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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ORANGE

PATRICK BURNS in his individual and representative capacities, Plaintiff, v. POWER PARAGON, INC. and DOES 1 through 10, inclusive, Defendants.	Case No.: 30-2021-01197621-CU-OE-CXC Assigned to: Hon. Lon Hurwitz, Dept. CX-103 **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF PATRICK BURNS' MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION AND PAGA SETTLEMENT**

DATE: September 8, 2023
TIME: 1:00 p.m.
DEPT.: CX-103

Case Filed: April 28, 2021
Trial Date: None set

I. INTRODUCTION

Plaintiff Patrick Burns ("Plaintiff") submits this memorandum in support of the motion for preliminary approval of the proposed class and Private Attorneys General Act ("PAGA") action settlement with Power Paragon, Inc. ("Defendant"), and seeks entry of an order: (1) preliminarily approving the proposed settlement of this class and PAGA action with Defendant; (2) approving the form and method for providing class-wide notice; (3) directing that notice of the proposed settlement be given to the class; and (4) scheduling a final approving hearing date to consider Plaintiff's motion for final approval of the settlement and entry of the Judgment, and Plaintiff's motion for approval of attorneys' fees and litigation expenses.

Plaintiff and Defendant have reached a full settlement of the above-captioned action, which is embodied in the Stipulation of Class Action and PAGA Settlement and Release of Claims ("Agreement"). A copy of the fully executed Agreement is attached as **Exhibit 1** to the Declaration of Corbett H. Williams ("Decl. Williams"), filed herewith. (The proposed Notice to Class Members is **Exhibit A** to the Agreement.)

As consideration for this Settlement, the total amount to be paid by Defendant is six hundred thousand dollars ($600,000.00) (the "Gross Settlement Amount"). The Gross Settlement amount will settle all issues pending in this litigation between the Plaintiff and the Class, on the one hand, and the Defendant, on the other hand, including: payment of all Settlement Shares to Participating Class Members, the Class Representative Service Payment, the Class Counsel Fees Payment, Class Counsel Litigation Expenses Payment, the payment to the California Labor Workforce Development Agency ("LWDA Payment"), and the expenses of the Settlement Administrator. The Settlement is all-in with no reversion to Defendant and no need to submit a claim form.

On January 31, 2023, the parties participated in a full-day mediation before Louis Marlin, a respected and experienced mediator of wage and hour class and PAGA actions. After lengthy negotiations, the parties reached a settlement, the broad terms of which were memorialized in a Memorandum of Understanding. The Parties then prepared the full Agreement, which was signed by all counsel and the Parties and is now presented to this Court for preliminary approval. As part of their agreement, this case was remanded to this Court for purposes of preliminary and final approval of the settlement.

The Settlement is fair, reasonable, and adequate, and should be preliminarily approved. Therefore, Plaintiff respectfully requests that this Court grant preliminary approval of the Agreement and enter the proposed order submitted herewith.

II. DESCRIPTION OF THE SETTLEMENT

The Gross Settlement Amount to be paid by Defendant is $600,000.00. (Agreement at pp. 2, 5; §§ I.P., III.A.) Under the Agreement, the Gross Settlement Amount consists of the following elements: (1) payments of the Settlement Shares to Participating Class Members, (2) Class Counsel Fees Payment and Class Counsel Litigation Expenses Payment, (3) the fees and expenses of the Settlement Administrator, (4) the LWDA Payment, and (5) the Class Representative Service Payment to the Plaintiff. The Gross Settlement Amount is all-in with no reversion to Defendant. (*Id.* at pp. 6-7; § III.B.) The Class is defined as individuals employed by Defendant as Field Service Engineers ("FSEs") from April 28, 2017 through the date of preliminary approval. (*Id.* at p. 1; § I.B.) Based on information provided by Defendant in discovery, Class Counsel estimates that there are 46 Class Members. (Williams Decl., ¶ 22.)

Within fourteen days following the Effective Date, the Settlement Administrator will advise counsel for Defendant of the amount necessary to fund the Settlement Fund. Defendant will fund the Gross Settlement Amount and the amount necessary to pay Defendant's share of payroll taxes within thirty days of the Effective Date. (*Id.* at p. 14; § III.F.9.) Within fifteen days after Defendant funds the Gross Settlement Amount, the Settlement Administrator will pay to Participating Class Members, their Settlement Shares; to Plaintiff, his Class Representative Service Payments; to Class Counsel, their Class Counsel Fees Payment and the Class Counsel Litigation Expenses Payment; to the LWDA, their LWDA Payment; and to the Settlement Administrator, its reasonable fees and expenses. (*Id.*) (Williams Decl., ¶ 23.)

The Net Settlement Amount shall equal the net amount available for Settlement shares to Participating Class Members from the Gross Settlement Amount after deducting the Court-approved amounts for the Class Representative Service Payments, the Class Counsel Fees Payment, the Class Counsel Litigation Expenses Payments, the LWDA Payment, and the fees and expenses of the Settlement Administrator. (Williams Decl., ¶ 24.)

