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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN DIEGO

SHEILA TOVAR and VANESSA CANO, on behalf of themselves and others similarly situated, Plaintiffs, vs. GC SERVICES LIMITED PARTNERSHIP; and DOES 1 to 100, inclusive, Defendants.	Case No. 37-2021-00038640-CU-OE-CTL Hon. Blaine K. Bowman **PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR PRELIMINARY APPROVAL OF CLASS AND PAGA ACTION SETTLEMENT** Date: October 25, 2024 Time: 8:30 a.m. Dept.: C-74 Action Filed: September 10, 2021

TO THE HONORABLE COURT, ALL PARTIES, AND THEIR ATTORNEYS OF RECORD:

NOTICE IS HEREBY GIVEN that on October 25, 2024, at 8:30 a.m., or as soon thereafter as the matter may be heard, in Department C-74 of the First Street Courthouse located at the Hall of Justice, 330 W. Broadway, San Diego, California 92101, before Hon. Blaine K. Bowman of the Superior Court of the State of California, County of San Diego, Plaintiffs Sheila Tovar and Vanessa Cano, on behalf of themselves and all others similarly situated ("Plaintiffs"), move the Court for preliminary approval of the Class Action Settlement Agreement and Release (the "Settlement Agreement" or the "Settlement," attached as **Exhibit 1** to the accompanying Declaration of Carolyn Hunt Cottrell). The Settlement resolves the claims in this action on a class and PAGA wide basis. In particular, Plaintiffs move for an order:

(1) Granting preliminary approval of the Settlement Agreement;

(2) Conditionally certifying the Settlement Class for settlement purposes;

(3) Approving the proposed schedule and procedure for completing the final approval process for the Settlement, including setting the Final Approval Hearing;

(4) Approving the Class Notice as it pertains to the Settlement Class (attached as **Exhibit A** to the Settlement Agreement);

(5) Preliminarily appointing and approving Schneider Wallace Cottrell Konecky LLP, Lawyers for Justice, PC, and Lavi & Ebrahimian, LLP as Class Counsel for the Settlement Class;

(6) Preliminarily approving Class Counsel's request for attorneys' fees and costs;

(7) Preliminarily appointing and approving Plaintiffs Vanessa Cano and Sheila Tovar as Class Representative for the Settlement Class;

(8) Preliminarily appointing and approving Phoenix Settlement Administrators as the Settlement Administrator for the Settlement Class; and

(9) Authorizing the Settlement Administrator to mail the approved Class Notice to the Settlement Class as set forth in the Settlement Agreement.

The Motion is based on this notice; the following Memorandum of Points and Authorities; the Declarations of Carolyn Hunt Cottrell, Vanessa Cano, Sheila Tovar, and Eve Howe; and all other records, pleadings, and papers on file in the consolidated action and such other evidence or argument as may be presented to the Court at the hearing on this Motion. Plaintiffs also submit a Proposed Order Granting Preliminary Approval of Class Action Settlement with their moving papers.

Date: October 3, 2024

Respectfully Submitted,

/s/ Ori Edelstein

Carolyn Hunt Cottrell
Ori Edelstein
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiffs Sheila Tovar and Vanessa Cano ("Plaintiffs"), seek preliminary approval of the proposed Class Action and PAGA Settlement Agreement and Release ("Settlement") reached with Defendant GC Services Limited Partnership ("Defendant").[1] After over three years of litigation, including informal pre-mediation discovery and extensive arm's length negotiations between counsel, the Parties have reached a global settlement of the Actions, memorialized in the Settlement

Plaintiffs brought their Actions on behalf of approximately 617 current and former hourly, non-exempt employees who worked for Defendant in the State of California (the "Class Members"), 309 of whom are also Aggrieved Employees under the Private Attorneys General Act ("PAGA"). Plaintiffs contend that Defendant violated California wage and hour laws by failing to compensate Class Members for all hours worked, including minimum wages and overtime, failing to provide adequate meal and rest periods, failing to reimburse necessary business expenses, failing to pay all wages at separation of employment, and failing to provide accurate, itemized wage statements.

The Settlement resolves the class and PAGA claims for a total non-reversionary settlement of $650,000. The Settlement provides excellent average recoveries of over $535.66 per Class Member. With this Settlement, the Parties are resolving numerous wage and hour claims unlikely to have been prosecuted as individual actions. The Settlement is fair, reasonable, and adequate in all respects, and Plaintiffs respectfully request that the Court grant the requested approval.

II. FACTUAL BACKGROUND

Plaintiffs and Class Members are all individuals who worked as non-exempt employees for Defendant in the State of California at any time during the Class Period (January 9, 2019, to December 4, 2023). Settlement ¶¶ 2.c and 2.g. The Class is comprised of approximately 617 individuals. *See* Declaration of Carolyn Hunt Cottrell in Support of Motion Preliminary Approval of Class Action Settlement ("Cottrell Decl."), ¶ 8. The Aggrieved Employees are the approximately 309 individuals who worked as non-exempt employees for Defendant in the State of California at any time during the PAGA Period of May 19, 2020 to December 4, 2023. *Id.*

Defendant operates as a provider of contact center outsourcing services throughout the United States and in California. Plaintiffs allege that Class Members experienced wage and hour violations in their work for Defendant. *Id.*, ¶ 1. In particular, Plaintiffs allege that Defendant routinely fails to compensate Class members for all hours worked. *Id*. Class Members are required to clock out and then continue

[1] The Settlement is attached as **Exhibit 1** to the accompanying Declaration of Carolyn Hunt Cottrell ("Cottrell Decl.") in Support of Plaintiffs' Motion for Preliminary Approval of Class Action Settlement.

working off-the-clock to complete the assigned tasks. *Id*. Moreover, Class Members were required to undergo security screenings while off-the-clock, at the beginning of Class Members' shifts, and when they returned from their meal periods. *Id*. They were not recorded and not compensated. *Id*.

