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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO

JORGE LUIS DIAZ BERNAL, individually, and
on behalf of all others similarly situated,

Plaintiff,

vs.

GACHINA LANDSCAPE MANAGEMENT,
INC., a California corporation; and DOES 1
through 10, inclusive,

Defendants.

Case No.: CGC-21-591923

[Hon. Andrew Y.S. Cheng]

CLASS ACTION

**PLAINTIFF'S NOTICE OF MOTION AND
MOTION FOR FINAL APPROVAL OF
CLASS AND REPRESENTATIVE ACTION
SETTLEMENT; MEMORANDUM OF
POINTS AND AUTHORITIES**

Date: September 11, 2024

Time: 9:30 a.m.

Courtroom: Dept. 613

Judge: Hon. Andrew Y.S. Cheng

Action Filed: June 1, 2021

Trial Date: Not Set

1 TO THE COURT, ALL PARTIES, AND THEIR COUNSEL OF RECORD:

2 PLEASE TAKE NOTICE that on September 11, 2024, at 9:30 a.m., in Department 613 of the
3 above-captioned Court, located at 400 McAllister Street, San Francisco, CA 94102, Plaintiff JORGE
4 LUIS DIAZ BERNAL (“Plaintiff”) will and hereby does move this Court for an order:

5 1. Granting class certification of the Class, solely for settlement purposes pursuant to
6 Code of Civil Procedure § 382;

7 2. Finally approving the CLASS ACTION AND PAGA SETTLEMENT
8 AGREEMENT AND CLASS NOTICE (“Settlement” or “Agreement”);

9 3. Appointing counsel for Plaintiff, Moon Law Group, PC, as Class Counsel;

10 4. Appointing Plaintiff as the Class Representative;

11 5. Ruling that Settlement Class Members who did not timely submit requests for
12 exclusion from the settlement as set forth in the Agreement have released their claims against
13 Defendants and the other releasees as set forth in the Agreement;

14 6. Ruling that Settlement Class Members who did not timely object to the settlement
15 pursuant to the terms set forth in the Agreement are barred from prosecuting or pursuing any
16 appeal of the Court’s Order;

17 7. Awarding the sums requested in the Motion;

18 8. Entering a Final Judgment; and,

19 9. Without affecting the finality of the final judgment, reserving continuing
20 jurisdiction over the parties for the purposes of implementing, enforcing and/or administering
21 the settlement as set forth in the Agreement or enforcing the terms of the Final Judgment.

22 Good cause exists to grant this Motion because: (1) the Class meets all of the requirements for
23 class certification for settlement purposes under Code of Civil Procedure § 382; (2) the Settlement
24 Agreement is a fair, adequate, and reasonable compromise of the disputed wage and hour claims asserted
25 by Plaintiff; (3) Plaintiff and Class Counsel are adequate to represent the Class; and, (4) the notice
26 procedures and related forms complied with California Rules of Court 3.766(d) and (e) and this Court’s
27 Order granting preliminary approval of the Settlement, and adequately apprised Class Members of their
28 rights and fully comport with due process.

1 This Motion is made pursuant to Rule 3.769 and Rule 3.1113(e) of the California Rules of Court,
2 which require approval by the Court of a class action settlement and permit the Court to extend the page
3 limit for memoranda.

4 TENTATIVE RULINGS: As a general practice, Department 613 provides tentative rulings for
5 the following types of matters:

- 6 • In general, tentative rulings will only be issued for preliminary and final approval of
7 settlements.
- 8 • The Court may also issue a tentative ruling if the parties need to clarify certain issues for
9 the Court.

10 This Motion is based on this Notice of Motion and Motion, the attached Memorandum of
11 Points and Authorities, the Declarations of H. Scott Leviant, Plaintiff, and the Settlement Administrator
12 in support thereof, all papers and pleadings on file with the Court in this action, all matters judicially
13 noticeable, and on such oral and documentary evidence as may be presented in connection with the
14 hearing on the Motion.

15
16 Respectfully submitted,

17 Dated: August 8, 2024

MOON LAW GROUP, PC

18 By: 
19 _____
20 Kane Moon
21 H. Scott Leviant
22 Mariam Ghazaryan

23
24 Attorneys for Plaintiff
25
26
27
28

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Pursuant to California Rules of Court, Rules 3.769, Plaintiff requests that this Court finally approve the class action settlement set forth in the CLASS ACTION AND PAGA SETTLEMENT AGREEMENT AND CLASS NOTICE (“Settlement” or “Agreement”) with GACHINA LANDSCAPE MANAGEMENT, INC. (“Defendant”).

After informal and formal discovery, the exchange of documents and data, and an arm’s-length mediation session with mediator Marc Feder, Esq., Plaintiff and Defendant (collectively referred to herein as the “Parties”) reached a proposed class action settlement with a gross settlement amount (“GSA”) of **\$1,250,000.00** in compromise of disputed claims asserted on behalf of the below-defined Class consisting of **1,227** Class Members who worked a total of **107,986** workweeks.¹ Plaintiff believes this settlement is a fair, adequate, and reasonable compromise of disputed claims for alleged wage and hour violations and penalties asserted in this case.

Plaintiff now submits this Motion for Final Approval of Class Action Settlement, along with the

¹ After all of the records, including older records in poor condition, were carefully examined and converted to electronic data, it was determined that, while the true workweek count of 107,986 was extremely close to the estimate of 105,000 workweeks, the Class size was much larger. This appears to have occurred for *two* reasons, with data analysis confirming the source of the miscount. First, there were a huge number of Class Members who worked for extremely short durations. For example, about 250 Class Members worked less than two months, and their workweek count was so tiny that it appears that they were overlooked when pulling data on a shift basis, rather than employee basis. In fact, the Class workweek distribution has a very long “tail” of short duration employees. Second, a number of employees with nearly identical names were incorrectly seen as a single person, with their workweeks added together, due, in part, to the use of handwritten timesheets. This left the total workweek count accurate, but the Class size count inaccurate. The meticulous data review process prepared for notice administration, which took longer than expected because of the condition of the records, cleared up the name amalgamation issue and also identified many Class Members who were not counted initially due to their very short employment durations. Turning to data analysis, the Aggrieved Employee count for PAGA purposes is slightly *lower* than estimated (733, instead of 750), revealing that the additional Class Members were concentrated in the earliest part of the Class Period, where the old records in poor condition required much more work to organize than more recent records. The end result is that (1) the value of a workweek is almost unchanged after the final data review, (2) the Class Members with long employment durations during the Class Period will receive settlement shares that are not impacted by the higher Class size, with net payments ranging as high as \$2,000.00 or more for those long duration employees, and (3) more than 350 Class Members with short employment durations during the Class Period will receive net payments of \$105 or less. Dilution is not an issue here, particularly on a per workweek basis, since, by definition, there is no “dilution” when payments are made on a workweek basis and the total workweeks are not materially greater than estimated. (Leviant Decl., ¶ 6(b).)

Settlement (attached to the Declaration of H. Scott Leviant [“Leviant Decl.”], Exhibit 1 thereto). For the Court’s convenience, below, in Part III, is a summary of the key provisions of the Settlement.