The Settlement Administrator will pay a Settlement Share from the Net Settlement Amount to each Participating Class Member. The submission of a claim form is not required for a Participating Class Member to receive a payment. The Settlement Share for each Participating Class Member will be calculated by dividing the number of Workweeks worked by the Participating Class Member by the total Workweeks worked by all Participating Class Members. That number is then multiplied by the Net Settlement Amount. The calculation is represented by the following formula: Participating Class Member Settlement Share = (Workweeks worked by Participating Class Member ÷ Total Weeks Worked) x Net Settlement Amount. (Agreement at p. 7; § III.C.) Based on the expected number of Class Members and the anticipated Net Settlement Amount of $362,250.00, Class Counsel estimates that Participating Class Members will receive a mean Settlement Share equal to approximately $7,875.00. (Williams Decl., ¶ 25.)

No later than twenty-one days after the Court enters its Order Granting Preliminary Approval of the Settlement, Defendant will provide to the Settlement Administrator with each Class Member's Class Data. (*Id.* at p. 9; § III.F.2.) Class Members will have forty-five days from the initial mailing of the Notice by the Settlement Administrator to object to the Settlement. (*Id.* at pp. 10-11; § III.F.4.) Class Members will likewise have forty-five days to submit an Election Not to Participate in Settlement to the Settlement Administrator. (*Id.* at pp. 11-12; § III.F.4.) The Class Notice will advise the Class Members of their right to object to the Settlement and will include instructions for submitting an objection. (*Id.* at p. 9-12; § III.F.2.) (Williams Decl., ¶ 26.)

Settlement checks that are not cashed or deposited within 180 days will become void and any remaining portion of the Net Settlement Amount will be paid to Public Law Center, 601 W Civic Center Dr., Santa Ana, CA 92701 pursuant to the terms of Code of Civil Procedure section 384. (*Id.* at p. 14; § III.F.10.) (Williams Decl., ¶ 27.)

The Parties have agreed to use Phoenix Settlement Administrators as the Settlement Administrator for the Settlement. (*Id.* at pp. 7-8; § III.E.) Payment of the expenses of the Settlement Administrator from the Gross Settlement Fund shall be made for the expenses of effectuating and administering the Settlement. The Settlement Administrator shall receive payment for services in an amount not to exceed $5,250. (*Id.* at p. 7; § III.B.d.) (Williams Decl., ¶ 28.)

Subject to Court approval, the Agreement provides for Class Counsel to be awarded a sum not to exceed 30% of the Gross Settlement Amount as their Class Counsel Fees Payment. (*Id.* at p. 6; § III.B.d.). Class Counsel will also be allowed to apply separately for an award of litigation expenses in an amount not to exceed $20,000. (*Id.*) In support of this request, Class Counsel will provide evidentiary support, including lodestar. Subject to Court approval, the Agreement provides for payment of Class Representative Service Payment of no more than $15,000 to Plaintiff, or such lesser amount as may be approved by the Court at final approval.[1] (*Id.* at p. 6; § III.B.a.) Defendant agrees not to oppose a request for attorneys' fees, costs and a service award consistent with the Agreement. (*Id.* at p. 6; § III.B.) (Williams Decl., ¶ 29.)

Subject to Court approval, $30,000 will be paid from the Gross Settlement Amount for settlement of civil penalties under PAGA, Labor Code Section 2698 *et seq.* Pursuant to the requirements of Labor Code §2699(i) the PAGA Payment shall be allocated $22,500 to the LWDA and $7,500 allocated to the Net Settlement Amount for distribution to the Participating Class Members. (*Id.* at p. 6-7; § III.B.c.) (Williams Decl., ¶ 30.)

III. CASE BACKGROUND

On April 28, 2021, Plaintiff Patrick Burns filed this class and representative PAGA action against Defendant. The operative Second Amended Complaint alleges claims for: (1) Violation of California Labor Code §§ 510, 1194, and 1197.1 (Unpaid overtime Wages); (2) violation of California Labor Code § 2802(a) (Failure to Indemnify Necessary Expenditures); (3) Violation of

[1] Plaintiff will address the reasonableness of this award when filing his final approval papers, including the enhancement factors set forth in *Golba v. Dick's Sporting Goods*, *Inc.*, (2015) 238 Cal. App. 4th 1251 and *Clark v. Am. Residential Servs. LLC,* (2009) 175 Cal. App. 4th 785.

California Labor Code §§ 226.7, 226.7(b), and 512 (Meal periods); (4) Violation of California Labor Code § 226.7 (Rest Breaks); (5) Violation of California Labor Code § 226 (Wage Statements); (6) Violation of California Business & Professions Code §§ 17200, *et seq.*; (7) Civil Penalties Under The Private Attorneys General Act, Labor Code §§ 2698, *et seq.*; (8) Violation of the Fair Labor Standards Act, 29 U.S.C. §§ 201, *et seq.* ("FLSA"). (Williams Decl., ¶ 3.)

Defendant is a division of L3Harris Technologies, a publicly traded defense contractor. Plaintiff seeks to represent a class of approximately 46 individuals employed by Paragon in California as Field Service Engineers ("FSE(s)"). Plaintiff contends that Defendant uniformly misclassified Plaintiff and the Class as "exempt" and failed to pay Class Members overtime, failed to provide regular meal and rest periods and failed to reimburse necessary work-related expenses. Defendant vigorously denies these allegations. Plaintiff was employed by Defendant as an FSE from in or about 2011 through July 16, 2021. (*Id.*, ¶ 4.)

