believes the Settlement is fair and reasonable.
 3 (Ex. “2” at ¶¶ 19-22). *See, e.g., In re NVIDIA Corp. Derivative Litig.*, No. C-06-06110-SBA (JCS),
 4 2008 WL 5382544, at *4 (N.D. Cal. Dec. 22, 2008) (“[S]ignificant weight should be attributed to
 5 counsel’s belief that settlement is in the best interest of those affected by the settlement.”); *In re*
 6 *Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1043 (N.D. Cal. 2008) (counsel’s recommendation
 7 weighed in favor of settlement, given counsel’s familiarity with the dispute and significant
 8 experience in securities litigation).

9 **B. The Settlement Has No Obvious Deficiencies and Falls Well Within the Range**
 10 **for Approval.**

11 When evaluating the adequacy of a settlement, courts balance a plaintiff’s expected
 12 recovery against the value of the offer. *Tableware*, 484 F. Supp. 2d at 1080; *Portal Software*, 2007
 13 WL 1991529, at *6. This case involves a range of disputed issues including the merits of Plaintiffs’
 14 claims, how much time was spent waiting in line and completing the screening, how much time
 15 was spent walking to the time clocks following the screening, the number of shifts when screenings
 16 occurred, and whether the time spent walking to the time clocks is compensable. While Plaintiffs
 17 believe that the Class Members have meritorious claims, Defendant denies, and continues to deny,
 18 each and all of the claims and contentions asserted by Plaintiffs. Likewise, Defendant disputes
 19 Plaintiffs’ damages calculation.

20 The Settlement is fair and reasonable because it provides for a recovery that is
 21 approximately 98% of the amount of unpaid wages owed to the Class Members at nearly one
 22 minute of additional time worked off-the-clock as a result of the COVID screenings, assuming
 23 unpaid time on every other shift. (Ex. “2” at ¶¶ 19-22). That is the Settlement allows the Class
 24 Members to keep the five minutes that Walmart previously paid them plus additional time of nearly
 25 one minute of pay. (*Id.*)

26 The proposed Settlement is also fair to the Plaintiffs and Class Members because it
 27 provides for a Settlement based upon the actual data in Defendant’s possession, including the dates
 28

1 of employment and COVID screening data in Defendant's possession. Ultimately, the settlement
 2 provides an excellent result for the Class Members, particularly considering the risk of no recovery
 3 if Plaintiffs and the Class Members were unsuccessful through trial and appeal.

4 Nevertheless, the following provides a further explanation of the merits of the claims for
 5 the Court's benefit.

6 **1. The time spent waiting in line and completing the COVID-19 screening**
 7 **is compensable under California law.**

8 Plaintiffs contend that the time spent by the Plaintiffs and Class Members waiting in line
 9 and undergoing the COVID-19 screenings is compensable under California law. The Industrial
 10 Welfare Commission (IWC) was established "to fix minimum wages, maximum hours of work,
 11 and standard conditions of labor." *Martinez v. Combs*, 49 Cal. 4th 35, 50 (2010). Wage orders
 12 issued by the IWC are to be construed so as to promote employee protection. *Mendiola v. CPS*
 13 *Security Solutions, Inc.*, 60 Cal. 4th 833, 840 (2015). Indeed, IWC wage orders must be "liberally
 14 construed in a manner that serves its remedial purposes" of protecting and benefitting employees.
 15 *Dynamex Operations West, Inc., v. Superior Court*, 4 Cal. 5th 903, 953 (2018); *see also Augustus*
 16 *v. ABM Security Services, Inc.*, 2 Cal. 5th 257, 262 (2016) (finding that when construing wage
 17 orders, courts adopt the construction that best gives effect to the Legislature and the IWC's purpose
 18 of protecting employees); *Industrial Welfare Com. v. Superior Court*, 27 Cal. 3d 690, 702 (1980)
 19 (same).

20 Wage Order 7, Cal. Code Regs., tit. 8, § 11070, requires employers to pay their employees
 21 a minimum wage for all "hours worked," *id.*, § 11070, subd. 4(B), defined as "the time during
 22 which an employee is subject to the control of an employer, and includes all the time the employee
 23 is suffered or permitted to work, whether or not required to do so." *Id.*, § 11070, subd. 2(G).
 24 Therefore, Wage Order 7 establishes two separate tests to determine whether an activity must be
 25 paid by an employer: (1) whether the employee is subject to the control of the employer, and (2)
 26 whether the employer suffered or permitted the employee to perform the work. *Morillion v. Royal*
 27 *Packing Co.*, 22 Cal. 4th 575, 582 (2000). Thus, an employee who is *subject to the control* of an
 28 employer does not have to be working during that time to be compensated. *Id.* Likewise, an

1 employee who is *suffered or permitted to work* does not have to be under the employer's control
 2 to be compensated, provided the employer has or should have knowledge of the employee's work.
 3 *Troester v. Starbucks Corp.* 5 Cal. 5th 829, 853 (2018); *Hernandez v. Pacific Bell Telephone Co.*,
 4 29 Cal. App. 5th 131, 137 (2018). Under either test, Plaintiffs contend the time spent by Walmart
 5 employees completing the COVID-19 screenings is compensable under California law.