II. THE NOTICE PROCESS IS UNDERWAY WITHOUT ISSUE

Plaintiff and Defendant have thus far fulfilled the class notice procedures set forth in the Settlement. The Settlement Administrator, Phoenix Settlement Administrators. (“Phoenix”), sent individual Notices to 1,227 Class Members on July 1, 2024, after a delay while employee records were organized and converted into an electronic format. (Declaration of Mayra Gonzalez, ¶ 5.) 2 Notices were returned, but new addresses were found after skip tracing. (*Id.*, at ¶ 6.) Thus far, there has been two opt outs and **no** objections or workweek disputes received. (*Id.*, at ¶¶ 7-9.) *A supplemental declaration will be filed before the hearing to advise the Court of final opt out and objection totals.*

III. THE MAJOR TERMS OF SETTLEMENT

The provisions of the proposed Settlement include the following:

- Defendant agrees not to oppose certification for purposes of Settlement (Settlement, ¶ 12.1);
- Class: All California persons currently or formerly employed by Defendant as hourly-paid non-exempt employees in the State of California at any time during the Class Period (the “Class Period” is the period from June 1, 2017 to August 3, 2023). “Participating Class Member” means a Class Member who does not submit a valid and timely Request for Exclusion from the Class portion of the Settlement. (Settlement, ¶¶ 1.5, 1.9, 1.12, 1.34.)
- Settlement Amount: Defendant will pay a maximum of **\$1,250,000.00**, referred to as the Gross Settlement Amount (or GSA herein), resulting in an estimated average **gross** workweek value of **\$11.57**.² Settlement, ¶ 1.21; 3.1; Leviant Decl., ¶ 17.);
- Funding of Gross Settlement Amount: Defendant shall fully fund the Gross Settlement Amount, and also fund the amounts necessary to fully pay Defendant’s share of payroll taxes by transmitting the funds to the Administrator no later than 14 days after the Effective Date, or 12 months after August 3, 2023, whichever is later. (Settlement, ¶ 4.3.)

² The gross workweek value at the time of preliminary approval was estimated to be \$11.90, based on 105,000 workweeks. There are 107,986 workweeks in the final data, and the per workweek value is almost unchanged.

- 1 • Class Size: **1,227** individuals who worked **107,986** workweeks. (Settlement, ¶ 4.1.);
- 2 • PAGA Group Size: **731** aggrieved employees, who worked **25,841** Pay Periods
- 3 (Settlement, ¶ 4.1);
- 4 • PAGA Period: June 1, 2020 to August 3, 2023. (Settlement, ¶ 1.30);
- 5 • Escalator Clause: If the number of workweeks in the Class Period exceeds 105,000 by more
- 6 than 12.5%, Defendant will increase the Gross Settlement Amount in the exact proportionate
- 7 amount as to any additional workweeks above 12.5% (i.e., 14.5% more workweeks than
- 8 estimated will result in a 2% proportionate increase in the Gross Settlement Amount).
- 9 (Settlement, ¶ 8.) **The Escalator Clause is not triggered, given that actual workweeks**
- 10 **are 107,986, about 2% above the estimate.**
- 11 • Kullar/Munoz Analysis: Plaintiff addresses the claims analysis herein, at Part V.B.3, and in
- 12 the Declaration of Leviant, at Paragraph 18;
- 13 • No Reversion: The Settlement is a ***non-reversionary*** settlement (Settlement, ¶ 3.1);
- 14 • Certification: Plaintiff addresses certification requisites herein, at Part V.A. Certification
- 15 was addressed in much greater detail in the Motion for Preliminary Approval;
- 16 • No Claim Form: No claim form is required (Settlement., ¶ 3.1);
- 17 • Class Release: The Settlement will release wage-and-hour claims for Participating Class
- 18 Members (those Class Members who do not opt out of the Settlement) all claims that were
- 19 alleged, or reasonably could have been alleged, based on the facts stated in the Operative
- 20 Complaint (Settlement, ¶ 5.2);
- 21 • PAGA Release: Aggrieved Employees and the LWDA will release all claims for PAGA
- 22 penalties that were alleged, or could have been alleged, based on the facts in the PAGA
- 23 Notice, regardless of whether they opt out of the Class Settlement (Settlement, ¶ 5.3);
- 24 • Net Settlement Amount Available to the Class: After deducting Class Counsel's attorneys'
- 25 fees and costs, service payment to Plaintiff, administration costs, and the PAGA penalty,
- 26 the remainder will be available for distribution to Class Members who do not opt out, with
- 27 each Class Member receiving a share based on the number of Workweeks each Class
- 28 Member worked for Defendant within the Class Period. The Net Settlement Amount is

estimated to be at least **\$671,833.33**, resulting in an average **net** payment per Class Member of at least **\$767.81**, before any tax withholdings. (Settlement, ¶ 1.27.)

- Tax Allocation: The amounts distributed to Class Members will be characterized as 20% alleged unpaid wages, 80% to interest and penalties, and PAGA Settlement payments to Aggrieved Employees will be allocated as 100% penalties. (Settlement, ¶¶ 3.2.4.1, 3.2.5.)
- Employer's Portion of Payroll Taxes Paid Separately: Defendant's portion of payroll taxes (e.g., FICA, FUTA, etc.) owed on any settlement payments to Class Members that constitute wages will be paid separate and apart from the GSA (Settlement, ¶ 3.1);
- Settlement Administrator: The notice portion of the Settlement will be administered by a third-party Administrator, Phoenix Settlement Administrators. Phoenix's actual costs for settlement administration are \$15,000.00, due to unexpected additional mailing and processing costs resulting from the larger Class. (Settlement, ¶ 3.2.3; Gonzalez Decl., ¶ 15.) The Class was advised that administration would cost \$12,500.00, and ***Plaintiff's Counsel agrees to pay the additional \$2,500.00 out of their award of fees in this matter so that the information provided to the Class remains as accurate as possible.***
- Class Data for Administration: The Settlement Administrator will receive the Class Data within 15 calendar days of Preliminary Approval, use the National Change of Address ("NCOA") database to update the Class Data, and then use skip tracing on returned Notices (Settlement, ¶¶ 4.2; 1.10);
- Notice: The Notice will issue within 14 days of receipt of the Class List (Settlement, ¶ 7.4.2). The Notice describes how to dispute workweeks, submit an objection in writing, in person, or through an attorney, or request exclusion (Settlement, ¶¶ 7.5 – 7.7);
- Notice Language: Notice will issue in English and Spanish (Settlement, ¶ 1.11; 7.4.2);
- Objections: Objections can be submitted in person, through an attorney, or in writing to the Administrator, with no pre-requisite to being heard (Settlement, ¶¶ 7.7.1 – 7.7.3);
- Exclusion Requests: The procedure for exclusion requests, mailing a request to the Settlement Administrator, is the same as the procedure for submitting a written objection (Settlement, ¶¶ 7.5.1 and 7.7.2);