Defendant removed this case to the United States District Court for the Central District of California on September 3, 2021. Following removal, Plaintiff conducted extensive discovery, including propounding written interrogatories and document demands. After extensive meet and confer efforts, Plaintiff filed a motion to compel the production of documents, together with responses for interrogatories. Following the District Court's ruling on the motion, Defendant produced documents and data sufficient to support a motion for class certification. In particular, Plaintiff obtained copies and descriptions of relevant policies and procedures, job descriptions, and a representative sampling of Class Member payroll data. Class Counsel also obtained class member contact information and interviewed and obtained declarations from numerous Class Members in support of Plaintiff's motion for class certification. (*Id.*, ¶¶ 5-6.)

In addition, Plaintiff took the deposition of Defendant's corporate representative and person most knowledgeable, Mark Levin, and Defendant took Plaintiff's deposition. Class Counsel filed Plaintiff's motion for class certification on June 18 2022. On January 31, 2023, after Plaintiff's motion for class certification was fully briefed, but before the hearing on the motion, the parties mediated the case with mediator Louis Marlin. The discovery provided by Defendant, which including payroll data, was sufficient for Plaintiff to evaluate the merits of the case and associated risks, thereby informing Plaintiff's decision to settle the matter. After an all-day mediation, the parties reached an agreement in principle to settle the dispute. That agreement was thereafter documented in a Memorandum of Understanding on March 2, 2023. The Parties then prepared the full Agreement, which was signed by all counsel and the Parties and is now presented to this Court for preliminary approval. Plaintiff and Class Counsel believe that this Settlement is fair, reasonable, and adequate. (*Id.*, ¶ 7.)

Although a settlement has been reached, Defendant denies any liability or wrongdoing of any kind associated with the claims alleged in the Action and further denies that, for any purpose other than settlement, the Action is appropriate for class treatment. Defendant denies that it has failed to comply with any provisions of the California Labor Code or the FLSA. Further, Defendant contends that class certification would be inappropriate for any reason other than for settlement. (*Id.*, ¶ 8.)

Plaintiff contends that Defendant misclassified FSEs as "exempt" and failed to pay FSEs for time worked in excess of eight hours per day and/or forty hours per week, including pay at applicable overtime rates. Plaintiff further contends that Defendant failed to provide California FSEs with regular and code-compliant meal and rest periods and did not pay required premiums for such missed breaks. (*Id.*, ¶ 9.)

Plaintiff further contends that the Action is appropriate for class certification on the basis that the Plaintiff's claims meet the requisites for class certification. Without admitting that class certification is proper, Defendant has stipulated that the Class may be certified for settlement purposes only. The Parties agree that certification for settlement purposes is not an admission that class certification would be proper or that Plaintiff would be an adequate class representative if the class certification issues were litigated. Further, the Agreement is not admissible in this or any other proceeding as evidence that the Class could be certified absent a settlement. (*Id.*, ¶ 10.)

Class Counsel have conducted a thorough investigation and have diligently evaluated the class claims against Defendant. Class Counsel have reviewed in detail the documents and other information provided by the Defendant in discovery. Class Counsel have similarly evaluated information provided by Plaintiff and other members of the Class. Based on this information and investigation, Class Counsel believe that the settlement with Defendant on the terms set forth in the Agreement is fair, reasonable, and adequate and are in the best interest of the Class in light of all known facts and circumstances, including the risks of continued litigation, the risk that class certification will be denied, together with the risk the result of trial, continued delay and potential appellate issues. (*Id.*, ¶ 11.)

IV. THE SETTLEMENT MEETS THE CRITERIA NECESSARY FOR THIS COURT TO GRANT PRELIMINARY APPROVAL

When a proposed class-wide settlement is reached, the settlement must be submitted to the court for approval. (2 H. Newberg & A. Conte, *Newberg on Class Actions* (3d ed. 1992) at §11.41, p.11-87). California "[p]ublic policy generally favors the compromise of complex class action litigation." (*Nordstrom Comm'n Cases* (2010) 186 Cal. App. 4th 576, 581 quoting *Cellphone Termination Fee Cases* (2009 180 Cal.App.4th 1110, 1117-18).) Class action settlements are approved where the proposed settlement is "fair, adequate and reasonable." (*Dunk v. Ford Motor Co*. (1996) 48 Cal.App.4th 1794, 1801 [citing *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 625 (9th Cir. 1982), cert. denied, 459 U.S. 1217 (1983)].

Preliminary approval is the first of three steps that comprise the approval procedure for settlements of class actions. The second step is the dissemination of notice of the settlement to all Class Members. The third step is a final settlement approval hearing, at which evidence and argument concerning the fairness, adequacy, and reasonableness of the settlement may be presented and Class Members may be heard regarding the settlement. (*See Dunk v. Ford Motor Co.*, 48 Cal.App.4th 1794, 1801 (1996); *Manual for Complex Litigation, Second* §30.44 (1993); Cal. Rules of Court, rule 3.769.)

