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10 **UNITED STATES DISTRICT COURT**

11 **CENTRAL DISTRICT OF CALIFORNIA – WESTERN DIVISION**

12 CARL THIEROFF, an individual;
13 JOSHUA KAHANE, an individual;
14 PHILLIP WALTON, an individual; on
15 behalf of themselves and a Class of all
16 other persons similarly situated,

17 Plaintiffs,

18 vs.

19 MARINE SPILL RESPONSE
20 CORPORATION, a Tennessee
21 Corporation; and DOES 1 through 100,
22 inclusive,

23 Defendants.

Case No.: 2:21-cv-06075-GW-MRW
CLASS AND PAGA
REPRESENTATIVE ACTION

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PLAINTIFFS' [UNOPPOSED]
MOTION FOR PRELIMINARY
APPROVAL OF CLASS AND
REPRESENTATIVE ACTION
SETTLEMENT**

Date: December 14, 2023

Time: 8:30 a.m.

District Judge: Hon. George H. Wu

State Court Compl. Filed: 5/14/21

Removal Filed: 7/28/21

1st Amended Compl. Filed: 10/22/21

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Trial Date: None

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I. INTRODUCTION

Plaintiffs Joshua Kahane, Carl Thieroff, and Phillip Walton (“Plaintiffs”) seek preliminary approval under Federal Rule 23(e) of a \$325,000 non-reversionary Settlement on behalf of approximately 96 current and former Responders and response-related non-exempt employees employed with Defendant Marine Spill Response Corporation (“MSRC” or “Defendant”) between May 14, 2017 and the date of preliminary approval or December 31, 2023, whichever is later (“Class Members”). This is a non-reversionary cash settlement, and all Class Members who do not opt out will receive a payment, without a requirement to submit a claim form.

This action, which first alleged eleven causes of action including for unpaid overtime, regular and minimum wages, unreimbursed business expenses, failure to provide meal and rest breaks, and derivative claims, following motion practice, is now a class and PAGA representative action on behalf of approximately 96 individuals for only: (i) unpaid wages (for off the clock work and unpaid on-call time (calculated at minimum wage)) on behalf of non-union hourly Responder employees (74 of the 96 class members), and (ii) unreimbursed business expenses (for cell phone usage and mileage) on behalf of all 96 hourly Responder employees.

This case was resolved with the assistance of an experienced mediator, Michael Young, Esq. Plaintiffs argue MSRC’s realistic potential liability for their on-call and off-the-clock unpaid wages and unreimbursed business expense claims are \$1,845,165.20, or \$1,883,565.20 for all their claims, including the derivative wage statement penalty claim.

The \$325,000 Gross Fund Value represents 17-18% of MSRC’s realistic potential liability for Plaintiffs’ claims, including the derivative claim. Plaintiffs believe this is an excellent result, especially considering MSRC’s evidence that Class Members rarely received calls while they were on-call, that on those rare instances the responses were typically sent by responding to an automated message, lasting mere seconds, and that Class Members were free to engage in personal activities, off-

1 premises, while on call, as well as that MSRC has provided Class Members with work
2 cell phones to use specifically for the purpose of responding to on call requests.

3 Plaintiffs seek an order: (1) preliminarily approving the proposed Settlement; (2)
4 approving the form and content of the Class Notice; (3) directing that Class Notice be
5 given to Class Members; (4) provisionally certifying the Settlement Class and
6 appointing Plaintiffs as Class Representatives and Plaintiffs' counsel as Class Counsel;
7 (5) preliminarily approving Settlement administration services to be provided by the
8 Settlement Administrator, and; (6) scheduling a Fairness Hearing.