- 1 • PAGA Allocation: From the GSA, **\$100,000.00** will be allocated to settle claims brought
2 pursuant to the California Private Attorneys General Act, Labor Code § 2699 *et seq.*
3 (“PAGA”), and seventy-five percent (75%), or **\$75,000.00**, will be paid to the California
4 Labor & Workforce Development Agency. (Settlement, ¶ 1.33; 3.2.5);
- 5 • Notice to LWDA: Notice was provided prior to the filing of this Motion. Evidence is
6 attached to the Leviant Declaration;
- 7 • Enhancement/Service Award to Plaintiff: Defendant will not oppose the application for
8 Class Representative Service Payment of up to **\$7,500.00** for Plaintiff, to be paid from the
9 GSA (Settlement, ¶ 3.2.1);
- 10 • Fees and Costs: Defendant will not oppose Class Counsel’s application for fees not to
11 exceed 33 1/3% of the GSA (**\$416,666.67**), and actual costs, in an amount not to exceed
12 **\$24,000.00**, to be paid out of the GSA (Settlement, ¶ 3.2.2). From the fee award, Class
13 Counsel agrees to deduct \$2,500.00 to compensate the Settlement Administrator for
14 additional work required as a result of the larger Settlement Class;
- 15 • Check Void Period: Settlement checks will be valid for 180 days (Settlement, ¶ 4.4.1);
- 16 • Uncashed Checks: Any settlement checks that are mailed to the Class Members and remain
17 uncashed after 180 days of the date of issuance will be cancelled, and the moneys will be
18 directed to the State Controller’s Office, Unclaimed Property Division in the name of the
19 Class Member (Settlement, ¶ 4.4.3);
- 20 • Judgment Notice: Judgment will be posted on the Settlement Administrator’s website after
21 entry (Settlement, ¶ 7.8.1);
- 22 • Confidentiality Provisions: The Settlement permits Class Counsel to discuss the Settlement
23 with Class Members (Settlement ¶ 12.2).

24 (Leviant Decl., ¶¶ 11-12 and Exhibit 1 thereto.)

25 **IV. FACTUAL AND PROCEDURAL BACKGROUND**

26 **A. Plaintiff’s Claims**

27 Plaintiff worked for Defendant as a laborer performing landscaping services. On June 1, 2021,
28 Plaintiff commenced this Action by filing a Complaint alleging causes of action against Defendant for:

1 failure to pay minimum and regular rate wages, failure to pay overtime compensation, failure to provide
2 meal periods, failure to authorize and provide rest breaks, failure to timely pay final wages at termination,
3 failure to provide accurate itemized wage statements, failure to indemnify for necessary business
4 expenses, and Unfair Business Practices. (Leviant Decl., ¶ 4.)

5 Plaintiff sent a letter to the Labor and Workforce Development Agency (“LWDA”), pursuant to
6 California Labor Code § 2699.3, providing notice of his intent to seek civil penalties under the Private
7 Attorneys General Act, California Labor Code § 2698, *et seq.* (“PAGA Letter”). (*Id.* at ¶ 5.) The
8 LWDA did not indicate that it intended to investigate the alleged violations referenced in the letter, and
9 the 65-day time period permitted for the LWDA to provide such a notification expired. On September 17,
10 2021, Plaintiff filed a First Amended Complaint alleging an additional cause of action for violation of the
11 Private Attorneys General Act (“PAGA”). The First Amended Class and Representative Action
12 Complaint is the operative complaint in the Action (the “Operative Complaint.”) (*Id.* at ¶ 5.)

13 **B. Pre-Mediation Data Production and Analysis**

14 The Parties conducted informal and formal discovery and investigation of the facts and law.
15 Such investigation included, *inter alia*, the exchange of extensive data and discoverable information in
16 preparation for the mediation sessions. (Leviant Decl., ¶ 6.) The Parties have analyzed time clock, pay
17 and other data pertaining to Plaintiff and the Class during the relevant Settlement Period, including but
18 not limited to the numbers of former and current members of the Class, average workweeks and pay
19 periods, and average rate of hourly pay. (*Id.*) In addition, Defendant also provided documents reflecting
20 wage and hour policies and practices during the Settlement Period and information regarding the total
21 number of current and former employees in the Class. (*Id.*) Minimal sampling was used; data for most
22 class members was provided to counsel. The margin of error calculation for the sample of the Class in
23 this case is as follows:

24
$$1.96 \sqrt{\frac{0.5(1-0.5)}{76,540}} \sqrt{\frac{95,937-76,540}{95,937-1}} = \text{margin of error}^3 = 0.16\%$$

25
26
27

28 ³ The term “1.96” is derived from a standard deviation table for a 95% confidence interval, known as
a “z-table.” It is not affected by sample or population size. The margin of error is an “overestimate” of

(*Id.*) With a sample of 76,540 shifts out of 95,937 estimated shifts at the time data was collected, Class Counsel calculated that the margin of error, using the population adjustment factor, was no more than 0.16 percent, a highly accurate sample.⁴ (*Id.*)

After reviewing documents regarding Defendant’s wage and hour policies and practices and other information obtained during the exchange of discovery, Class Counsel were able to evaluate the probability of class certification, success on the merits, and the reasonably obtainable maximum monetary exposure for all claims. Class Counsel reviewed these records and prepared a damage analysis prior to mediation. Class Counsel also investigated the applicable law regarding the claims and defenses asserted in the litigation. (Leviant Decl., ¶ 7.)

C. Settlement

On February 28, 2023, the Parties participated in a mediation with Kelly Knight, Esq., which did not result in a settlement of the matter. (Leviant Decl., ¶ 8.) On August 3, 2023, the Parties participated in a second all-day mediation presided over by Marc Feder, Esq., which led to this Agreement to settle the Action. (*Id.*) The Parties discussed at length the burdens and risks of continuing with the litigation as well as the merits of claims and defenses. (*Id.*) After the mediation, the Parties then signed a long form settlement agreement (the “Agreement”). (*Id.*)

Plaintiff and Class Counsel are aware of the burdens of proof necessary to establish liability for the claims asserted in the Action, both generally and in response to Defendant’s defenses thereto. (Leviant Decl., ¶ 9.) Plaintiff and Class Counsel have also taken into account Defendant’s agreement to enter into a Settlement that confers substantial relief upon the Class. (*Id.*)

Based on the foregoing, Plaintiff and Class Counsel have determined that the Settlement set forth

because the variance is presumed to be at its highest value, using $0.5(1-0.5)$ to represent $p*q$ in the variance equation of $(p*q)/n$.

⁴ The margin of error formula does not require an adjustment factor for extremely large populations. A poll of all potential voters in the United States, for example, does not require an adjustment for the population size, since the second radicand in the equation (the fraction in the second radical sign) is effectively equal to 1. This is because the square root of a fraction that is very close to 1 is even closer to 1. Consider a population of 200 million and a sample of 1,000 individuals from that population. The second radicand is the fraction of 200 million minus 1,000, all divided by 200 million minus 1. That is equal to 0.999995. The square root is 0.99999975, which is indistinguishable from 1 when talking about a margin of error percentage even to the nearest tenth of a percent. But when the population size is much smaller, the population size has a major impact on the margin of error for a given sample size.

1 in this Agreement is a fair, adequate, and reasonable Settlement and is in the best interests of the Class.
2 (Leviant Decl., ¶ 10.) Solely for the purpose of settling this case, the parties agree that the requirements
3 for establishing class action certification with respect to this class have been met and are met. (*Id.*) If
4 this Settlement is not approved by the Court for any reason, Defendant reserves the right to contest class
5 certification. (*Id.*) This Settlement, if approved, will result in the termination of the litigation through the
6 entry of the Judgment and the release of all Released Claims for all Class Members, including all within
7 the class definition who have not elected to exclude themselves from the Class. (*Id.*)

8 **V. CLASS DEFINITION**

9 The Class is defined as follows:

10 All California persons currently or formerly employed by Defendant as hourly-paid
11 non-exempt employees in the State of California at any time during the Class Period
12 (the “Class Period” is the period from June 1, 2017 to August 3, 2023). “Participating
13 Class Member” means a Class Member who does not submit a valid and timely
14 Request for Exclusion from the Class portion of the Settlement. (Settlement, ¶¶ 1.5, 1.9,
15 1.12, 1.34.)