The primary question presented on an application for preliminary approval of a proposed class action settlement is whether the proposed settlement is "within the range of possible approval." (*Manual for Complex Litigation*, Second § 30.44 at 229; *Gautreaux v. Pierce*, 690 F.2d 616, 621 n.3 (7th Cir. 1982).[2] Preliminary approval is merely the prerequisite to giving notice so that "the proposed settlement... may be submitted to members of the prospective Class for their acceptance or rejection." (*Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp.*, 323 F. Supp. 364, 372 (E.D. Pa. 1970); *Sayaman v. Baxter Healthcare Corp*., 2010 U.S. Dist. LEXIS 151997, *3 (C.D. Cal. 2010)). There is an initial presumption of fairness when a proposed settlement, which was negotiated at arm's length by counsel for the Class, is presented for court approval. (*Newberg*, 3d Ed.,§11.41, p.11-88; *Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 245 [citation omitted]; see also *Cho v. Seagate Tech. Holdings, Inc.*, (2009) 177 Cal. App. 4th 734, 742-45 [upholding trial court's determination that settlement was "fair, reasonable and adequate" where the settlement "provided valuable benefits to the class … that were 'particularly valuable in light of the risks plaintiff would have faced if she proceeded to litigate her case.'"). However, the ultimate question of whether the proposed settlement is fair, reasonable, and adequate is made after notice of the settlement is given to the Class Members and a final settlement hearing is held by the Court.

A. The Role of The Court in Preliminary Approval of a Class Action Settlement

The approval of a proposed settlement of a class action suit is a matter within the broad discretion of the trial court. (*Wershba v. Apple Computer, Inc.,* 91 Cal.App.4th 224, 234-235 (2001); *Dunk v. Ford Motor Co.* 48 Cal.App.4th 1794 (1996)). Preliminary approval does not require the trial court to answer the ultimate question of whether a proposed settlement is fair, reasonable, and adequate. That final determination is made only after notice of the settlement has been given to the class members and after they have been given an opportunity to voice their views of the settlement or to be excluded from the settlement. (3B J. Moore, *Moore's Federal Practice* §§23.80 - 23.85 (2003)).

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[2] California courts look to federal authority on class actions. *Vasquez v. Superior Court*, 4 Cal.3d 800, 821 (1971). "It is well established that in the absence of relevant state precedents trial courts are urged to follow the procedures prescribed in Rule 23 of the Federal Rules of Civil Procedure for conducting class actions." *Frazier v. City of Richmond*, 184 Cal. App.3d 1491, 1499 (1986), *citing Green v. Obledo*, 29 Cal.3d 126, 145-146 (1981).

In considering a potential settlement for preliminary approval purposes, the trial court does not have to reach any ultimate conclusions on the issues of fact and law which underlie the merits of the dispute, and need not engage in a trial on the merits. (*Wershba*, *supra*, 91 Cal.App.4th at 239-40; *Dunk*, *supra*, 48 Cal.App.4th at 1807). The Ninth Circuit explains, "the very essence of a settlement is compromise, 'a yielding of absolutes and an abandoning of highest hopes.'" (*Officers for Justice v. Civil Service Com'n of City and County of S.F.*, 688 F.2d 615, 624 (9th Cir. 1982). The question whether a proposed settlement is fair, reasonable, and adequate necessarily requires a judgment and evaluation by the attorneys for the parties based upon a comparison of "'the terms of the compromise with the likely rewards of litigation.'" (*Weinberger v. Kendrick*, 698 F.2d 61, 73 (2d Cir. 1982), cert. denied 464 U.S. 818 (1983) (quoting *Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424-25 (1968))). Thus, when analyzing the settlement, the amount is "not to be judged against a hypothetical or speculative measure of what might have been achieved by the negotiators." (*Officers for Justice*, 688 F.2d at 625, 628).

With regard to class action settlements, the opinions of counsel should be given considerable weight both because of counsel's familiarity with this litigation and previous experience with cases such as these. (*Officers for Justice*, 688 F.2d 615, 625 (9th Cir. 1982); *In re Wash. Public Power Supply System Sec. Litig.*, 720 F. Supp. 1379, 1392 (D. Ariz. 1989); *Kirkorian v. Borelli*, 695 F. Supp. 446, 451 (N.D. Cal. 1988); *Weinberger*, 698 F.2d at 74). For example, in *Lyons v. Marrud, Inc.*, [1972-1973 Transfer Binder] Fed. Sec. L. Rep. (CCH) Paragraph 93,525 (S.D.N.Y. 1972), the court noted that "[e]xperienced and competent counsel have assessed these problems and the probability of success on the merits.... The parties' decision regarding the respective merits of their position has an important bearing." (*Id.* at ¶ 92,520). "The recommendations of plaintiffs' counsel should be given a presumption of reasonableness." (*Boyd v. Bechtel Corp.*, 485 F.Supp. 610, 622 (N.D. Cal. 1979)). As a result, courts hold that the recommendation of counsel is entitled to significant weight. (*Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 528 (C.D. Cal. 2004)).