Plaintiffs also allege that Defendant routinely fails to provide legally compliant meal breaks. *Id*., ¶ 27. These employees are regularly forced to take late meal periods, after the fifth hour of work, and their meal periods are often cut short and/or interrupted. *Id*. Class Members also regularly miss, work through, and are interrupted during rest breaks. *Id*., ¶¶ 27, 32. This was also due to the great volume of work Defendant assigned to these employees, which was often time sensitive. *Id*. Despite these violations, Defendant fails to pay the required premium pay for all non-compliant meal and rest periods. *Id*., ¶¶ 27, 32, 43.

Defendant also fails to reimburse Class Members for all necessary business expenses, for example, use of their personal vehicles and cell phones. *Id*., ¶ 37.

These violations resulted in derivative claims for Defendant's failure to pay all wages at separation of employment, and failure to provide accurate itemized wage statements. *Id*., ¶¶ 43, 46, 48.

As a result of these alleged violations, Plaintiffs allege claims for: (1) failure to pay for all hours worked; (2) failure to pay overtime wages; (3) failure to provide meal periods; (4) failure to provide rest periods; (5) failure to reimburse necessary business expenditures; (6) failure to timely pay earned wages; (7) failure to provide timely and accurate wage statements; (8) waiting time penalties; and (9) unfair business practices in violation of Cal. Bus. & Prof. Code §§ 17200, *et seq*. *Id*., ¶ 1.

III. PROCEDURAL HISTORY

A. Plaintiffs' Claims

As a result of the above violations, Plaintiffs each filed a PAGA action, class action, and individual arbitration against Defendant. Cottrell Decl., ¶ 10.

On July 1, 2021, Plaintiff Tovar filed a class action against Defendant in this Court. Cottrell Decl., ¶ 11. On September 10, 2021, Defendant filed a motion to remove Plaintiff Tovar's class action to the United States District Court. *Id*. On October 18, 2021, Defendant filed a Motion to Compel Arbitration which the Southern District of California granted on December 17, 2021. *Id.*

Plaintiff Cano filed a PAGA action against Defendant in the Superior Court of California, County of Los Angeles, on July 19, 2021. Cottrell Decl., ¶ 12. On August 2, 2022, Defendant filed a motion to compel arbitration of Plaintiff Cano's individual PAGA claims, which the Court denied. Defendant filed an appeal in the Second Appellate District. *Id.*

On September 10, 2021, Plaintiff Tovar filed a PAGA action for penalties. Cottrell Decl., ¶ 13. On May 25, 2022, Defendant filed a Motion to Stay Plaintiff Tovar's PAGA action. *Id.* On July 29, 2022, the

San Diego Superior Court granted Defendant's Motion to Stay. *Id.*

On April 22, 2022, Plaintiff Cano filed an arbitration demand with JAMS for her individual wage and hour claims. However, on September 8, 2022, the arbitrator issued a Ruling on Jurisdiction, finding she had no jurisdiction over the action, and it was dismissed. Cottrell Decl., ¶ 14.

On December 29, 2022, Plaintiff Tovar filed a demand for Arbitration with JAMS for her individual wage and hour claims. Cottrell Decl., ¶ 16.

Plaintiff Cano filed her Class and Collective Action Complaint against Defendant in United States District Court, Central District of California on January 9, 2023. Cottrell Decl., ¶ 17.

B. The Parties Exchanged Informal Discovery

The Parties agreed to mediate Plaintiff Cano's and Plaintiff Tovar's class and PAGA actions with well-respected mediator Jeff Ross on July 18, 2023. Cottrell Decl., ¶ 19. The Parties engaged in extensive informal discovery in preparation for mediation. *Id.*, ¶ 20. Defendant informally produced documents and data Plaintiff Cano requested in order to prepare for the mediation, including but not limited to 515 pages of documents (including applicable policies and procedures), two excel spreadsheets with time and pay information, and various figures and data points. *Id.* Class Counsel used this information to perform a detailed investigation of Defendant's timekeeping and payroll policies and practices, and to prepare a comprehensive damages analysis. *Id.*, ¶ 22.

C. Mediation

The Parties participated in a full-day mediation with mediator Jeff Ross on July 18, 2023. Cottrell Decl., ¶ 23. With the assistance of Mr. Ross, who has vast experience mediating wage and hour disputes, counsel engaged in serious and arm's length negotiations. *Id*. The case did not settle on the date of the mediation. However, following mediation, negotiations continued, and Defendant produced certain confidential information to Plaintiffs about its financial condition and ability to pay a settlement, which Plaintiffs took into consideration in further negotiations. Plaintiff consulted a financial expert to analyze Defendant's confidential financial information. Cottrell Decl., ¶ 42. The expert confirmed that Defendant had limited ability to fund a settlement, and that continuing to litigate would pose substantial risk that Defendant would not be able to pay any judgment or settlement in the future. *Id.*, ¶ 42. Following further negotiations, Mr. Ross ultimately made a mediator's proposal, which the Parties accepted, culminating in an agreement to settle for $650,000.00, on October 4, 2023. *Id.*, ¶ 25.

After the agreement to settle, counsel for the Parties extensively met and conferred over the detailed terms of the settlement for purposes of executing a long-form settlement agreement and worked to finalize the Settlement Agreement and corresponding notice documents, subject to the Court's approval. *Id.*, ¶ 34. Several drafts and revisions were circulated in order to arrive at the final settlement. *Id*. The Settlement

Agreement was fully executed on March 8, 2024. *Id.*, ¶ 35.