16 (Leviant Decl., ¶ 34 and Exhibit 1.)

17 **VI. DISCUSSION**

18 **A. Consistent with the Court’s Findings at the Time of Preliminary Approval, the** 19 **Court Should Certify the Class for Settlement Purposes**

20 Under Code of Civil Procedure § 382, class certification is warranted so long as there is a
21 numerous and ascertainable class with a well-defined community of interest and that a “class action
22 proceeding is superior to other means for a fair and efficient adjudication of the litigation.” *See, e.g., Sav-*
23 *on Drug Stores, Inc. v. Superior Court*, 34 Cal.4th 319, 326, 332 (2004). For purposes of this Settlement
24 only, Defendants stipulate to conditional certification. (Settlement ¶ 12.1.)

25 “The certification question is ‘essentially a procedural one that does not ask whether an action is
26 legally or factually meritorious.’” *Id.*, at 326, quoting *Linder v. Thrifty Oil Co.*, 23 Cal. 4th 429, 439-440
27 (2000). The certification question asks whether the theory of recovery advanced by the plaintiff is likely
28 to prove amenable to class treatment. *See, e.g., Jaimez v. Daiohs USA, Inc.*, 181 Cal. App. 4th 1286,
1298 (2010). As the court noted in *Dunk*, although certification requirements are intended “to protect the
interests of the non-representative class members,” that concern is “protected by the trial court’s fairness

review of the settlement.” *Dunk v. Ford Motor Co.* 48 Cal. App. 4th 1794, 1807 n. 19 (1996). In view of these standards, *as discussed more thoroughly as part of the preliminary approval motion*, the Settlement Class should be certified for settlement. Code Civ. Proc. § 382; Rules of Court, Rule 3.769(c).

B. The Court Should Approve the Settlement Because It Is a Fair, Adequate, and Reasonable Compromise of Disputed Wage Claims

California courts favor settlement. *See, e.g., Stambaugh v. Superior Court*, 62 Cal. App. 3d 231, 236 (1976). Unlike most settlements, class action settlements involve a court approval process that exists to prevent fraud, collusion, and unfairness to class members. *Malibu Outrigger Bd. of Governors v. Superior Court*, 103 Cal.App.3d 573, 578-579 (1980). This approval process consists of preliminary settlement approval, notice being given to class members, and a final fairness and approval hearing being held at which class members may be heard with respect to the settlement. *Id.* For the reasons discussed below, this Court should finally approve the Settlement and enter Judgment.

1. Class Action Settlements Are Subject to Review and Approval.

Any settlement of class litigation must be reviewed and approved by the presiding court. Rules of Court, Rule 3.769(a). Approval occurs in two steps: (1) an early (preliminary) review and (2) a subsequent (final) review after notice has been distributed to the class members. The Preliminary Approval Hearing and Final Approval Hearing coincide with these two steps. The present motion seeks *final approval* and the entry of a Judgment.

To evaluate a settlement, a court must receive “*basic*” information about the nature and magnitude of the claims in question and the basis for concluding that the consideration being paid for the release of those claims represents a reasonable compromise.” *Kullar v. Foot Locker Retail, Inc.*, 168 Cal. App. 4th 116, 133 (2008). But the record need *not* contain an explicit statement of the maximum theoretical recovery. *Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles*, 186 Cal. App. 4th 399, 409 (2010).

2. The Parties Reached the Settlement Through Arms’ Length Negotiations Between Experienced Counsel with the Assistance of a Highly Qualified Mediator After Sufficient Data Was Exchanged to Evaluate Settlement.

A settlement is presumptively fair where it is reached through arms’ length bargaining, based on sufficient discovery and investigation to allow counsel and the court to act intelligently, counsel is

1 experienced in similar litigation, and the percentage of objectors is small. *Dunk*, 48 Cal.App.4th at 1802;
2 *In re Microsoft I-V Cases*, 135 Cal. App. 4th 706, 723 (2006); *7-Eleven Owners for Fair Franchising v.*
3 *Southland Corp.*, 85 Cal. App. 4th 1135, 1146 (2000). In exercising these powers, the overriding concern
4 is to ensure that a proposed settlement is “fair, adequate, and reasonable.” *Dunk*, at 1801, quoting
5 *Officers for Justice v. Civil Serv. Comm’n of San Francisco*, 688 F.2d 615, 625 (9th Cir. 1982).

6 Relevant factors in making this determination, include, but are not limited to:

7 [T]he complexity and likely duration of further litigation, the risk of maintaining class
8 action status through trial, the amount offered in settlement, the extent of discovery
9 completed and the state of the proceedings, the experience and views of counsel, the
presence of a governmental participant, and the reaction of the class members to the
proposed settlement.

10 *Id.* These factors require balancing, are non-exhaustive, and, trial courts should tailor the factors to each
11 case and give due regard to “what is otherwise a private consensual agreement between the parties.” *Id.*

12 Here, the Settlement resulted from thorough, arms’ length negotiations between experienced
13 counsel with the assistance of two highly regarded mediators, Kelly Knight, Esq. and Mark Feder, Esq.
14 (Leviant Decl., ¶¶ 8-10.) With respect to the claims at issue in this case, Plaintiff obtained data from
15 Defendant and then carefully reviewed that information. Counsel for Plaintiff also examined relevant
16 policies and interviewed witnesses in detail about their work experiences and Defendant’s practices.

17 Based on that review, Plaintiff estimated potential exposure and then estimated risk factors to
18 adjust the reasonable expected outcome. The investigation that Plaintiff’s counsel conducted was
19 sufficient to provide them with enough information to intelligently evaluate the estimated exposure for
20 purposes of negotiating the Settlement in view of the risks discussed below and was sufficient to allow
21 this Court to do the same. *See, e.g., Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 245 (2001).

22 **3. The Settlement Represents a Fair, Adequate, and Reasonable Compromise**
23 **of Class Members’ Claims Based on Defendant’s Estimated Liability**
24 **Exposure Given the Risks Continued Litigation Would Entail.**

25 A settlement is not judged against what might have been recovered had a plaintiff prevailed at
26 trial and does not have to provide 100% of damages sought to be fair and reasonable. “In the context of a
27 settlement agreement, the test is not the maximum amount plaintiffs might have obtained at trial on the
28 complaint, but rather whether the settlement is reasonable under all of the circumstances.” *Wershba*, 91

1 Cal. App. 4th at 250. Accordingly, because settlements involve compromise, even one that provides for
2 substantially narrower relief than would likely be obtained if the suit were successfully litigated can be
3 reasonable given that “the public interest may indeed be served by a voluntary settlement in which each
4 side gives ground in the interest of avoiding litigation.” *Id.*

5 With respect to the claims asserted on behalf of the Class in this case, there are serious risks that
6 support this compromise amount. These risks include, but are not limited to: (i) the risk that Plaintiff
7 would be unable to establish liability for unpaid wages, *see Duran v. US Bank Nat’l Ass’n*, 59 Cal. 4th 1,
8 39 & n. 33 (2014) (“*Duran*”); (ii) the risk that Defendant’s meal and rest period policies might not
9 ultimately support class certification or a class-wide liability finding; (iii) the risk that uncertainties about
10 the ultimate legality of Defendant’s policies and practices could preclude class-wide awards of statutory
11 penalties; (iv) the risk that individual differences between Class Members could be construed as
12 pertaining to liability and not solely to damages; (v) the risk that any civil penalties award under PAGA
13 could be reduced by the Court in its discretion; (vi) the risk that lengthy trial or appellate litigation could
14 ensue; and, (vi) the risk that violation rate estimates could prove lower than expected. (Leviant Decl., ¶
15 16.) These risks are non-exhaustive.