B. Factors To Be Considered In Granting Preliminary Approval

A number of factors are to be considered in evaluating a settlement for purposes of preliminary approval. In determining whether to grant preliminary approval, the court considers whether the "(1) the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, (2) has no obvious deficiencies, (3) does not improperly grant preferential treatment to class representatives or segments of the class, and (4) falls within the range of possible approval." (*In re Tableware Antitrust Litig.*, 484 F.Supp. 2d 1078, 1079 (N.D. Cal. 2007)). No one factor should be determinative, but rather all factors should be considered. The analysis has been summarized as follows:

> If the proposed settlement appears to be the product of serious, informed, noncollusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class, and falls within the range of possible approval, then the court should direct that notice be given to the class members of a formal fairness hearing, at which evidence may be presented in support of and in opposition to the settlement. (*Manual of Complex Litigation, Second* §30.44, at 229).

Here, the Settlement meets all of these criteria for preliminary approval.

1. The Settlement is the Product of Serious, Informed and Arm's Length Negotiations by Experienced Counsel

This settlement is the result of extensive 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. Plaintiff and Class Counsel have determined that it is desirable and beneficial to the Class Members to put to rest the Released Class Claims.[3]

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[3] Released Claims are defined as all claims alleged in the operative complaints in the Action, or that could have been alleged arising out of or reasonably related to the facts in the operative complaints in the Action or any amendments thereto and which accrued during the Class Period and includes all claims arising out of or relating to the alleged misclassification of Settlement Class Members, and any claims based on state, federal, local, or common law for unpaid wages, minimum wages, regular wages, overtime wages, working more than six days in seven, expense reimbursement, wage statements, payroll recordkeeping, reporting time, improper deduction of wages, failure to provide workers' compensation insurance, meal period premiums and/or penalties, rest break premiums and/or penalties, sick leave, final pay, timely payment of wages, waiting time penalties, and unfair business practices. (Agreement at p. 3; §I.W.)

The Parties attended an arms-length private mediation before Louis Marlin, a respected and experienced mediator of class and PAGA actions and wage and hour lawsuits. Prior to the mediation, the parties engaged in extensive discovery, through which Plaintiff obtained copies of relevant policies and procedures, job descriptions and a representative sampling of Class Member payroll data. (*Id.*, ¶¶ 6-7.) Plaintiff's Counsel analyzed this information and prepared and submitted a mediation brief to Mediator Marlin. On January 31, 2023, the Parties participated in a full day mediation. After reaching an agreement on the broad terms of the settlement, the Parties entered into an agreement in the form of a Memorandum of Understanding. The Parties then prepared the full Agreement, which was signed by all counsel and the Parties and is now presented to this Court for preliminary approval. Plaintiff and Class Counsel believe that this Settlement is fair, reasonable, and adequate. (*Id.*, ¶ 7.)

Class Counsel have conducted a thorough investigation into the facts of the class action. Class Counsel have diligently evaluated the Class Members' claims against Defendant. Class Counsel reviewed discovery materials provided by Defendant. Class Counsel conducted review of data. Based on the foregoing data and their own independent investigation, evaluation and experience, Class Counsel believe that the settlement with Defendant on the terms set forth in the Agreement is fair, reasonable, and adequate and are in the best interest of the Class in light of all known facts and circumstances, including the risk of significant delay, the defenses asserted by Defendant, and potential appellate issues. (*Id.*, ¶ 11.)

Plaintiff and Class Counsel recognize the expense and length of continuing to litigate and trying the Action against Defendant through possible appeals which could take several years. Class Counsel have also considered the uncertain outcome and risk of litigation, especially in complex actions such as the Action. (*Id.*, ¶ 12.)

Class Counsel are also mindful of, and recognize, the inherent problems of proof under, and asserted defenses to, the claims asserted in the Action. Based upon their evaluation, Plaintiff and Class Counsel have determined that the settlement set forth in the Agreement is in the best interest of the Class Members. (*Id.*, ¶ 13.)

The Parties are represented by experienced and capable counsel who have zealously advocated their respective positions with the assistance of an experienced mediator. Accordingly, "[t]here is likewise every reason to conclude that settlement negotiations were vigorously conducted at arms' length and without any suggestion of undue influence." (*In re Wash. Public Power*, 720 F. Supp. at 1392).

2. The Settlement Has No "Obvious Deficiencies" and Falls Within the Range of Reasonableness Sufficient for Approval.

The proposed Settlement has no "obvious deficiencies" and is well within the range of possible approval. All Class Members will receive an opportunity to participate in the Settlement and receive payment according to the same formula if they do not opt out.

The amounts to compensate the Class Members for the alleged violations at the time this Settlement was negotiated were calculated by Class Counsel. Class Counsel analyzed the data and determined the potential recovery for the employees. For unpaid overtime, premiums for missed meal and rest periods and unreimbursed expenses, Class Counsel estimates that Class Members are owed $1,662,000. (Williams Decl., ¶ 14).

Although Class Counsel is confident that the Action is appropriate for certification and that a judgment exceeding $1 million could be obtained at trial, the inherent risks and cost of class action litigation weigh in favor of settlement. Of particular concern in this case is the possibility that (1) the court will deny Plaintiff's motion for class certification and (2) that Plaintiff could be found to be non-exempt under state and federal law. (Williams Decl., ¶ 15).