Per the Settlement Agreement, the Parties agreed to consolidate all PAGA and class actions in this court for settlement purposes. Settlement ¶ 21. On April 8, 2024, the Court approved the Parties' Joint Stipulation and Order for Leave to File a First Amended Complaint. Cottrell Decl., ¶ 18. On May 15, 2024, Plaintiffs filed the First Amended Complaint consolidating all claims. *Id.*

IV. TERMS OF THE SETTLEMENT

D. Basic Terms and Value of the Settlement

Defendant has agreed to pay a non-reversionary Gross Settlement Amount of $650,000.00 to settle all aspects of the case. Settlement Agreement ¶ 2.s. The Net Settlement Amount is defined as the Gross Settlement Amount, less deductions for: Class Representative Service Awards to the Plaintiffs (not to exceed $15,000 each), Fee Award to Class Counsel (not to exceed 35%, or $227,500.00), Class Counsel's Costs capped at $30,000, Settlement Administrator Costs to the Settlement Administrator, capped at $12,500, and payment to the Labor & Workforce Development Agency ("LWDA") for its 75% share (the " PAGA Payment") ($19,500).[5] Settlement Agreement ¶¶ 2.w., 2.cc., 2.o., 29.d., 29.c. The Net Settlement Amount to be paid to Class Members is approximately $330,500.00.[6]

E. Proposed Class Definition

The Settlement Class to be certified for settlement purposes includes all current and former hourly, non-exempt employees who worked for Defendant in the State of California during the period between January 9, 2019, and December 4, 2023. Settlement Agreement, ¶¶ 2.c. & 2.g.

The Aggrieved Employees means all individuals who worked as non-exempt employees for Defendant in the State of California any time during the period between May 19, 2020, and December 4, 2023. Settlement Agreement, ¶¶ 2.b. & 2.x.

F. Proposed Release

Upon Final Approval of the Settlement Agreement and payment of the Settlement amounts, Participating Class Members will release and discharge "any and all claims based on or arising out of the same factual predicates in any of the complaints filed in the Actions, including the Consolidated Complaint, as well as any of the PAGA letters submitted by Plaintiffs to the LWDA in connection with the Actions, and including all claims that were pled or could have been pled based on the factual allegations in the Actions." Settlement Agreement, ¶ 17.

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[5] The Parties agree to allocate $26,000.00 of the Gross Settlement Amount to the settlement of the PAGA claims, which the Parties believe in good faith is a fair and reasonable apportionment. The Settlement Administrator shall pay 75%, or $19,500.00, of this amount to the LWDA, and 25% or $6,500.00 remain as part of the Net Settlement Amount. Settlement Agreement, ¶ 29.c. The Net PAGA Settlement Amount is to be divided pro rata based on pay periods worked amongst all PAGA Aggrieved Employees. *Id.*, ¶ 33.

Upon Final Approval of the Settlement Agreement and payment of the Settlement amounts Plaintiffs, as representatives of the State of California and on behalf of the LWDA and as representatives of the Aggrieved Employees, fully and finally release the Released Parties from all claims for civil penalties under PAGA asserted in any of the complaints filed in the Actions, including the Consolidated Complaint, as well as any of the PAGA letters sent by Plaintiffs to the LWDA in connection with the Actions, and all claims that could have been asserted in the Actions based on the same alleged facts and theories. Settlement Agreement, ¶ 18.

G. Allocation and Awards

Class Members will receive a settlement award check without the need to submit a claim form. *Id*., ¶ 43. Participating Class Members shall be eligible to receive a share of the Net Settlement Amount based on the Eligible Workweeks worked during the Class Settlement Period. Settlement Agreement ¶ 32. Each Workweek during which work was performed will be equal to one (1) settlement share. Settlement Agreement, ¶ 32.iii. The total number of settlement shares for all Class Members will be added together and the resulting sum will be divided into the Net Settlement Amount to reach a per share dollar figure. *Id.* That figure will then be multiplied by each Class Member's number of settlement shares to determine the Class Member's pro rata portion of the Net Settlement Amount. *Id.*

Each Aggrieved Employee shall receive a pro rata share of the Net PAGA Amount as an Individual PAGA Payment which will be based on the number of Eligible Pay Periods each Aggrieved Employee worked during the PAGA Settlement Period. Settlement Agreement, ¶ 33. Each pay period during which work was performed will be equal to one (1) settlement share. Settlement Agreement, ¶ 33. ii. The total number of settlement shares for all Aggrieved Employees will be added together and the resulting sum will be divided into the Net PAGA Amount to reach a per share dollar figure. *Id.* That figure will then be multiplied by each Aggrieved Employee's number of settlement shares to determine the Aggrieved Employee's pro rata portion of the Net PAGA Amount. *Id.*

Settlement Award checks will remain valid for 180 calendar days from the date of their issuance. Settlement Agreement, ¶ 21.c. With ninety (90) days remaining, a reminder postcard will be sent via U.S. mail to those who have not yet cashed their settlement check. Settlement Agreement, ¶ 40. After one hundred and eighty (180) calendar days of issuance, funds from undeposited Individual Settlement Payment and Individual PAGA Payment checks will be held by the Settlement Administrator. *Id.* Thereafter, the Settlement Administrator will transmit the amount of that uncashed settlement payment to the State of California, to be held by the Controller in accordance with California's Unclaimed Property Law for the benefit of those Participating Class Members and Aggrieved Employees who did not cash their checks until such time that they claim their property. *Id.*

H. Settlement Administration

The Parties have agreed to use Phoenix Settlement Administrators as the Settlement Administrator to administer the Settlement, for total fees and costs currently estimated at $12,500.00. Settlement Agreement, ¶¶ 2.dd. & 29.d. The Settlement Administrator will be responsible for preparing, printing, and mailing the Settlement Notice to all Class members, re-mailing any Settlement Notice returned as non-deliverable but with forwarding addresses, and re-mailing the Notice Packet to any new address obtained by way of skip-trace. Settlement Agreement ¶¶ c.-g. The Settlement Administrator will also receive and process requests for exclusion forms and workweek disputes, calculate the settlement payments, calculate all applicable payroll taxes, withholdings, and deductions; and prepare and issue all disbursements to Participating Class Members, the Service Award to Plaintiffs, payment to the LWDA payment, payment to Class Counsel for fees and costs, and payment to itself for fees in administering the settlement. Settlement Agreement ¶¶ 22-24; 28-29.