6 A similar issue was addressed by the California Supreme Court in *Frlekin v. Apple, Inc.* In
 7 *Frlekin*, Apple required its retail store employees to undergo exit searches where the employees'
 8 bags, purses, and packages were searched. *Frlekin v. Apple, Inc.*, 8 Cal. 5th 1038, 1043-44 (2020).
 9 The Apple employees were required to clock out before submitting to the exit search and thus,
 10 they were not paid for that time. *Id.* at 1044. After applying the "control test," the California
 11 Supreme Court held that the Apple employees were entitled to compensation during the time they
 12 spent in the exit search because the "Apple employees are clearly under Apple's control while
 13 awaiting, and during, the exit searches." *Id.* at 1047. The *Frlekin* Court explained as follows:

14 Based on the language of the control clause, Apple employees are entitled to
 15 compensation for the time during which they are subject to Apple's control. (Cal.
 16 Code Regs., tit. 8, § 11070, subd. 2(G).) Applying a strictly textual analysis, Apple
 17 employees are clearly under Apple's control while awaiting, and during, the exit
 18 searches. Apple controls its employees during this time in several ways. First,
 19 Apple requires its employees to comply with the bag-search policy under threat of
 20 discipline, up to and including termination. Second, Apple confines its employees
 21 to the premises as they wait for and undergo an exit search. Third, Apple compels
 22 its employees to perform specific and supervised tasks while awaiting and during
 23 the search. This includes locating a manager or security guard and waiting for that
 24 person to become available, unzipping and opening all bags and packages, moving
 25 around items within a bag or package, removing any personal Apple technology
 26 devices for inspection, and providing a personal technology card for device
 27 verification.

28 *Id.*

In finding that the exit searches were compensable, the California Supreme Court relied
 upon the decision of *Bono Enterprises, Inc. v. Bradshaw*, 32 Cal. App. 4th 968, 972 (1995). In
Bono, the court held that workers who were required to remain on the employer's premises during
 their lunch period were entitled to compensation for that time. *Id.* In reaching this decision, the
 court interpreted the phrase "subject to the control of an employer" to mean "[w]hen an employer
 directs, commands or restrains an employee." *Id.* at 975. Therefore, when an employer directs,

1 commands, or retrain an employee at the workplace, that employee remains subject to the
2 employer's control and must be paid. *Id.*

3 In Plaintiffs' view, the facts in this case are very similar to the facts in *Frlekin* and *Bono*.
4 Plaintiffs assert that: (1) Walmart required every employee to complete the COVID-19 screening
5 and it was not optional, (2) employees were confined to the premises of Walmart when they waited
6 for and during the screening, and (3) Walmart compelled its employees under the threat of
7 discipline to have their temperature taken and to answer questions about their health.

8 **2. The time spent by the Plaintiffs and Class Members after they**
9 **completed the COVID-19 screenings but before they clocked-in is**
10 **compensable under California law.**

11 After the COVID-19 screenings were concluded, the Plaintiffs and Class Members were
12 required to walk from the designated screening location (which generally was either in a tent
13 outside the Walmart store, in the garden center, or the automotive center) and walk to the time
14 clocks to clock-in. The distance from the COVID-19 screening station to the time clocks was
15 greater than two football fields at some locations. Plaintiffs contend that, while walking to the
16 time clocks, the Plaintiffs and Class Members were at times approached by customers with
17 questions or their co-workers about work related matters. Plaintiffs' expert has estimated that the
18 average amount of time spent by the Plaintiffs' and Class Members after the COVID-19 screening
19 was completed by prior to clocking-in is approximately 4.52 minutes.

20 Plaintiffs contend this time is compensable because Walmart exercised control over its
21 employees as soon as they reported to the screening location and maintained that control after the
22 screening was completed. After completing the screening, Walmart employees were required to
23 clock-in by the start of their shifts. The Plaintiffs and Class Members were also required to follow
24 Walmart's policies immediately after the screening was completed, were subject to discipline if
25 they engaged in behavior that violated Walmart's policies at the facilities (even when they were
26 off-the-clock), were required to use Walmart's clock-in system, and were required to follow
27 Walmart's policies and procedures when clocking-in. Under these facts, Plaintiffs contend the
28 Class Members remained subject to Walmart's control after completing the health screening and

1 that time is compensable. *See Morillion v. Royal Packing Co.*, 22 Cal. 4th 575, 582 (2000); *Senne*
 2 *v. Kansas City Royals Baseball Corp.*, 934 F.3d 918, 944-46 (9th Cir. 2019).