Defendant contends that class certification is inappropriate because Plaintiff is not "typical" of the other FSEs he seeks to represent and that individual issues predominate. In particular, Defendant argues that Plaintiff, one of the most senior FSEs, had executive and managerial responsibilities, including participation in training, hiring decisions and supervision of other FSEs. Although Plaintiff disputes that Plaintiff could meet the "executive" or "administrative" exemption under state or federal law, Class Counsel recognizes that there is substantial risk that class certification could be denied on this basis. (*Id.*, ¶ 16.)

Where both sides face significant uncertainty, the attendant risks favor settlement. (*Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998)). Here there is significant risk for Defendant that Plaintiff's motion for class certification will be granted and that Plaintiff will prevail on the merits at trial. Similarly, although Class Counsel remains confident in Plaintiff's claims, counsel recognizes the significant risk that class certification will be denied. Class Counsel is also cognizant of the significant risks to the class claims at trial even if class certification is granted. (*Id.*, ¶ 17.)

After arm's-length negotiations between experienced and informed counsel, the Parties recognized the potential risks and agreed on the settlement of $600,000. As the federal court recently held in *Glass v. UBS Fin. Servs.*, 2007 WL 221862 at *4 (N.D.Cal. Jan. 27 2007), where the parties faced uncertainties similar to those here:

> 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.

3. The Settlement Does Not Improperly Grant Preferential Treatment to Class Representative or Segments of The Class

The relief provided in the settlement will benefit all members of the Class. The settlement does not grant preferential treatment to Plaintiff or segments of the Class in any way, and payments to the Class Members are all determined under a neutral methodology. All Class Members will receive the same opportunity to participate in and receive payment through a neutral formula that is based upon the weeks worked for that individual.

Plaintiff will apply to the Court for a service payment in consideration for his service, broad release, and for the risks undertaken on behalf of the Class. (Agreement at pp. 1-2, 6, 15; § I.I., III.B.a., III.G.2.) Plaintiff performed his duties admirably by working with Class Counsel. (*Id.*, ¶ 18.) The requested Plaintiff's service payment is well within the accepted range of awards for purposes of preliminary approval. *See e.g. Mathein v. Pier 1 Imps. (U.S.), Inc.,* 2018 U.S. Dist. LEXIS 71386 (E.D. Cal. 2018) (awarding $12,500 where average class member payment was $351); *Holman v. Experian Info. Solutions, Inc.*, 2014 U.S. Dist. LEXIS 173698 (N.D. Cal. 2014) (approving $10,000 service award where class member recovery was $375); *Rausch v. Hartford Fin. Servs. Grp.*, 2007 U.S. Dist. LEXIS 14740, 2007 WL 671334 (D. Or. 2007) (approving award of $10,000 where class member recoveries were as little as $150); (awarding $25,000 service award to each of six plaintiffs in overtime class action); *Glass v. UBS Fin. Servs.*, 2007 WL 221862, *16-17 (N.D.Cal. 2007) (awarding $25,000 service award in overtime class action and a pool of $100,000.00 in enhancements). As explained in *Glass*, service awards are routinely awarded to class representatives to compensate the employees for the time and effort expended on the case, for the risk of litigation, for the fear of suing an employer and retaliation there from, and to serve as an incentive to vindicate the statutory rights of all employees. 2007 WL 221862 at *16-17.

4. The Stage of The Proceedings Are Sufficiently Advanced to Permit Preliminary Approval of The Settlement

The stage of the proceedings at which this settlement was reached also militates in favor of preliminary approval and ultimately, final approval of the settlement. Class Counsel has conducted a thorough investigation into the facts of the class action. Class Counsel began investigating the Class Members' claims before this Action was filed. The parties engaged in substantial discovery, including the production of documents, obtaining responses to interrogatories, and took key depositions. In addition, Plaintiff's motion for class certification was fully briefed. (Williams Decl., ¶ 19.) Class Counsel engaged in a thorough research and analysis of the relevant claims and class member data. Class Counsel are also experienced with the claims at issue here, as Class Counsel previously litigated and settled similar claims in numerous other actions. Accordingly, the agreement to settle did not occur until Class Counsel possessed sufficient information to make an informed judgment regarding the likelihood of success on the merits and results that could be obtained through further litigation. (*Id.*, ¶ 20.)

Class Counsel is of the opinion that the settlement with Defendant for the terms set forth in the Agreement is fair, reasonable, and adequate and is in the best interest of the Class in light of all known facts and circumstances, including the risk of obtaining class certification, significant additional delay, defenses asserted by Defendant, and numerous potential appellate issues. Counsel for both Parties possessed sufficient information to make an informed judgment regarding the likelihood of success on the merits and the results that could be obtained through further litigation. (*Id.*, ¶ 21.)

In *Glass*, the Northern District of California granted final approval of an unpaid wages action although in *Glass* no formal discovery had been conducted prior to the settlement:

> Here, no formal discovery took place prior to settlement. As the Ninth Circuit has observed, however, "[i]n the context of class action settlements, 'formal discovery is not a necessary ticket to the bargaining table' where the parties have sufficient information to make an informed decision about settlement." *See In re Mego Financial Corp. Securities Litigation*, 213 F.3d at 459. (*Glass*, 2007 U.S. Dist. LEXIS 8476 at *14).