16 In light of the uncertainties of protracted litigation, the settlement amount reflects a fair and
17 reasonable recovery for the Class Members. (Leviant Decl. ¶¶ 13-20.) The settlement amount is, of
18 course, a compromise figure. (Leviant Decl. ¶ 17.) By necessity it took into account risks related to
19 liability, damages, and the defenses asserted by Defendant. (*Id.*) Moreover, each Class Member will be
20 given the opportunity to opt-out of the Settlement, allowing those who feel they have claims that are
21 greater than the benefits they can receive under this Settlement to pursue their own claims. (*Id.*) For the
22 approximately **1,227** members of the Class, the average **gross** value of a workweek is **\$11.57**. (*Id.*)
23 Given that Defendant could challenge certification and liability, this is a significant sum to have achieved
24 in settlement. Moreover, a Class Member who worked a greater number of workweeks will receive a
25 larger Settlement share than a Class Member who worked for a shorter time during the class period. (*Id.*)

26 The maximum calculated exposure, after removing the *most* implausible or extreme estimated
27 recoveries, is **\$10,695,164.75**, *including* PAGA penalties (which, nevertheless, includes a highly
28 optimistic view of what could be proven in this matter), **or \$8,000,000 if the weakened Labor Code §§**

1 **203 and 226 penalties are removed.** (Leviant Decl., ¶ 18.) However, after analyzing the claims in this
2 matter, Plaintiff has concluded that the Gross Settlement Amount of **\$1,250,000.00** is about 75% of the
3 **\$1,673,139.55** estimate of *risk-adjusted* recovery (excluding interest) at this stage in the litigation. (*Id.*)
4 This assessment is based on an assessment of the current fair value of the case, using estimated risks,
5 average wage rates, numbers of employees, and the amount of time covered by the class period. (*Id.*)

- 6 • Based on information from Plaintiff and a few co-workers, the reasonably estimated exposure
7 for unpaid off-the-clock wages was calculated, with the assistance of an expert, to be
8 approximately **\$509,308.20**, based on an estimate of an unpaid 5 minutes for every shift to
9 get through COVID-19 screening. However, COVID-19 screenings ended in 2021, and the
10 estimate of 5 minutes to simply have a forehead temperature scan and answer a question
11 (“Do you feel sick?”) was overly generous. With very high risk factors for certification and
12 liability proof, we estimate the claims to have a value of **\$81,489.31**, consistent with a
13 certification probability of 40% and merits success at 40%. Counsel believe that these
14 percentages are probably too high, and the fair value of the claim is well below \$81,489.31.
15 This theory of recovery has an additional degree of risk because it depends entirely on Class
16 Member estimates of the frequency and duration of off-the-clock time, making it testimony-
17 dependent. The composition of this class includes a large number of individuals who are
18 unlikely to be willing to participate as declarants for certification or witnesses at trial. This
19 increases the likelihood that Plaintiff would have insufficient evidence to overcome
20 Defendant’s opposition to certification of this claim.
- 21 • Using time and pay data, we determined, with the assistance of our data analysis expert, that
22 the total value of underpaid wages due to rounding was approximately **\$87,628.00**.
23 Rounding ended in July 2022. The data showed that 40% of employees were underpaid due
24 to rounding, but 49% were overpaid due to rounding. The question of whether the underpaid
25 employees have a viable claim is currently uncertain. Rounding is now before the California
26 Supreme Court, in the case of *Camp v. Home Depot* (Counsel represents Plaintiff Camp in
27 that matter). It is unclear whether the *Camp* appellate Court rule will prevail or whether the
28 prior rounding decisions will be found to correctly interpret California law. With all that
said, Counsel assigned a value to the unpaid rounding wages of **\$30,669.80**, consistent with a
certification probability of 70% and merits success at 50%. While rounding claims have
recently gained in potency, this claim is more complicated given that rounding ended part
way through the class period *and* employees often wrote in their own times, adding
uncertainty to the accuracy of time clock entries. The autonomy of landscape workers is a
serious factual issue in this matter, and not just for the rounding claim. Small teams worked
in remote locations, often without any supervisor present other than a designated “lead”
employee. Many choices about how to manage work time were controlled by the employees
and could differ significantly by team.
- The allegation made by Plaintiff was that rest breaks were allegedly sometimes combined
with meal periods. Assuming one violation for every class member for every week resulted
in an estimated liability of **\$1,711,084.75**. Counsel then concluded that, due to the need to
certify and prove this claim with nothing but class member testimony, the current value of the
claim is **\$213,885.59**, consistent with chances of certification and proof of liability of 50%
and 25% respectively. As it turns out, this may greatly overstate the value of this claim.
While Counsel aggressively advocated for this theory of liability at mediation, investigation
suggests that Defendant’s contentions may be accurate about this claim – it is possible that
only a few work groups chose, *voluntarily*, to combine their rest breaks with their meal
periods for a longer break. Assuming this is true, then the fact of employee choice overrides
the Defendant’s obligation to provide rest breaks. The rest break claim has, realistically, a

very low likelihood of certification. A claim with an “exposure” of \$2 million, but a chance of certification of less than 10% is not worth \$2 million. It is worth less than \$200,000 at its present value. If we certified the claim, the value increases. But the most likely outcome is that certification would be unsuccessful, and the value of the claim drops to zero in that event. Counsel believes a value of about \$200,000 on this claim is, if anything, generous.

- The exposure of **\$675,586.80** attributed to the meal break claim is based entirely on observed meal period violations within the time records. The two largest categories of violations were seen, overwhelmingly, in shifts with no recorded meal period and shifts with meal periods that started a few minutes late (1-5 minutes late was the most common category of late meal period). This, does not, however, mean that this claim would be easy to certify or prove on the merits if certified. Again, the major issue here is that small teams of landscape workers were, for most of the day, left on their own. These small workgroups were left alone to set their own meal schedule. Counsel considered there to be high risk that, in a war of declarations, Defendant could supply far more showing that class members decided each day when they wanted to break for lunch. With this in mind, Counsel believe that a risk-adjusted exposure of **\$108,093.89** is a reasonable valuation for this claim, at the pre-certification stage. More generally speaking, this type of workforce, with small teams operating in the field, is, consistently, one of the more difficult types when thinking about the potential for class certification. While many landscaping companies cut some corners on wage and hour compliance, the ability to demonstrate that on a classwide basis is exceedingly difficult.
- Risk-adjusted penalty recoveries for Labor Code § 203 penalties were estimated to be approximately **\$591,773.70**, on a maximum exposure of **\$1,690,782.00** (with certification and merits success chances of 70% and 40% respectively, based on the rounding theory of unpaid wages, adjusted for the additional risk of needing to prove other elements in addition to the underlying wage claim). The value of this claim was just dealt a severe blow by the recent California Supreme Court decision of *Naranjo v. Spectrum Security Services, Inc.* (May 6, 2024), which significantly strengthened the good faith defense to Section 203 penalties. ***The uncertainty regarding the legality of rounding would make proof of a knowing and intentional violation almost impossible.***
- Risk-adjusted penalty recoveries for wage statement penalties were estimated to be approximately **\$280,778.75**, on a maximum exposure of **\$802,225.00** (with certification and merits success chances of 70% and 40% respectively, based on the rounding theory of unpaid wages, adjusted for the additional risk of needing to prove other elements in addition to the underlying wage claim). The value of this claim was just dealt a severe blow by the recent California Supreme Court decision of *Naranjo v. Spectrum Security Services, Inc.* (May 6, 2024), which significantly strengthened the good faith defense to Section 226 penalties. ***The uncertainty regarding the legality of rounding would make proof of a knowing and intentional violation almost impossible.***
- A reasonably calculated exposure for unreimbursed expenses was estimated to be **\$59,700.00**, but with chances of certification and proof of liability (70% and 60% respectively) for a risk-adjusted exposure of **\$25,074.00**. The allegation is that Defendant required employees to send photos of landscaping completion to supervisors when there were out-of-the-ordinary tasks to be completed. But issue would not have impacted the majority of the class, and it is my opinion that the claim is heavily over-valued at \$59,700. At most, one employee per crew would send photos, and that would *only* occur when a supervisor could not visit a job site to verify the completion of special projects.
- Performing risk-adjusted valuations for all claims yields a total value in the range of