9 II. FACTUAL AND PROCEDURAL BACKGROUND

10 MSRC is an oil spill response organization mandated by the United States
11 government. Plaintiffs are employed by MSRC as various levels of non-exempt,
12 hourly-paid Responder position in California. Plaintiffs' job duties include site
13 assessments for oil drilling, preventative maintenance of spill equipment throughout
14 California, and keeping oil containment gear and equipment ready in case of an
15 emergency. Declaration of David R. Markham ("Markham Decl."), ¶2. Because of the
16 nature of their job duties, Class Members are on-call outside of their scheduled shift
17 times. *Id.*

18 Plaintiffs filed their initial class action complaint on May 14, 2021 in the Los
19 Angeles Superior Court, and Defendant removed to the Central District of California
20 on July 28, 2021. On October 22, 2021, Plaintiffs filed a First Amended Complaint
21 ("FAC") alleging causes of action for: (1) failure to pay overtime compensation; (2)
22 failure to pay wages for all hours worked; (3) failure to provide meal periods; (4) failure
23 to provide rest periods; (5) failure to pay reporting time pay; (6) failure to provide
24 accurate itemized wage statements; (7) failure to pay business expenses; (8) failure to
25 pay wages due and payable twice monthly; (9) failure to pay wages at termination of
26 employment; (10) unlawful competition and business practices in violation of Business
27 and Professions Code 17200, et seq. ("UCL"); and (11) civil penalties under the Private
28 Attorneys General Act ("PAGA"). *Id.*, ¶3.

1 On November 19, 2021, Defendant moved to dismiss Plaintiffs' FAC, primarily
2 on the grounds that during the relevant time period Plaintiffs were union members
3 subject to a Collective Bargaining Agreement ("CBA"), and that the CBA, and not state
4 law, governed Plaintiffs' overtime and meal and rest break claims, and thus Labor
5 Management Relations Act ("LMRA") preemption was warranted. On June 6, 2022,
6 the Court granted Defendant's motion in part and dismissed, without leave to amend,
7 Plaintiffs' first (overtime compensation), third (meal periods), fourth (rest periods), and
8 ninth (wages upon termination) causes of action. The remaining causes of action for
9 unpaid wages for all hours worked, reporting time pay, unreimbursed expenses, and for
10 derivative claims, were dismissed with leave to amend. *Id.*, ¶4.

11 On June 27, 2022, Plaintiffs filed a Second Amended Complaint ("SAC"). In the
12 SAC, Plaintiffs sought to add a new class representative, Philip Walton. After meeting
13 and conferring about Defendant's intent to file a motion to dismiss the SAC, counsel
14 for the parties stipulated to permit Plaintiffs to file a Third Amended Complaint
15 ("TAC"). *Id.*, ¶5.

16 Plaintiffs' TAC, filed on July 15, 2022, also named Plaintiff Walton as additional
17 Plaintiff, and alleged causes of action for: (1) failure to pay regular and/or minimum
18 wages for all hours worked; (2) failure to pay reporting time pay; (3) failure to provide
19 accurate itemized wage statements; (4) failure to pay business expenses; (5) failure to
20 pay wages due and payable twice monthly; (6) unlawful competition and unlawful
21 business practices in violation of the UCL; and (7) civil penalties under PAGA. *Id.*, ¶6.

22 On August 19, 2022, Defendant moved to dismiss Plaintiffs' TAC on several
23 grounds, including on the ground Plaintiffs' claims were preempted by the CBA and/or
24 LMRA, and that Plaintiffs' factual allegations in the complaint were insufficient and
25 not plausible. Defendant also filed a motion to strike three paragraphs of Plaintiffs'
26 complaint, which the Court denied. *Id.*, ¶7. On March 23, 2023, the Court granted
27 Defendant's motion to dismiss, but with leave to amend to add additional facts about
28 non-union Plaintiff Walton's on-call time allegations, and all Plaintiffs' Labor Code

1 2802 claims for cell phone expenses and mileage, and derivative claims to the extent
2 based on the surviving causes of action. Plaintiffs filed their operative Fourth Amended
3 Complaint (“4AC”) on April 20, 2023. *Id.*

4 On April 28, 2023, following the conference of counsel, the parties agreed to
5 attend mediation and stay formal discovery, including any depositions, in lieu of an
6 informal exchange of data in advance of this mediation, and stayed Defendant’s
7 responsive pleading to the 4AC. If the case had not settled, Defendant indicated that it
8 would have filed an additional motion to dismiss the remaining claims. *Id.*, ¶8.

9 Defendant disputes all of the allegations and asserted a wide variety of defenses
10 (several of which have already been successful in early motion rulings), and which
11 were critical in Plaintiffs’ evaluation of the settlement value of this case. *Id.*, ¶9.