3 Further, once an employee begins a principal activity for the day, all activities after that
 4 must be compensated by the employer until the employee ceases working for the day. *IBP, Inc. v.*
 5 *Alvarez*, 546 U.S. 21 (2005). In *IBP, Inc.*, the Supreme Court explicitly held that walking time
 6 which occurs after the performance of an employee's first principal activity of the day is
 7 compensable because it is part of the continuous workday. *Id.* at 37 ("during a continuous workday,
 8 any walking time that occurs after the beginning of the employee's first principal activity and
 9 before the end of the employee's last principal activity" is compensable). This what is known as
 10 the "continuous workday rule." *Wren v. RGIS Inventory Specialists*, No. Civ. A. 06-05778, 2009
 11 WL 2612307, at *24 (N.D. Cal. Aug. 24, 2009). The continuous workday rule provides that once
 12 the first compensable activity is performed, then all subsequent activities are compensable. 29
 13 C.F.R. § 790.6(b); *Aguilar v. Mgmt. and Training Corp.*, 948 F.3d 1270, 1279 (10th Cir. 2020)
 14 (collecting cases). Here, Plaintiffs contend the first compensable activity was the COVID-19
 15 screening. Based upon this authority, the time spent after the COVID-19 screening.

16 **3. The amount of time spent off-the-clock was greater than five minutes.**

17 The Parties heavily disputed the amount of time the Plaintiffs spent waiting-in line and
 18 completing the screening. Defendant's expert, Robert Crandall, viewed hundreds of hours of video
 19 footage of the COVID screenings and determined that the mean time spent waiting-in line and
 20 completing the screening was approximately 29.1 seconds. If the 29.1 seconds of time (for waiting
 21 and screening) is added to the 4.52 minutes of time spent walking to the time clocks, then the total
 22 amount of time spent off-the-clock is 5.01 minutes. However, under the Plaintiffs' model, if the
 23 mean screening time is added to the walking time of 4.52 minutes along with waiting time analysis
 24 (assuming a random rate of arrival) of 0.94 minutes, then the average screening time is 5.95
 25 minutes. If approved by the Court, the Settlement will provide a recovery of approximately 5.46
 26 minutes of screening time.

C. The Settlement Meets the Requirements for Preliminary Approval.

In evaluating the fairness of a settlement award, “the settlement’s benefits must be considered by comparison to what the class actually gave up by settling.” *Martinez v. Knight Transp.*, 2023 U.S. Dist. LEXIS 51757, at *30 (quoting *Campbell v. Facebook, Inc.*, 951 F.3d 1106, 1123 (9th Cir. 2020)). To determine whether a settlement “falls within the range of possible approval,” a court must focus on “substantive fairness and adequacy” and “consider plaintiffs’ expected recovery balanced against the value of the settlement offer.” *Martinez v. Knight Transp.*, 2023 U.S. Dist. LEXIS 51757, at *30 (quotation omitted); *see also Harris*, 2011 U.S. Dist. LEXIS 48878, at *11 (noting that courts “must estimate the maximum amount of damages recoverable in a successful litigation and compare that with the settlement amount” in determining “the value of the settlement against the expected recovery at trial”).

But the court “need not reach any ultimate conclusions on the contested issues of fact and law which underlie the merits of the dispute.” *Cashon*, 2023 U.S. Dist. LEXIS 169355, at *10 (quoting *Chem. Bank v. City of Seattle*, 955 F.2d 1268, 1291 (9th Cir. 1992)). Rather, the court should weigh, among other factors, the strength of a plaintiff’s case; the risk, expense, complexity, and likely duration of further litigation; the extent of discovery completed; and the value of the settlement offer. *Id.*

Here, the amount of the Settlement is fair and adequate when viewed in light of the risks and delays associated with continued litigation. Plaintiffs believe that a conservative range regarding the amount of time spent off-the-clock for COVID screenings is between 5.18 minutes and 6.22 minutes. (Ex. “2” at ¶ 20).

Additionally, the Settlement “does not improperly grant preferential treatment to the [Plaintiffs] or segments of the class.” *Portal Software*, 2007 WL 1991529, at *5. Plaintiffs will be receiving their proportionate share of the Class Damages according the same formula as the rest of the Class Members. *See NASDAQ*, 176 F.R.D. at 102 (settlement may be approved preliminarily where it does not improperly grant preferential treatment to class representatives or segments of the class”). While the Settlement anticipates the possibility that Plaintiffs’ Counsel will apply for

1 a service award for Plaintiffs, the Settlement is in no way conditioned on them receiving this award.
 2 This demonstrates that the Settlement is fair and reasonable to all.