The Settlement Administrator will also create a website for the Settlement, to allow Class Members to view the notice (in generic form), the Settlement Agreement, and all papers filed by Class Counsel to obtain preliminary and final approval of the Settlement Agreement. Cottrell Decl., ¶ 75; Settlement Agreement ¶ 21.c. The Settlement Administrator will also establish a toll-free call center for telephone inquiries from Class Members. *Id*.

V. ARGUMENT

A. The Court Should Grant Preliminary Approval of the Settlement

A class action may not be dismissed, compromised, or settled without the approval of the court.[4] Cal. Rules of Court, Rule 3.769 describes three distinct steps for approval of class action settlements by California courts: (1) preliminary approval of the proposed settlement after submission of a written motion for preliminary approval, the proposed class action settlement, and the proposed Class Notice; (2) mailing of notice of the settlement to all affected Class members; and (3) a final settlement approval hearing at which Class Members may be heard regarding the settlement, and at which evidence and argument concerning the fairness, adequacy, and reasonableness of the settlement is presented.

With this Motion, Plaintiffs request that the Court take the first step and grant preliminary approval. The Settlement proposed herein is based on arm's length negotiations that were guided by Class Counsel's investigation and the evaluation of informal discovery. Cottrell Decl., ¶¶ 23, 28-41. The negotiations included extensive communications between Class Counsel and counsel for Defendant and mediation

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[74] *See* Cal. Code Civ. Proc. § 1781(f); Cal. Rules of Court, Rule 3.769; see also Fed. R. Civ. P. 23(e). The California Supreme Court has authorized and urged California's trial courts to use Fed. R. Civ. P. 23 and federal case law for guidance in considering class action issues. *See Green v. Obledo* (1981) 29 Cal.3d 126, 145-46.

supervised by an experienced and respected mediator. *Id.* Class Counsel investigated the applicable law and the facts and extensively analyzed the potential damages that might be recovered for the employees. Cottrell Decl., ¶ 54-66. The proposed Settlement provides substantial monetary recovery for the Class Members, and it satisfies all of the required due process protections. *Id.*, ¶¶ 67-68. Thus, the proposed Settlement is fair, reasonable, and adequate, and Plaintiffs therefore request that this Court grant preliminary approval.

B. The Court Should Certify the Settlement Class

This Court should certify the proposed Class pursuant to Cal. Code Civ. Proc. § 382. California has a strong public policy in favor of broad enforcement of wage and hour laws for the benefit of workers and in favor of using the class action device. *Sav-on Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 340. A party seeking class certification has the burden to establish the existence of both an ascertainable class and a well-defined community of interest among class members. 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. *Id.* at 326.

The benefits and efficiencies of this proposed Settlement, when compared to continued litigation of this case on either a class basis or through multiple individual suits, justifies certification of the proposed Class. Cottrell Decl., ¶ 45. The Settlement specifically defines the Class for Settlement purposes as: all current and former hourly, non-exempt employees who worked for Defendant in the State of California during the period between January 9, 2019, and December 4, 2023. Cottrell Decl., ¶ 46; Settlement Agreement, ¶¶ 2.c., 2.g. The parties stipulate that the requisites for class certification with respect to the Class Members are met for purposes of settlement. Cottrell Decl., ¶ 47; Settlement ¶ 13. Applying the standards outlined herein, the Court should certify the proposed Class as defined herein.

1. The Class Members are numerous and ascertainable.

To be certified, a class must be numerous in size such that it is impracticable to bring them all before the court. Cal. Code Civ. Proc. § 382. The ultimate issue in evaluating this factor is whether the class is too large to make joinder practicable. *Rose v. City of Hayward* (1981) 126 Cal.App.3d 926, 934; *Collins v. Rocha* (1972) 7 Cal.3d 232, 238. Plaintiffs satisfy the numerosity element as there are 617 Class Members, making joinder impracticable. Cottrell Decl., ¶ 48; *Rose*, *supra*, at 934; *Collins, supra*, at 238.

In determining whether a class is "ascertainable," courts "examine the class definition, the size of the class, and the means of identifying the class members." *Reyes v. Bd. of Supervisors* (1987) 196 Cal.App.3d 1263, 1274-75. Plaintiffs defined the Class according to objective criteria. The Class Members are easily identifiable, and Defendant will provide a Class list identifying each Class Member. Cottrell

Decl., ¶ 49.

2. Plaintiffs' claims raise common issues of fact or law.

"[T]he focus in a certification dispute is on what type of questions – common or individual – are likely to arise in the action[.]" *Sav-on*, 34 Cal.4th at 427. The California Supreme Court has expressly held that predominance does not require that all questions of law and fact be uniform for all members of the class. *Id*. at 338.

Plaintiffs contends that common questions of law and fact predominate here. Cottrell Decl., ¶ 50. The wage and hour violations at issue are borne of Defendant's standardized policies, practices, and procedures regarding timekeeping, meal and rest breaks, and expense reimbursements, that Defendant imposes, creating pervasive issues of fact and law that are amenable to resolution on a class-wide basis. *Id*. Class Members are subject to the same: timekeeping, payroll, compensation, expense reimbursement, and meal and rest period policies and practices. *Id*. Plaintiffs' other derivative claims will rise or fall with the primary claims. *Id.* Because these questions can be resolved at the same juncture, Plaintiffs contend the commonality requirement is satisfied for the Class. *Id*. Defendant disputes that class certification of any claims would be appropriate if the litigation were to continue, however, the Parties agree to class certification for the purposes of this settlement only.

3. Plaintiffs' claims are typical of the claims of the Class.

Plaintiffs also must establish that their claims are typical to those of the putative Class they seek to represent. *Chern v. Bank of America* (1976) 15 Cal.3d 866, 874. A representative plaintiff's claims are "typical" if they arise from the same event, practice, or course of conduct that gives rise to the claims of the other class members and if their claims are based on the same legal theory. *Classen v. Weller* (1983) 145 Cal.App.3d 27, 46-47. The typicality requirement is not onerous and does not require the claims to be identical. *Id.*

Here, Plaintiffs were subject to the alleged illegal policies and practices that form the basis of the claims asserted in this case. *Id.* Thus, Plaintiffs contend that the typicality requirement is also satisfied. *Id*.