Here, Class Counsel was in an even stronger position to evaluate the fairness of this settlement because Class Counsel had the more information available.

V. THE CLASS IS PROPERLY CERTIFIED FOR SETTLEMENT PURPOSES

Plaintiff contends that the proposed settlement meets all the requirements for class certification under the California Code of Civil Procedure §382 as demonstrated below, and therefore, the Court may appropriately approve the Class as defined in the Agreement. This Court should conditionally certify the Class for settlement purposes only, defined as follows:

> All current and former Field Service Engineers (which includes individuals who held the following positions: Principal Field Service Engineer II/Senior Specialist Field Engineering; Specialist, Field Engineering/Principal Field Engineer; Senior Associate Field Engineering/Field Engineer) Employed by Power Paragon, Inc. from April 28, 2017 to through the date of preliminary approval.

(Agreement at p. 1; § I.B.)

The Class Period is the period from April 28, 2017 to through the date of preliminary approval. Based on information provided by Defendant in discovery, Class Counsel estimates that there are 46 Class Members. (Williams Decl., ¶¶ 4, 22, 31.)

A. California Code of Civil Procedure § 382

Plaintiff seeks certification of this Class for settlement purposes under California Code of Civil Procedure § 382. The California Supreme Court has summarized the standard for determining whether class certification is appropriate as follows:

> Code of Civil Procedure Section 382 authorizes class actions "when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court...." The party seeking certification has the burden to establish the existence of both an ascertainable class and a well-defined community of interest among class members. (*citations omitted*). The "community of interest" requirement embodies three factors: (1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class.

Sav-On Drug Stores, Inc. v. Superior Court, 34 Cal. 4th 319, 326 (2004)).

While Defendant reserves all rights to dispute that the Plaintiff can satisfy any of these requirements, Defendant will not dispute that these requirements may be satisfied in this case for purposes of settlement and therefore, the proposed Class should be certified for purposes of settlement only. (Agreement at p. 5; § II.I.)

B. The Proposed Class Is Ascertainable and Sufficiently Numerous

The Class is ascertainable and the identities and contact information for all Class Members can readily be determined through examination of Defendant's employment files. Given that the class consists of approximately 46 members, numerosity is easily satisfied. (*See Bowles v. Superior Court*, 44 Cal.2d 574 (1955) (class with 10 members sufficiently numerous); *Rose v. City of Hayward*, 126 Cal.App.3d 926, 934 (1981) (class of 48 members satisfies numerosity requirement.)). Here, the approximately 46 current and former employees that comprise the Class can be identified based on Defendant's records and are sufficiently numerous for class certification. (Decl. Williams at ¶ 31.)

C. Common Issues of Law and Fact Predominate

Predominance of common issues of law or fact does not require that the common issues be dispositive of the entire controversy or even that they be dispositive of all liability issues. (1 *Newberg on Class Actions*, Section 4.25 at 4-82, 4-83 (1992)). "Predominance is a comparative concept, and 'the necessity for class members to individually establish eligibility and damages does not mean individual fact questions predominate.'" (*Sav-On*, 34 Cal. 4th at 334).

Commonality exists if there is a predominant common legal question regarding how an employer's policies impact its employees. Whether Plaintiff is likely to prevail on his theory of recovery is irrelevant at the certification stage since the question is "essentially a procedural one that does not ask whether an action is legally or factually meritorious." (*Linder v. Thrifty Oil Co.*, 23 Cal. 4th 429, 439-440 (2003)).

Here, Plaintiff contends that common questions of law and fact are present, and specifically the common questions of whether: (1) Plaintiff and Class Members were exempt and whether they are entitled to overtime pay under both California and federal law; (2) whether Plaintiff and Class are owed premiums for missed meal and rest periods and (3) whether Defendant adequately reimbursed its employees for work-related expenses. (Williams Decl., ¶ 32.) Defendant does not oppose such a finding for purposes of this settlement only.

D. The Claims of the Plaintiff Are Typical of the Class Claims

The typicality requirement requires Plaintiff to demonstrate that the members of the class have the same or similar claims as Plaintiff. "The typicality requirement is met when the claims of the Plaintiff [] arise from the same event or are based on the same legal theories." (*Tate v. Weyerhaeuser Co.*, 723 F.2d 598, 608 (8th Cir. 1983)). In *Hanlon v. Chrysler Co.*, 150 F.3d 1011 (9th Cir. 1998), the Ninth Circuit held that "[u]nder the rule's permissive standards, representative claims are 'typical' if they are reasonably coextensive with those of absent class members; they need not be substantially identical." 50 F.3d at 1020.

In the instant case, Plaintiff contends that the typicality requirement is fully satisfied. Plaintiff, like every other member of the Class was employed by Defendant as a delivery driver is a member of the Class, as set forth in the Agreement. Plaintiff was subject to the same employment practices concerning reimbursement of costs he incurred in furnishing a personal vehicle and cellular telephone for work purposes as all other Class Members. Thus, the claims of Plaintiff and the Class Members arise from the same course of conduct by the Defendant, involve the same employment policies, and are based on the same legal theories. (Williams Decl., ¶ 33.) For purposes of settlement, the typicality requirement is met as to the common issues presented in this case. Defendant will not oppose such a finding for purposes of this settlement only.