12 **III. VIGOROUS PROSECUTION OF THIS ACTION**

13 Class Counsel has vigorously advanced Plaintiffs’ position and thoroughly
14 investigated Class Members’ claims. Prior to attending the mediation, the Parties
15 engaged in informal discovery. In advance of mediation, Defendant produced the
16 applicable policies and handbooks in effect during the class period, time records and
17 payroll records for 25% of Class Members, and classwide data points and information.
18 Additionally, Defendant produced Plaintiffs’ personnel files, time records and pay
19 statements. Plaintiffs’ counsel prepared a damages model in advance of mediation. *Id.*,
20 ¶10.

21 The parties carefully investigated the claims and facts alleged in this action and
22 have made a thorough study of the legal principles applicable to the claims asserted
23 against MSRC. As a result of Class Counsel’s investigation of the claims in this action,
24 the damages analysis, a careful review of the applicable policy and operative
25 documents, and an informal exchange of discovery and information, the parties had a
26 clear understanding of their respective claims and defenses. *Id.*, ¶11.

27 The parties settled this case with the assistance of an experienced mediator,
28 Michael Young, Esq. The mediation took place on August 7, 2023. At the conclusion

1 of the mediation session, the parties reached the settlement in principle and shortly
2 thereafter executed a Memorandum of Understanding. *Id.*, ¶12. After additional weeks
3 of arms'-length negotiations, the parties finalized the terms of the settlement
4 agreement. Markham Declaration, **Ex. 1** (executed settlement agreement).¹

5 **IV. SETTLEMENT TERMS**

6 **A. Settlement Relief**

7 The monetary relief will be provided to the Settlement Class Members who are
8 defined as:

9 All persons currently or formerly employed by MSRC in the State of
10 California as non-exempt Responders, or as other non-exempt response-
11 related employees in a position with similar job duties and/or titles, at any
12 time during the Class Period.
13 Settlement Agreement, §I(F).

14 The Settlement Class does not include any person who submits a timely and valid
15 opt-out request. *Id.*, §I(CC). The Settlement Class Period is from May 14, 2017 to the
16 later of December 31, 2023 or the date the Settlement is preliminarily approved. *Id.*,
17 §I(J).

18 The Gross Fund Value is \$325,000. *Id.*, §I(S). This amount includes payments
19 to Settlement Class Members, attorneys' fees and costs, \$13,000 allocated as PAGA
20 penalties, of which 25% (or \$3,250) shall be paid to the class and 75% (or \$9,750) shall
21 be paid to the LWDA, the Class Representatives' Incentive Payments, and
22 administration costs. *Id.*, §§I(S)(Z). Defendant will pay the employer-side payroll taxes
23 in addition to the Gross Fund Value. *Id.*, §I(S).

24 **1. Net Fund Value.**

25 From the Gross Fund Value, the administration costs, attorneys' fees and costs,
26 the LWDA's share of PAGA penalties, the Incentive Payments to the Class
27 Representatives - as the Court awards and in the proposed amount discussed below -

28 ¹ The Settlement Agreement was submitted to the LWDA concurrent to the filing of
this motion, and proof of submission is attached as **Exhibit 2** to Markham Declaration.
Markham Decl., ¶38.

will first be deducted, to result in a Net Fund Value, which is approximately \$158,916.67. *See* Settlement Agreement, §I(W).

2. Settlement Formula and Distribution

Class Members who do not opt out of the Settlement will receive Individual Settlement Payments from the Net Fund Value. *Id.* Each Class Member's Individual Settlement Payment shall be determined on a pro rata basis based upon the number of workweeks during which the employee worked in proportion to the aggregate number of workweeks by all Settlement Class Members, as follows:

$$\frac{\text{Workweeks Worked by Class Member}}{\text{Total Workweeks Worked by all Class Members}} \times \text{Net Fund Value} = \text{Class Member's Payment}$$

Id., §III(G)(1).

This is a non-reversion cash Settlement and Class Members need not submit a claim form to receive a payment. *Id.*, §I(S-U). Class Members who do not opt out of the Settlement will release MSRC from all claims that relate to the causes of action initially asserted in this action – or that those that could have been asserted in this action based on the facts alleged in Plaintiffs' Complaints and PAGA letter. *Id.*, §§I(BB), (GG).