4. Plaintiffs and Class Counsel will adequately represent the Class.

A plaintiff is an adequate class representative if his or her claims are not inconsistent with or antagonistic to the claims of the class members. *See Johnson v. GlaxoSmithKline, Inc.* (2008) 166 Cal.App.4th 1497, 1509. In the instant case, there is no conflict between Plaintiffs and the proposed Class. Cottrell Decl., ¶ 52. Plaintiffs' claims are in line with those of the Class and Plaintiffs have prosecuted this case with the interests of the Class in mind. *Id.* Plaintiffs have met with Counsel, conducted interviews regarding their work experiences, and participated in class-wide settlement decisions. *Id*. Furthermore, Plaintiffs have selected counsel with extensive experience in class action and employment litigation, including wage and hour class actions, and who do not have any conflict with the Class. *Id*. For the foregoing reasons, Plaintiffs are adequate class representatives, and Counsel are appropriate Class Counsel. *Id*.

C. The Settlement Should be Preliminarily Approved Because it is Fair, Reasonable, and Adequate

The decision to approve or reject a proposed settlement is within a court's discretion. *Wershba v. Apple Computer, Inc*. (2001) 91 Cal.App.4th 224, 234-35. To grant preliminary approval of a class action settlement, courts need only find that the settlement falls within the range of possible final approval, also described as "the range of reasonableness." *See, e.g., North County Contractor's Assn., Inc. v. Touchstone Ins. Servs*. (1994) 27 Cal.App.4th 1085, 1090; *see also Newberg on Class Actions* at §11:25.

To make this determination, courts must consider several relevant factors, including "the strength of plaintiffs' case, the risk, expense, complexity and likely duration of further litigation, the risk of maintaining class action status through trial, the amount offered in settlement, the extent of discovery completed and the stage of the proceedings, [and] the experience and views of counsel." *Dunk v. Ford Motor Co*. (1996) 48 Cal.App.4th 1794, 1801. "The list of factors is not exclusive, and the court is free to engage in a balancing and weighing of the factors depending on the circumstances of each case." *Wershba*, *supra*, at 245.

Courts make an initial evaluation of the fairness, reasonableness, and adequacy of the proposed settlement based on information already known, supplemented as necessary by briefs, motions, or information presented by the settling parties. *See Manual for Complex Litigation* at § 21:632. A proposed settlement is not to be measured against a hypothetical ideal result that might have been achieved. *See, e.g., 7-Eleven Owners for Fair Franchising v. Southland Corp*. (2000) 85 Cal.App.4th 1135, 1150 (quoting *Linney v. Cellular Alaska P'ship* (9th Cir. 1998) 151 F.3d 1234, 1242) ("This court has aptly held that it is the very uncertainty of outcome in litigation and avoidance of wasteful and expensive litigation that induce consensual settlements."). Courts must ensure that "the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned." *Hanlon v. Chrysler Corp*. (9th Cir. 1998) 150 F.3d 1011, 1027.

A presumption of fairness exists where: (1) the settlement is reached through arm's length bargaining; (2) investigation and discovery are sufficient to allow counsel and the court to act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of objectors is small. *Dunk*, 48 Cal.App.4th at 1802. The first three of these conditions are satisfied here, and Plaintiffs expect that the fourth condition will also be satisfied.

1. The Settlement Was Reached Through Arm's Length Negotiations

The Settlement is presumptively fair because it was reached through arm's length negotiations. As discussed above, the parties only reached an agreement to settle after a full-day mediation with mediator Jeff Ross and only after Mr. Ross made a mediator's proposal. See

2. The Parties' informal discovery enabled them to make informed decisions regarding settlement.

Preliminary approval is warranted where the Court is provided sufficient information regarding the discovery process and the facts developed, so that the Court may form "an understanding of the amount that is in controversy and the realistic range of outcomes of the litigation." *Kullar v. Foot Locker Retail Inc.* (2008) 168 Cal.App.4th 116, 129-31; *Clark v. Am. Residential Servs. LLC* (2009) 175 Cal.App.4th 785, 801. This does not require the Court to review the outer reaches of possible exposure without taking into account actual risks of certification, decertification, dispositive motions, and trial. *Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles* (2010) 186 Cal. App. 4th 399, 408-9.

The Parties engaged in extensive informal discovery that has enabled both sides to assess the claims and potential defenses in this action. Cottrell Decl. ¶¶ 20-22. This allowed the Parties to accurately assess the legal and factual issues that would arise if the case proceeded to trial. *Id.*

In the lead up to mediation, Class Counsel reviewed applicable policies, time records, pay records, and information relating to the size and scope of the Class, as well as data permitting Class Counsel to understand the number of workweeks and pay periods in the Class Period and PAGA Period. Class Counsel also spoke to numerous employees who confirmed the allegations and labor code violations. Cottrell Decl., ¶ 28.

From this information, Class Counsel initially estimated about 617 employees worked 23,618 work weeks, and 203,884 shifts during the damages period (January 9, 2019, through mediation). The employees were compensated at an average hourly rate of $15.95. Class Counsel was then able to estimate the average rate at which Class members missed meal and rest periods, and incurred out-of-pocket expenses. Class Counsel estimated that: (1) 30% of shifts had a missed and/or non-compliant meal breaks (13% facially non-compliant based on time records, plus claimed interrupted breaks), (2) 16% of shifts had a claimed missed and/or non-compliant rest break, (3) employees averaged 18 minutes of alleged unpaid time per day, and (4) approximately 50% of Class Members were not reimbursed for claimed mileage and 100% were not reimbursed for cellphone use. Cottrell Decl., ¶¶ 29, 30.

Defendant denies Plaintiffs' allegations and contends its wage and hour policies and practices comply with California law, and denies that any such violations of the California Labor Code occurred.