1 **\$1,157,254.55**, excluding PAGA.⁵

- 2 • PAGA penalty exposures are commonly calculated two ways, primarily to address the issue
3 of “stacking,” which is the argument that a single incorrect act cannot result in multiple
4 penalties all based on that one violation. Here, the approximate number of pay periods is
5 currently estimated to be 25,000. Using the “catch-all” \$100 penalty, and assuming one
6 violation for every single PAGA Pay Period, the exposure would be \$2,500,000. However,
7 we also, with the assistance of our data analyst at Berger Consulting, calculated all penalties
8 that could be identified, even where that resulted in “stacking” of penalties. The resulting
9 exposure under that more aggressive method is **\$5,158,850.00**. Counsel then had to
10 determine a viable current value for this claim. The PAGA claim would require the
11 participation of a large percentage of a part-time job workforce of employees of a landscape
12 maintenance business. Many of the claims are testimony dependent. In addition, the Court
13 could, in the interest of justice, reduce any penalty further, once the violation was proven. A
14 10% valuation is a very reasonable recovery percentage rate, based, primarily, on the
15 substantial difficulty of obtaining cooperation of a large percentage of Aggrieved Employees
16 who would gain relatively little for doing so. The resulting, risk-adjusted exposure is
17 **\$515,885.00**.

18 The concurrently-filed Declaration of H. Scott Leviant sets forth claim valuation in additional detail.

19 (See, Leviant Decl., ¶ 18.)

20 Settlement of a class action at the pre-certification stage necessarily includes a large risk
21 reduction. Class actions are certified at very low rates. When considering the probability of certification
22 in any case, generally, the rational decision, pre-certification, is to assume that there is less than a 20%
23 chance of obtaining certification unless a claim in the case is unusually well suited to certification. The
24 Judicial Council’s Class Certification in California: SECOND INTERIM REPORT FROM THE
25 STUDY OF CALIFORNIA CLASS ACTION LITIGATION - FEBRUARY 2010 (“Second Interim
26 Report”), at page 5, states that “less than a quarter of disposed cases in the study sample were certified,
27 either through a litigated motion for certification or as part of a classwide settlement agreement.” See,
28 Second Interim Report, at 5 (emphasis added).⁶ (Leviant Decl., ¶ 19.) That “or” is significant. The
29 certification rates identified in the study of less than 25% includes **both** contested certifications and
30 settlement certifications, which are the majority of certifications. (*Id.*) In other words, one must assume

31 ⁵ In a sense, it is nonsensical to assign specific percentages to future events, but it does provide a
32 specific method for attempting to reduce the concept of “very high risk” or “high risk” to a quantifiable
33 amount. Certification of a claim is typically a binary event. One does not obtain a 20% certification; a
34 claim is either certified or it is not. But the current expected value is best quantified by applying a risk
35 reduction, based on the total experience of counsel.

36 ⁶ The report is available at <https://www.courts.ca.gov/documents/classaction-certification.pdf> (last
37 viewed March 12, 2024). The link to the report contained in my prior declaration was incorrect.

1 in any wage and hour class action prior to certification that a contested certification motion will have a
2 success rate of well under 25%, and probably closer to 10%. (*Id.*) The facts of each case have bearing
3 on these percentages. (*Id.*) But it cannot be disputed that certification is an exceptionally difficult
4 procedural hurdle to clear. Thus, it is not unreasonable to start from the proposition that a pre-
5 certification settlement that is 10% to 15% of the maximum plausible exposure is a valid starting point
6 for valuation. If roughly 10% of class actions are certified on a contested basis, then, on average, 90% of
7 the time a class will not be certified and the result for the class is zero dollars. (*Id.*) The recovery is
8 roughly **12%** of the maximum plausible recovery (estimated to be approximately **\$10,695,164.75**,
9 including PAGA), which falls within the expected outcome under the likelihood of success metric. (*Id.*)
10 It would also be appropriate to evaluate the result by examining only the premium wages at issue
11 (approximately \$2,983,607.75, with no risk reduction), excluding penalties and interest; the settlement is
12 about 42% of the premium wages (unpaid wages, meal period premiums, and rest break premiums) at
13 maximum realistic exposure value.⁷ This Settlement achieves the goals of the litigation.

14 **4. The Proposed Method for Allocating Settlement Funds Is Fair.**

15 The proposed method of allocating the Settlement Fund to Class Members also is fair and
16 reasonable. The Settlement Fund is to be allocated between all Class Members, based on time worked by
17 the Class Member during the Class Period, in relation to the total amount of time worked by all
18 participating Class Members. This proposed method is fair and reasonable because each Class Member's
19 actual potential damages vary based on the number of workweeks he or she worked (e.g., Lab. Code §
20 226.7 provides for an extra hour of pay at the employee's regular rate of pay for each violation, resulting
21 in a higher potential damage when a higher number of incidents occur). A Class Member who worked a
22 greater number of work weeks will receive a larger payment under the Settlement than a Class Member
23

24 ⁷ The exclusion of interest and penalties from the fairness evaluation is proper because, first, PAGA
25 penalties are discretionary (*see* Lab. Code § 2699(e)(2) (the court in its discretion "may award a lesser
26 amount than the maximum civil penalty amount specified by this part...")), and, second, courts evaluate
27 the strength of a proposed settlement without taking potential penalties or interest into consideration. *See*
28 *Rodriguez v. West Publishing Corp.*, 563 F.3d 948, 955 (9th Cir. 2000); *see also Miller v. CEVA*
Logistics U.S.A., Inc., 2015 WL 729638, at *7 (E.D. Cal. Feb. 19, 2015) (court utilized calculation of a
defendant's exposure exclusive of interest and penalties to determine whether the settlement fell within
the range of possible approval).

1 who worked for a shorter amount of time. (Leviant Decl., ¶¶ 13, 17.)