Settlement checks will be valid and negotiable for 180 calendar days. *Id.*, §III(K)(12). After that time, the Parties propose that the funds represented by uncashed checks be tendered to the Controller of the State of California to be held pursuant to the Unclaimed Property Law, California Civil Code, section 1500 *et seq.*, for the benefit of those Settlement Class Members who did not cash their checks, until such time that they claim their property, in compliance with Code of Civil Procedure section 384(b), and subject to the Court's approval. *Id.* In no event will any of the funds revert to Defendant. *Id.*, §(I)(S).

All Settlement payments are subject to taxation, and will be reported to the IRS and state tax authorities. Twenty percent (20%) of each Class Member's Individual

1 Settlement Payment will be allocated as wages, and eighty percent (80%) as penalties
2 and interest, with withholding to apply only to the portion allocated to wages. *Id.*,
3 §III(G)(2). Settlement Class Members shall seek their own tax advice regarding this
4 Agreement. *Id.*, §III(J).

5 **3. Settlement Amount Calculations (Kullar analysis)**

6 The Settlement Amount of \$325,000 derives from Plaintiffs and Class Members'
7 remaining on-call, off-the clock and unreimbursed business expense claims. Markham
8 Decl., ¶13. MSRC produced time records and payroll data for a 25% sample of Class
9 Members, and classwide data points and information. Plaintiffs also reviewed MSRC's
10 policies in effect during the Class Period, and Plaintiffs' personnel files. *Id.* The pre-
11 mediation exchange of information revealed there are 96 individuals who fit the class
12 definition, including 22 union employees and 74 non-union employees. The average
13 hourly rate of class members is \$26.66 for non-union employees. *Id.* Plaintiffs' counsel
14 calculated maximum exposure based on the data point information exchanged pre-
15 mediation. *Id.*

16 On-Call Claim: The **maximum** potential exposure for this claim based on 12
17 hours per day spent on mandatory on call, at the current minimum wage of \$15.50 * 5
18 days per week [instead of 7 to account for occasional PTO or sick time] * the number
19 of workweeks for non-union Class Members (9,295) = \$8,644,350.

20 However, there are substantial risks that this claim would be dismissed in further
21 motion practice and the on-call time would not be compensable at all, which would
22 result in \$0 of recovery. *See* Section V(C)(2)(b), *supra*. Conservatively, to account for
23 these substantial risks, Plaintiffs discount this claim by 50 percent for certification risks
24 and then an additional 40 percent to account for the substantial risks on the merits. *See*
25 *e.g., Milburn v. PetSmart, Inc.*, 2019 WL 5566313 *4 (E.D. Cal. Oct. 29, 2019)
26 (approving settlement as fair and reasonable where plaintiff applied forty to fifty
27 percent discount each for class certification and risks on the merits); Thus, the potential
28 realistic value for this claim is **\$1,728,870**. Markham Decl., ¶13.

1 Off-the Clock Claim: This calculation is based on time spent receiving phone
2 calls and messages from managers or contractors and responding to on-call calls
3 (without actually reporting), approximately 15 minutes in total, 2 times per week: 15
4 minutes (0.25 hours) * 2 times per week * \$26.66 average regular rate of pay * 9,295
5 workweeks (non-union) = \$123,902.35. However, Defendant presented evidence that,
6 in actuality, Class Members responded to calls sporadically, likely defeating
7 commonality and predominance for this claim. Plaintiffs discount this claim by 50%
8 for the substantial certification risks, and an additional 40% for risks on the merits,
9 including evidence that Plaintiffs and Class Members actually responded to these calls
10 very rarely, which by following the automated prompts routinely only lasted mere
11 seconds, to \$24,780.47. *Id.*, ¶13.

12 Unreimbursed Business Expenses (Personal Cell Phones): Plaintiffs calculate
13 maximum value for this claim based on the following: Personal cell phone usage:
14 \$40/month as a fair estimate * 72 months in Class Period * all employees in class period
15 (non-union & union) (96) = \$276,480. However, there are substantial risks to this claim,
16 including that Defendant presented evidence that all Class Members had work phones
17 (and a brand specifically marketed to companies with on-call employees for reliability).
18 Plaintiffs discount this claim by the same 50% discount to account for significant class
19 certification risks and an additional 40% to account for risks on the merits, to \$55,296.