3. Litigating the Action not only would delay recovery, but would be expensive, time consuming, and involve substantial risk.

In contrast to the risk and uncertainty of continued litigation, the Settlement will yield a prompt, certain, and substantial recovery. Such a result will benefit the parties and the court system.

The monetary value of the proposed Settlement represents a fair compromise given the risks and uncertainties posed by continued litigation. Cottrell Decl., ¶ 55. A preliminary review of the Settlement reveals the fairness of its terms. The estimated Net Settlement Amount of $330,500.00 derived from the Gross Settlement Amount of $650,000.00 will result in fair and just relief to the Class Members and Aggrieved Employees. Cottrell Decl., ¶ 53. The $650,000.00 settlement represents approximately 21% of the potential exposure for the substantive claims for unpaid wages (including overtime), meal and rest breaks, and expense reimbursements.[9] *Id*., ¶ 40.

The Settlement provides an estimated average recovery of $535.66 per Class Member, assuming 100% participation in the Settlement. *Id*., ¶ 53. The result is within the reasonable standard, particularly when considering the nature of Plaintiffs' claims and the difficulty and risks presented by continuing this litigation. *Id*., ¶ 78. *Balderas v. Massage Envy Franchising* (N.D. Cal. 2014) 2014 WL 3610945 (settlement approved of only 5% of projected maximum recovery). *Villegas v. J.P. Morgan Chase* (N.D. Cal. 2012) 2012 WL 5878390 (approved settlement that was 15% of potential recovery).

The payment for all claims for civil penalties brought under PAGA of $26,000.00 represents 4% of the Gross Settlement Amount, and slightly over 1% of the estimated PAGA penalties of $2,442,968, well within the range of settlements previously approved by other courts.[10] *Id*.

If the Action did not settle, Plaintiff would first need to overcome Defendant's appeal of the denial of its motion to compel arbitration in Plaintiff Cano's PAGA Action currently pending before the Second Appellate District.

Recovery of the damages and penalties previously referenced would also require complete success and certification of all of Plaintiffs' claims, a questionable feat in light of developments in wage and hour and class action law as well as the legal and factual grounds that Defendant has asserted to defend this action. *Id*., ¶ 57. Off-the-clock claims may pose difficulty to certify for class treatment, given that the nature, cause, and amount of the off-the-clock work may vary based on the individualized circumstances

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[9] When derivative claims and potential PAGA penalties are included, the Settlement represents 8% of the total maximum $7,824,417 exposure.

[10] *See Haralson v. U.S. Aviation Servs. Corp.* (N.D. Cal. 2019) 383 F.Supp.3d 959, 972-74 (citing cases reflecting approval of settlements at 0.2% to 1.1% of verdict value of PAGA penalty); *Gilmore v. McMillan-Hendryx Inc.* (E.D. Cal. Jan. 20, 2022) 2022 U.S. Dist. LEXIS 11032 at * 9 (recognizing the inherent risks and costs in any litigation matter, and approving a PAGA settlement that amounted to approximately 4.2% of the total exposure calculated by plaintiff).

of the worker.[11] This risk is especially true here, where class members were assigned to work in numerous positions at numerous locations. In addition, certification of off-the-clock work claims is complicated by the lack of documentary evidence and reliance on employee testimony. *Id*., ¶ 58. While Plaintiffs are confident that they would establish that common policies and practices give rise to the off-the-clock work for Class Members, Plaintiffs face the risk that the Court would decline to certify the Class altogether, or for at least some claims. *Id*., ¶ 59. Even assuming that a contested motion for certification was granted, the Plaintiffs would then have to establish class-wide liability and prove up various issues regarding damages and penalties.

Additionally, the Plaintiffs' derivative claims regarding waiting time penalties and wage statements rise and fall with Plaintiffs' other wage payment claims. *Id*., ¶ 60. For example, the Plaintiffs would recover nothing under § 203 if they were unable to prove the underlying claims or defeat a "good faith" dispute defense. *Id*.; *see* Cal. Code Regs. Tit. 8, § 13520 [good faith dispute, based in law or fact, precludes award of waiting time penalties].

If the Actions were to go to trial as a class action and representative PAGA action, the fees and costs would certainly exceed the fees and costs requested here. *Id*., ¶ 56. Litigating the class and PAGA action claims would require substantial additional preparation and discovery. *Id*. It would require depositions of experts, the presentation of percipient and expert witnesses at trial, as well as the consideration, preparation, and presentation of voluminous documentary evidence and the preparation and analysis of expert reports. *Id.*

Finally, the fairness of the Settlement is further underscored by the risk that Defendant's financial condition at the time of the mediation. *Id.* The Court may consider Defendant's financial resources and ability to pay a larger settlement when deciding whether to approve a class settlement. *See, e.g., Dunk,* 48 Cal.App.4th at 1801 (noting a court must include the risk of insolvency and inability to pay a larger settlement in its assessment of the reasonableness of a class action settlement). Here, Plaintiff consulted a financial expert who opined that Defendant had limited ability to fund a settlement, and that continuing to litigate would pose substantial risk that Defendant would not be able to pay any large judgment or settlement in the future. *Id.* Defendant's financial condition was a significant factor in reaching the settlement. Settlement, ¶ 21, b.

In contrast to litigating this suit, resolving this case by means of the Settlement will yield a prompt, certain, and very substantial recovery for the Class Members. Cottrell Decl., ¶ 61.

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[11] *See, e.g., In re AutoZone, Inc., Wage & Hour Emp't Practices Litig*. (N.D. Cal. 2012) 289 F.R.D. 526, 539, aff'd, (9th Cir. Oct. 4, 2019) No. 17-17533, 2019 WL 4898684; *Kilbourne v. Coca-Cola Co.* (S.D. Cal. July 29, 2015) No. 14CV984-MMA BGS, 2015 WL 5117080, at *14; *York v. Starbucks Corp*. (C.D. Cal. Nov. 23, 2011) No. CV 08-07919 GAF PJWX, 2011 WL 8199987, at *30.