3 Moreover, the Settlement resolves the claims raised by Plaintiffs under PAGA and
 4 allocates a fair amount to the State of California. The amount allocated to the State of California
 5 is fair and reasonable because had this case proceeded to trial, the Court could exercise its
 6 discretion to award a minimal PAGA penalty given the small amount of time allegedly at issue
 7 and Walmart's efforts to pay for the time. Thus, the Settlement provides additional compensation
 8 to the Plaintiffs, allows for the Class Members to retain the five minutes they have already been
 9 paid per shift plus additional pay, and allows for a fair resolution of the PAGA claims.

10 **D. The Proposed Notice Plan Meets All Requirements.**

11 The proposed form of the Notice fully complies with the requirements of Rule 23, the
 12 FLSA, due process, and is substantially similar to the prior notice of class certification approved
 13 by California Courts. The Notice apprises the Class Members of the nature of this case, the
 14 definition of the Classes and the claims that will be released. Additionally, the Notice: (1)
 15 describes the Settlement; (2) explains that the Parties disagreed regarding whether any damages
 16 were recoverable; (3) includes a brief description of a request for attorney fees and expenses, as
 17 well as the request for the Service Award; (4) states that the Court will exclude from the Class any
 18 Class Member who requests exclusion (and sets forth the procedures and deadline for doing so);
 19 (5) describes how to object to the proposed Settlement; (6) provides the name, address and
 20 telephone number of the Claims Administrator who will be available to answer questions from
 21 Class Members: and (7) states the date, time and location of the Final Approval Hearing and
 22 advises Class Members to check the Court's PACER site. These disclosures are thorough and
 23 should be approved.

24 **E. CAFA Notice.**

25 Under the Class Action Fairness Act (CAFA), 28 U.S.C. § 1715, "[n]ot later than 10 days
 26 after a proposed settlement of a class action is filed in court, each defendant that is participating in
 27 the proposed settlement shall serve upon the appropriate State official of each State in which a
 28 class member resides and the appropriate Federal official, a notice of the proposed settlement[.]"

Defendant will separately prepare and mail the notice required by 28 U.S.C. § 1715 (b) by December 26, 2023.

F. Schedule for Final Approval Proceedings.

As set forth in the Settlement Agreement, the following is the proposed schedule for the remaining deadlines in the preliminary and final approval proceedings:

ACTION	DEADLINE
Deadline for Mailing CAFA Notice, 28 U.S.C. § 1715 (b)	December 26, 2023
Deadline for Production of Class List to Settlement Administrator	30 days after entry of Preliminary Approval Order
Deadline for Sending Notice	60 days after entry of Preliminary Approval Order
Deadline to Opt-Out	120 days after entry of Preliminary Approval Order
Filing Deadline for Objections	120 days after entry of Preliminary Approval Order
Final Approval Hearing	At least 90 days after preliminary approval

VII. CONDITIONAL CLASS CERTIFICATION IS APPROPRIATE

Plaintiffs request conditional certification under Rule 23 for settlement purposes only. Plaintiffs have fully briefed this issue in their Motion for Class Certification, which remains pending.¹⁹ In sum, this class should be certified because liability in this case primarily involves the resolution of two legal issues: (1) whether the time spent waiting in line and completing the screening is compensable under California law, and (2) whether the time spent after completion of the screening but prior to clocking-in is compensable under California law. Resolution of both issues can be resolved on a class basis because the policies and procedures for the screening were the same for all Class Members and there is common proof that is applicable to all Class Members.

¹⁹ This Court granted conditional certification of the FLSA collective on February 27, 2023. [Dkt. 90] Walmart has filed objections and those objections are still pending pursuant to this Court's May 18, 2023 order staying the case. [Dkt. 117]

1 For these reasons, the requirements for class certification under Rule 23(a) and (b)(3) have been
2 satisfied.

3 **CONCLUSION**

4 Accordingly, Plaintiffs respectfully request that the Court grant preliminary approval of
5 the proposed Settlement, approve the Notice, and enter the proposed Preliminary Approval Order
6 submitted herewith.

7 Respectfully submitted,

8 Dated: December 15, 2023

HODGES & FOTY, LLP

9
10 By: /s/ Don J. Foty
11 Don Foty
Attorneys for Plaintiffs and Class Members
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14
15
16

17 **CERTIFICATE OF SERVICE**

18 This is to certify that on December 15, 2023, a true and correct copy of the foregoing
19 instrument was served via the Court's electronic filing system.

20 /s/ Don J. Foty
21 Don J. Foty
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