2 **5. The Proposed Enhancement Award to Plaintiff Warrants Approval.**

3 The proposed enhancement of \$7,500 to Plaintiff is intended to recognize substantial initiative
4 and significant efforts on behalf of the Class. Courts routinely approve incentive awards to compensate
5 named plaintiffs for the services they provide and the risks they incur during class action litigation, often
6 in much higher amounts than that sought here. Factors considered when awarding an incentive include
7 the actions the plaintiff has taken to protect the class, the degree to which the class has benefitted, the
8 amount of time and effort the plaintiff expended in the litigation, the risk to the class representative in
9 commencing suit (financial and otherwise), the notoriety and personal difficulties encountered, the
10 duration of the litigation, and the personal benefit (or lack thereof) enjoyed by the plaintiff as a result of
11 the litigation. *Clark v. Am. Residential Servs. LLC*, 175 Cal. App. 4th 785, 804 (2009). Here, Plaintiff
12 contributed time to the prosecution of this matter, including assistance prior to the mediation with
13 information and substantial time conferring with counsel over the course of this litigation and before it
14 was filed. (Bernal Decl., ¶¶ 5-21; Leviant Decl., ¶ 33.) The enhancement also recognizes risks Plaintiff
15 took to be personally liable for costs regardless of the success of the litigation, as well as the personal risk
16 of facing intrusive discovery and potential disclosure to future employers that Plaintiff sued an employer,
17 making future employment less certain. Plaintiff's Declaration supports the requested enhancement.

18 **6. The Proposed Award of Attorneys' Fees and Costs Is Also Fair, Adequate,**
19 **and Reasonable and Merits Approval.**

20 *a) Plaintiff's Counsel Should be Awarded Fees Based on a Percentage of*
21 *the Fund Recovered, Consistent with the Common Fund Method*

22 The request for fees as a percentage of a settlement is supported by the "common fund theory,"
23 where "one who expends attorneys' fees in winning a suit which creates a fund from which others derive
24 benefits, may require those passive beneficiaries to bear a fair share of the litigation costs." *Serrano v.*
25 *Priest*, 20 Cal. 3d 25, 35 (1977). The common fund doctrine has been applied "consistently in California
26 when an action brought by one party creates a fund in which other persons are entitled to share." *City*
27 *and County of San Francisco v. Sweet*, 12 Cal. 4th 105, 110 (1995). The lodestar may be cross-checked
28 against the percentage. *See In re Consumer Privacy Cases*, 175 Cal. App. 4th 545, 556-58 (2009).

1 The California Supreme Court removed any lingering doubt about the use of the percentage of
2 the fund method to award attorney's fees in California Courts. *Laffitte v. Robert Half Intern. Inc.*, 1 Cal.
3 5th 480, 503 (2016).⁸ Thus, this Court may and, as strongly encouraged by the California Supreme
4 Court, *should* award attorney's fees to Plaintiff's counsel based upon the percentage methodology.

5 "Empirical studies show that, regardless whether the percentage method or the lodestar method is
6 used, fee awards in class actions average around one-third of the recovery." *Chavez v. Netflix, Inc.*, 162
7 Cal. App. 4th 43, 47 n. 11 (2008). This is consistent with Plaintiff's counsel's experience in these cases.
8 Here, Plaintiff's Counsel requests attorneys' fees of **\$416,666.67** (33 1/3% of the GSA), and costs of
9 **\$19,774.81**, which includes payment for mediation, filing fees, and other expenses, including filing costs.
10 (Leviant Decl., ¶ 32.) Given the efforts and risks, and the results, these amounts warrant *final approval*.

11 *b) A Lodestar Cross Check Confirms that Class Counsel's Requested*
12 *Attorneys' Fees Are Reasonable*

13 Plaintiff's fee application is also reasonable based on lodestar. Under the lodestar method, the
14 court considers a compilation of the time spent and a reasonable hourly compensation of each attorney to
15 evaluate the reasonableness of the fee. *Ramos v. Countrywide Home Loans, Inc.*, 82 Cal. App. 4th 615,
16 622 (2000). The moving party meets its burden by submitting "declarations evidencing the reasonable
17 hourly rate for their services and establishing the number of hours spent working on the case" as
18 "California case law permits fee awards in the absence of detailed time sheets." *Wershba*, 91 Cal. App.
19 4th at 254-55; *Dunk*, 48 Cal. App. 4th at 1810; *Nightengale v. Hyundai Motors America*, 31 Cal. App.
20 4th 99, 103 (1994). The hours spent and the reasonable hourly compensation are used to arrive at a
21 "lodestar" figure which may then be augmented or diminished taking into account various "multiplier"
22 factors. *See Ramos*, 82 Cal. App. 4th at 622 (*citing Serrano*, 20 Cal. 3d at 48-49).

23 Here, Class Counsel's *total* lodestar is **\$221,930.00**, billed at the attorneys' hourly rates
24 (including about 15 hours of past and future time not billed by Mr. Leviant). (Leviant Decl., ¶ 32.) The
25

26 ⁸ The Supreme Court also corrected the misconception that *Dunk* should be viewed as expressing
27 doubt about the use of the percentage method: "The *Dunk* court, while finding the percentage method
28 inapplicable to the settlement before it due to the lack of a readily valued common fund, did not purport
to bar its usage generally in common fund cases." *Laffitte*, 1 Cal. 5th at 501.

1 billed lodestar to date is **\$207,305.00**, as reflected in Paragraph 32 of the Leviant Declaration. (Leviant
2 Decl., ¶ 32.) The request for **\$416,666.67** in attorneys' fees, which is **1.87** times the estimated total
3 lodestar, is reasonable under the lodestar method.

4 **(1) Class Counsel's Hours Are Reasonable**

5 In determining whether the number of hours was reasonable, the court must determine that "the
6 time spent was reasonably necessary and that [] counsel made 'a good faith effort to exclude from the fee
7 request hours that are excessive, redundant, or otherwise unnecessary.'" *Jordan v. Multnomah County*,
8 815 F.2d 1258, 1263 n.8 (9th Cir. 1987). The court should defer to the lawyer's judgment as to how
9 much time he was required to spend on the case. *Moreno v. City of Sacramento*, 534 F.3d 1106, 1112
10 (9th Cir. 2008) ("[l]awyers are not likely to spend unnecessary time on contingency fee cases in the hope
11 of inflating their fees. The payoff is too uncertain, as to both the result and the amount of the fee.").
12 Here, Counsel expended a prudent amount of time to achieve the excellent result. (Leviant Decl., ¶ 32.)

13 **(2) Class Counsel's Hourly Rates Are Reasonable**

14 The reasonable hourly rate is that prevailing in the community for similar work. *PLCM Group,*
15 *Inc. v. Drexler*, 22 Cal. 4th 1084, 1095 (2000). "[I]n assessing a reasonable hourly rate, the trial court is
16 allowed to consider the attorneys' skill as reflected in the quality of work, as well as the attorneys'
17 reputation and status." *MBNA American Bank, N.A. v. Gorman*, 147 Cal. App. 4th 1, 3 (2006). The trial
18 court may also "find hourly rates reasonable based on evidence of other courts approving similar rates."
19 *Parkinson v. Hyundai Motor America*, 796 F.Supp.2d 1160, 1172 (C.D. Cal. 2010).

20 Class Counsel are experienced litigators who specialize in employment law, with a substantial
21 wage and hour practice. (Leviant Decl., ¶¶ 21-27.) A number of courts, including this Court, have
22 approved Class Counsel's hourly rates. (Leviant Decl., ¶ 21.) Given the skill and experience of Class
23 Counsel, and the excellent result achieved, Class Counsel's hourly rates are reasonable.