4. Class Counsel are Experienced Class Action Litigators.

Class Counsel are experienced and respected class action litigators. Cottrell Decl., ¶¶ 5-7. Based on Class Counsel's knowledge and expertise in this area of law and in light of the risks identified above including Defendant's financial condition, Class Counsel believe this Settlement will provide an excellent benefit to the Class Members and Aggrieved Employees. Cottrell Decl., ¶ 62.

D. The Service Awards to Plaintiffs are Reasonable

Named plaintiffs in class action litigation are eligible for reasonable service awards. *See Staton v. Boeing Co.* (9th Cir. 2003) 327 F.3d 938, 977. Courts award service payments to advance public policy by encouraging individuals to come forward and perform their civic duty in protecting the rights of the class, as well as to compensate class representatives for their time, effort, and inconvenience. *In re Cal. Indirect Purchases* (1998) 1998 WL 1031494 at *11; *Munoz*, 186 Cal.App.4th at 412.

The service payments of up to $15,000.00 for each Plaintiff is intended to compensate them for the critical role they played in this case, and the time, effort, and risks undertaken in helping secure and obtain this $650,000.00 settlement on behalf of the Class Members and the LWDA. Cottrell Decl., ¶ 87. In agreeing to serve as Class Representatives, Plaintiffs formally agreed to accept the responsibilities of representing the interests of all Class Members. Cottrell Decl. ¶ 64. Throughout this litigation, Plaintiffs worked with Class Counsel and assisted in the development of the case. Cottrell Decl., ¶ 65; Declaration of Vanessa Cano in Support of Motion for Preliminary Approval of Class Action Settlement ("Cano Decl."), ¶¶ 5-13; Declaration of Sheila Tovar in Support of Motion for Preliminary Approval of Class Action Settlement ("Tovar Decl."), ¶¶ 7-9. They provided extensive information and documents during Class Counsel's initial investigation and the preparation of the complaints. *Id.* They also provided responses to Class Counsel's questions as the case progressed and provided valuable insight into Defendant's operations. *Id*. Plaintiffs have taken part in the Settlement decision and remained apprised of the case during approximately three years of litigation. *Id.* In addition, Plaintiffs, unlike the Class Members, also agree to a general release of claims. *Id.* Defendant does not oppose the requested payments to Plaintiffs as reasonable service awards. Cottrell Decl., ¶ 66.

E. The Requested Attorneys' Fees and Costs are Reasonable

In their fee motion to be submitted with the final approval papers, Plaintiffs will request, as attorneys' fees, a percentage of the common fund of up to 35% of the Gross Settlement Amount, or $227,500, plus reimbursement of costs actual costs not to exceed $30.000.00. Cottrell Decl., ¶ 67. At final approval, Class Counsel will provide detailed lodestar information to show the requested fee is reasonable under both the percentage method and the optional lodestar "cross-check." *Id.*, ¶ 68.

The California Supreme Court upheld the use of the common fund theory of recovery for attorneys' fees in *Laffitte v. Robert Half Int'l Inc.* (2016) 1 Cal.5th 480, 506. In *Laffitte*, the Court approved attorneys' fees in the amount of one third of the gross settlement (*e.g.*, an award of $6.33 million) under the common fund theory. *Id.* By awarding counsel a percentage of the total recovery, rather than fees based on hours worked, the common fund method encourages attorneys to efficiently litigate to achieve the best results possible for the class. *Id*. at 492-94. Indeed, the "percentage-of-recovery method is generally favored in common fund cases because it allows courts to award fees from the fund 'in a manner that rewards counsel for success and penalizes it for failure." *Id*. at 493 (quoting *In re Rite Aid Corp. Sec. Litig.* (3d Cir. 2005) 396 F.3d 294, 300).

The request for 35% of the Gross Settlement Amount is substantially within the range customarily approved by courts in California and should be approved. *See Ellsworth v. Leclair Fitness II LLC* (Sac. Cty. 2022) 2022 Cal. Super. LEXIS 59587, *8 ("The percentage of the gross settlement equates to 35% which is generally in line with percentage fees in similar litigation.").[12] This amount is in line with what California courts routinely uphold as reasonable.[13] Moreover, federal courts and secondary sources confirm that attorneys' fees in this range are reasonable.[14] These authorities establish that Class Counsel's request for 35% of the Gross Settlement Amount is well within the range customarily approved by courts in California.

Furthermore, reasonable litigation expenses are ordinarily included in an award of attorneys' fees pursuant to California wage and hour law. *Rider v. County of San Diego* (1992) 11 Cal.App.4th 1410, 1424. Class Counsel's litigation costs are currently estimated at approximately $ 18,943.82. Cottrell Decl., ¶ 72; Declaration of Eve Howe ("Howe Decl."), ¶ 6. Plaintiffs' counsel incurred costs including, inter alia, filing and service fees, costs for remote appearances, document retrieval, and mediation fees. Cottrell Decl., ¶ 72. These expenses were incidental and necessary to the effective representation of the Class and Aggrieved Employees. *Id.* They are reasonable and uncontested and should be approved. *Id.*

The amount of fees and costs requested are clearly set forth in the Settlement Notice. *Id.*, ¶ 73.

[12] See also, *Thompson v. Restoration Hardware, Inc.* (Marin County Super. Ct., Dec. 29, 2023) No. CIV2200970 (preliminarily approving a 35% award in a wage and hour class and PAGA action).

[13] *See, e.g., Guillen v. Framing by Superior* (Riverside Super. Nov. 4, 2021) No.: RIC 1804201, 2021 Cal. Super. LEXIS 89153, *9 (finally approving "request for an award for up to 33.3% of the Gross Settlement Amount") (Hon. Sunshine Sykes); *Asalati v. Intel Corp.* (Santa Clara Super. Ct., Oct. 29, 2018) No. 16cv302615 (approving 33.3% fee award); *Ochoa v. Haralambos Beverage Co.* (Los Angeles Super. Ct., Feb. 1, 2007) No. BC319588 (approving 33.3% fee award with no mention of lodestar crosscheck); *Big Lots Overtime Cases* (San Bernardino Super. Ct., JCC Proceeding No. 4283, Feb. 4, 2004) (approving award of attorney's fees of 33% of the recovery).