E. The Class Representative Fairly and Adequately Protected the Class

Plaintiff contends that the Class Members are adequately represented here because Plaintiff and Class Counsel (a) do not have any conflicts of interest with other class members, and (b) will prosecute the case vigorously on behalf of the class. First, Plaintiff is aware of his duties as representative of the Class and has actively participated in the prosecution of this case to date. Plaintiff effectively communicated with counsel, provided documents to counsel and participated in discovery, investigation and negotiations in the Action. Second, Plaintiff retained competent counsel who is experienced in employment class actions. Third, there is no antagonism between the interests of Plaintiff and those of the Class. Both the Plaintiff and the Class Members seek monetary relief under the same set of facts and legal theories – namely that Defendant failed to reimburse for expenses incurred in furnishing personal vehicle and cellular telephones for work purposes. (Williams Decl., ¶ 34.)

F. The Superiority Requirement Is Met

To certify a class, the Court must also determine that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. "Where classwide litigation of common issues will reduce litigation costs and promote greater efficiency, a class action may be superior to other methods of litigation." (*Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996)). As courts have previously observed:

> Absent class treatment, each individual plaintiff would present in separate, duplicative proceedings the same or essentially the same arguments and evidence, including expert testimony. The result would be a multiplicity of trials conducted

> at enormous expense to both the judicial system and the litigants. “It would be neither efficient nor fair to anyone, including defendants, to force multiple trials to hear the same evidence and decide the same issues.”

Sav-On, 34 Cal. 4th at 340, citing *Boggs v. Divested Atomic Corp.*, 141 F.R.D. 58, 67 (S.D. Ohio 1991)).

Here, a class action is the superior mechanism for resolution of the claims as pled by the Plaintiff. While Defendant would dispute that the superiority requirement may be satisfied in the absence of a settlement, it will not dispute such a finding for purposes of this settlement only.

VI. THE PROPOSED METHOD OF CLASS NOTICE IS APPROPRIATE

The Court has broad discretion in approving a practical notice program. The Parties have agreed upon procedures by which the Class Members will be provided with written notice of the Settlement similar to that approved and utilized in hundreds of class action settlements. In accordance with the Agreement, within 21 days after the Court enters its order granting Preliminary Approval of the Settlement, Defendant will provide to the Settlement Administrator an electronic database containing the Class Data. Within 14 days after receiving the Class Data, the Settlement Administrator will mail the Class Notice to all Class Members via first-class regular U.S. Mail to their last known addresses. (Agreement at p. 9; § III.F.2.)

The Class Notice, drafted jointly and agreed upon by the Parties through their respective counsel and to be approved by the Court, includes all relevant information. The Class Notice will include, among other information: (i) information regarding the Action; (ii) the impact on the rights of the Class Members if they do not opt out; (iii) information to the Class Members regarding how to opt out and how to object to the Settlement; (iv) the estimated settlement payment for each of the Class Members; (v) the amount of attorneys’ fees and litigation expenses to be sought; (vi) the amount of the Plaintiff’s service award request; (vii) the amount being paid to the LWDA; and (viii) the administration fees to be paid to the Settlement Administrator. (Williams Decl., ¶ 33.) (The proposed Class Noice is **Exhibit A** to the Settlement Agreement.)

The Class Notice will state that the Class Members shall have forty-five (45) days from the date that the Class Notice is mailed to them to request exclusion or to submit an objection. (Agreement at pp. 10-12; § III.F.4.). The Class Members will be given an opportunity to object to the terms of the Agreement and/or the request for attorneys' fees and costs and to participate at the final approval hearing, in accordance with the instructions set forth in the Class Notice. Class Members will be instructed to only contact the Settlement Administrator and Class Counsel and not the Court. Class Members who do not opt out will automatically receive a settlement payment. No claim form will be required for a Participating Class Member to receive payment. (Agreement at pp. 5, 12; § III.A., III.F.4.c.)

This notice program was designed to meaningfully reach the Class Members and advises them of all pertinent information concerning the settlement. The mailing and distribution of the Class Notice satisfies the requirements of due process and is the best notice practicable under the circumstances and constitutes due and sufficient notice to all persons entitled thereto. The Class Notice provides information on the terms and provisions of the settlement; the benefits that the settlement provides for Class Members; the date, time and place of the final settlement approval hearing; and the procedure and deadline for submitting comments, objections, and requests for exclusion. The Class Notice complies with Rules of Court 3.766 and 3.769(f).

VII. CONCLUSION

Plaintiff respectfully requests that the Court preliminarily approve the proposed settlement and sign the proposed Preliminary Approval Order, which is submitted herewith, and schedule the final fairness hearing for a date that is at least one hundred twenty (120) days after the date of Preliminary Approval.

Dated: August 14, 2023

Law Offices of Corbett H. Williams

By: ______________________________
Attorneys for Plaintiff
PATRICK BURNS