24 *c) Class Counsel's Costs Are Reasonable*

25 The Settlement Agreement provides for reimbursement of costs not to exceed \$24,000.00. Moon
26 Law Group, PC seeks costs in the amount of \$19,774.81. (Leviant Decl., ¶ 32, Exh. 2.) These costs
27 were reasonably incurred in prosecuting the Action on behalf of the Class Members and should be
28 approved by the Court. Accordingly, Class Counsel respectfully requests the Court approve total costs in

the amount of \$19,774.81. (*Ibid.*)

7. The Proposed Payment to the Administrator Is Fair and Reasonable

Phoenix Settlement Administrators, which has been selected due to its competitive bid, stated in its amended bid that administration could be performed for a flat rate of up to **\$12,500.00**. In counsel's experience, based on similar wage-and-hour actions, a cost of **\$12,500.00** is a fair and reasonable amount for administration fees and should be preliminarily approved, and it is below the Parties' original estimated cost of \$30,000 to administer the Settlement. (Leviant Decl., ¶ 34.) Phoenix already confirmed its capabilities and security protocols in the accompanying declaration. In the declaration filed herewith, Phoenix confirms that the administration process is underway, confirms it is performing as required, and confirms its bid. A supplemental declaration from Phoenix will be provided after the August 30, 2024, response period to address any updated information or confirm nothing has changed.

Because the Class size increased unexpectedly, due, primarily, to short duration employees from early in the Class Period, Phoenix incurred additional costs, and Plaintiff's Counsel will pay those additional costs as a result of the increased Class size. (*Id.*)

8. The PAGA Allocation is Reasonable

The ultimate decision as to the amount of penalties is always up to the discretion of the Court. Labor Code § 2699(e)(2) states: "In any action by an aggrieved employee seeking recovery of a civil penalty available under subdivision (a) or (f), a court may award a lesser amount than the maximum civil penalty amount specified by this part if, based on the facts and circumstances of the particular case, to do otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory."

Prior to the issuance of *Moniz v. Adecco USA, Inc.*, 72 Cal. App. 5th 56 (2021), the only sources of persuasive guidance as to how to assess the reasonableness of a PAGA allocation were found in federal court decisions. In their view, a PAGA allocation, even if a small portion of the total settlement, could be reasonable if the settlement of the wage and hour claims is robust and serves the deterrent purpose of PAGA. *O'Connor v. Uber Technologies, Inc.*, 201 F.Supp.3d 1110, 1135 (N.D. Cal. 2016) ("By providing fair compensation to the class members as employees and substantial monetary relief, a settlement not only vindicates the rights of class members as employees, but may have a deterrent effect upon the defendant employer and other employers, an objective of PAGA."). *Moniz* provided explicit

confirmation that this was an appropriate yardstick by which to measure reasonableness of a PAGA settlement. *Moniz*, 72 Cal. App. 5th at 77. *Moniz*, in agreeing with federal courts that have considered how to evaluate a PAGA settlement, concluded that the class action factors are appropriately considered, along with a consideration of whether the settlement furthers “PAGA’s purposes to remediate present labor law violations, deter future ones, and to maximize enforcement of state labor laws.”

As to the first set of elements (the class-type analysis), it is embodied in Plaintiff’s discussion of the adequacy of the settlement generally. Here, the expense, complexity and likely duration of future litigation was to some extent an unknown. However, what is certain is that to adequately establish the violations that would support a substantial penalty, tremendous time and expense would be invested.

The second element (the PAGA purposes element) is also satisfied here. As held by *Moniz*, PAGA’s purposes include (1) remediation of present labor law violations, (2) deterrence of future violations, and (3) maximization of enforcement of state labor laws. Here the allocation of a major portion of settlement funds to class members still advances the goal of labor law violation remediation. The allocation of a major portion of settlement funds to class members also deters future violations. This is a \$1,250,000.00 settlement, not a trivial sum. Deterrence is fulfilled. Finally, allocation of a major portion of settlement funds to class members still advances the goal of enforcement of state labor law. This settlement is, by definition, a response to alleged violations of labor laws, balanced against risks.

In addition, there is no evidence that a court or a commissioner had informed Defendant that their conduct violated the Labor Code. *Amaral v. Cintas Corp.*, 163 Cal. App. 4th 1157, 1209 (2008); *Willis v. Xerox Bus. Servs., LLC*, 2013 WL 6053831, *7-8 (E.D. Cal. 2013). And in *Cotter*, the court found a significant reduction of the PAGA claim would be appropriate because “[t]his does not appear to be a case where a company has deliberately sought to evade the law.” *Cotter*, 176 F. Supp. 3d at 941.

Finally, the PAGA allocation is fair. The LWDA is receiving \$75,000.00. The Class is receiving, net, an estimated \$671,833.33 for the releases of eight other claims (excluding the \$25,000.00 as the aggrieved employees’ share of the PAGA Allocation). While the proportion is tipped in favor of the employees, the allocation is not unfair because it satisfies California’s wage and hour policies.

VII. CONCLUSION

For all the foregoing reasons, because the Class meets the requirements for certification, because

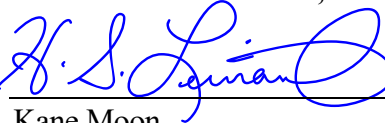
1 the Settlement bears all requisite indicia of fairness, and because the notice procedure complied with
2 Rule 3.766 and due process, this Court should grant this Motion for Final Approval.

3 Respectfully submitted,

4 Dated: August 8, 2024

MOON LAW GROUP, PC

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6 By:



Kane Moon
H. Scott Leviant
Mariam Ghazaryan

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8 Attorneys for Plaintiff
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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the State of California, County of Los Angeles. I am over the age of 18 and not a party to the within suit; my business address is 1055 W. 7th Street, Suite 1880, Los Angeles, CA 90017.

On the date indicated below, I served the document described as: **PLAINTIFF'S NOTICE OF MOTION AND MOTION FOR FINAL APPROVAL OF CLASS AND REPRESENTATIVE ACTION SETTLEMENT; MEMORANDUM OF POINTS AND AUTHORITIES** on the interested parties in this action by sending ☐ the original [or] ☒ a true copy thereof ☒ to interested parties as follows [or] ☐ as stated on the attached service list:

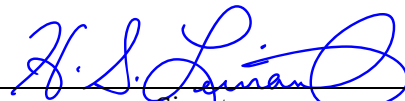
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Counsel for Defendant

- ☐ **BY MAIL (ENCLOSED IN A SEALED ENVELOPE):** I deposited the envelope(s) for mailing in the ordinary course of business at Los Angeles, California. I am "readily familiar" with this firm's practice of collection and processing correspondence for mailing. Under that practice, sealed envelopes are deposited with the U.S. Postal Service that same day in the ordinary course of business with postage thereon fully prepaid at Los Angeles, California.
- ☒ **BY E-MAIL:** I hereby certify that this document was served from Los Angeles, California, by e-mail delivery on the parties listed herein at their most recent known e-mail address or e-mail of record in this action.
- ☐ **BY PERSONAL SERVICE:** I delivered the document, enclosed in a sealed envelope, by hand to the offices of the addressee(s) named herein.
- ☐ **BY OVERNIGHT DELIVERY:** I am "readily familiar" with this firm's practice of collection and processing correspondence for overnight delivery. Under that practice, overnight packages are enclosed in a sealed envelope with a packing slip attached thereto fully prepaid. The packages are picked up by the carrier at our offices or delivered by our office to a designated collection site.

I declare under penalty of perjury under the laws of the State of California and the United States that the foregoing is true and correct. Executed this **January 30, 2024** at Los Angeles, California.

H. Scott Leviant
Type or Print Name


Signature