[14] *See Van Vranken v. Atlantic Richfield Co.* (N.D. Cal. 1995) 901 F.Supp. 294, 297-98 ("Class Counsel have also cited 73 district court opinions in which fees in the range of 30-50 percent of the common fund were awarded."); *In re Pacific Enters. Sec. Litig.* (9th Cir. 1995) 47 F.3d 373, 379 (33% fee award); Newberg on Class Actions, §11:24 (4th Ed. 2002); Manual for Complex Litigation, §14:6 (4th Ed. 2004).

Accordingly, Plaintiffs respectfully request the Court preliminarily approve the terms of the settlement, including the request for fees and costs. *Id*. Any objections by Class Members to the request for fees and costs may be considered by the Court at final approval. *Id*.

F. The Proposed Notice of Settlement and Claims Process Are Reasonable

"Adequate notice is critical to court approval of a class settlement under Rule 23(e)." *Hanlon*, 150 F.3d at 1025. A class action settlement notice "is satisfactory if it 'generally describes the terms of the settlement in sufficient detail to alert those with adverse viewpoints to investigate and to come forward and be heard.'" *Churchill Village LLC v. General Elec*. (9th Cir. 2004) 361 F.3d 566, 575.

All Class Members have been identified and the Notice of Settlement will be mailed directly to each Class Member. Cottrell Decl., ¶ 74. The proposed Notice is clear and straightforward and provides information on the nature of the action and the proposed, the terms and provisions of the Settlement Agreement, and the monetary awards that the Settlement will provide Class Members. *Id*. In addition, the Parties will provide a settlement website that provides a generic form of the Settlement Notice, the Settlement Agreement, and other case related documents and contact information. *Id*., ¶ 75.

The proposed Notice fulfills the requirement of neutrality in class notices. *Id*., ¶ 76; *See Newberg on Class Actions*, § 8.39 (3rd Ed. 1992)*; Manual for Complex Litig*. at §§ 21:311 and 21:312. It summarizes the proceedings necessary to provide context for the Settlement Agreement and summarizes the terms and conditions of the Settlement, including an explanation of how the settlement amount will be allocated between the Named Plaintiffs, Class Counsel, the Settlement Administrator, and the Class Members, in an informative, coherent and easy-to-understand manner, all in compliance with the Manual for Complex Litigation's recommendation that "the notice contain a clear, accurate description of the terms of the settlement." Cottrell Decl., ¶ 77; *Manual for Complex Litigation*, Settlement Notice § 21.312 (4th ed. 2004).

The Notice of Settlement clearly explains the procedures and deadlines for requesting exclusion from the Settlement and objecting to the Settlement, as well as the consequences of taking or foregoing the various options available to Class Members, and the date, time and place of the Final Approval Hearing. Cottrell Decl., ¶ 78. Pursuant to Rule 23(h), the proposed Notice of Settlement also sets forth the amount of attorneys' fees and costs sought by Plaintiffs, as well as an explanation of the procedure by which Class Counsel will apply for them. *Id*. The Notice of Settlement clearly states that the Settlement does not constitute an admission of liability by Defendant. *Id*., ¶ 79. Accordingly, the Notice of Settlement complies with the standards of fairness, completeness, and neutrality required of a settlement class notice disseminated under authority of the Court. *See Newberg on Class Actions*, §§ 8.21 and 8.39 (3rd ed. 1992); *Manual for Complex Litigation*, *Certification Notice*, § 21.311 and § 21.312 (4th ed. 2004).

Furthermore, reasonable steps will be taken to ensure that all Class Members receive the Notice. Cottrell Decl., ¶ 80. Before mailing, Defendant will provide to the Settlement Administrator an electronic database containing contact information for each Class Member. *Id*. Before mailing the Notice of Settlement, the Settlement Administrator shall perform a search based on the National Change of Address Database information to update and correct for any known or identifiable mailing address changes. *Id*. Within ten (10) days of receipt of the Class List from Defendant, the Settlement Administrator will mail the Notice of Settlement to each Class Member. *Id.*

With respect to Notices returned as undelivered, the Settlement Administrator will re-mail any Notices returned to the Settlement Administrator with a forwarding address following receipt of the returned mail. *Id*., ¶ 105. If any Notice is returned to the Settlement Administrator without a forwarding address, the Settlement Administrator will undertake reasonable efforts to search for the correct address, including skip tracing, and will promptly re-mail the Notice of Settlement to any newly found address. *Id*.

Class Members will have thirty (30) days from the mailing of the Notice of Settlement to request exclusion or object to the Settlement. *Id.*, ¶ 82. Any Class Member who does not submit a timely request to exclude themselves from the Settlement will be deemed a Participating Class Member. *Id.* At least ten (10) business day after the Response Deadline, the Settlement Administrator shall provide a report to Defendant's Counsel and Class Counsel showing: (i) valid Opt-Out Requests; (ii) written objections; (iii) Eligible Workweeks or Eligible Pay Period disputes; (iv) the number of undeliverable Notices of Settlement; (v) the estimated average and median recovery per Participating Class Member; (vi) the estimated average and median recovery per Aggrieved Employee; and (vii) the largest and smallest estimated amounts to be paid to Participating Class Members. *Id.*, ¶ 83.

Because the proposed Notice of Settlement clearly and concisely describes the terms of the Settlement and the awards and obligations for Class Members who participate, and because the Notice will be disseminated in a way calculated to provide notice to as many Class Members as possible, the Notice of Settlement should be preliminarily approved. *Id.*, ¶ 84.

VI. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court grant preliminary approval of the Settlement Agreement, in accordance with the schedule set forth herein.

Date:October 3, 2024

Respectfully Submitted,

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