20 Unreimbursed Business Expenses (Mileage): Plaintiffs calculate maximum
21 value for this claim based on the following: Mileage (for driving to locations outside
22 of Class Members' typical work location): 40 miles per month per Class Member (all
23 non-union & union) times 96 class members times the standard IRS mileage rate
24 (\$0.655) times 72 months = \$181,094.40. Plaintiffs discount this claim by the same
25 50% discount to account for significant class certification risks and an additional 40%
26 to account for risks on the merits, to \$36,218.88.

27 Wage Statement Penalties: Defendant's maximum exposure for this claim is as
28 follows: \$50 initial violation * 48 employees = \$2,400; \$100 subsequent violation *

2,149 pay periods (2,197 pay periods - 48) = \$214,900. Thus, Defendant's maximum exposure for section 226 violations is \$217,300. However, this results in an average recovery of \$4,527/employee, so the \$4,000/employee cap applies. Thus, the Defendant's maximum exposure for this claim is $48 * \$4,000$ is \$192,000. With the same discounts applied as above, as this claim is entirely contingent on Plaintiffs' unpaid wage claim, the discounted valuation for this claim is: \$38,400.

Thus, based on the assumptions above, MSRC's potential **maximum** liability for Plaintiffs' remaining direct claims is \$9,225,826.70, and an additional \$192,000 for Plaintiffs' derivative claim, possible only if Plaintiffs prevailed on their underlying claims, for a total potential maximum exposure of \$9,417,826.70 for all claims. Thus, the Settlement Amount of \$325,000 represents 3.5% potential maximum liability for all of Plaintiffs' claims. *Id.*, ¶13. When applying the discounts as discussed above, the discounted value for Plaintiffs' direct claims is \$1,845,165.20, or \$1,883,565.20 for all claims. Thus, the Settlement Amount of \$325,000 represents **17-18%** of the discounted realistic potential liability for all of Plaintiffs' claims. *Id.*

This is an excellent result given the strength of MSRC's defenses, including the likelihood that Plaintiffs' claims could be dismissed entirely on further motion practice, analogous case law where courts have not found on-call claim liability (*see* section V(C)(1)(B), *supra*), and in light of the risks and limited remaining claims in this action. This settlement is well in the range of – or exceeding – settlements commonly approved by California district and state courts. *Id.*, ¶14; *see also* section V(C)(2) below for a detailed explanation.

4. Attorneys' Fees and Costs

The parties agreed that, subject to approval by the Court, up to \$108,333.33, or one-third of the Settlement Amount, may be allocated to pay attorneys' fees, and up to \$15,000 may be allocated to reimburse Class Counsel for litigation costs. Settlement Agreement, §§I(E, M). Courts in California wage and hour cases, where the common fund is under \$10 million, tend to award attorneys' fees in the 30% - 40% range.

1 *Vasquez v. Coast Valley Roofing, Inc.*, 266 F.R.D. 482, 491-92 (E.D. Cal. 2010) (citing
2 to five wage and hour class actions where courts approved fee awards ranging from 30
3 to 33%). The trial court has discretion to award attorneys' fees based on either the
4 lodestar/multiplier calculation or the percentage-of-recovery method. *Laffitte v. Robert*
5 *Half Int'l, Inc.*, 1 Cal.5th 480, 503 (2016). Class Counsel intends to brief the fee
6 application using both methodologies, as cross checks.² Any portion of the requested
7 attorneys' fees and costs not awarded to Class Counsel shall be part of the Net Fund
8 Value and shall be distributed to Settlement Class Members as provided in the
9 Agreement. *Id.*

10 **5. *PAGA Payment to Labor Workforce Development Agency***

11 The Parties agreed that \$13,000 (or 4%) of the Gross Fund Value will be
12 allocated for payment under the PAGA. 75% of this amount (\$9,750) will be paid to
13 the LWDA, and 25% (\$3,250) to Settlement Class Members. *Id.*, §I(Z). This amount
14 is well within or exceeds the range of the PAGA penalties typically awarded as part of
15 class action settlements. *See Bravo v. Gale Triangle, Inc.*, 2017 WL 708766, at *19
16 (C.D. Cal. Feb. 16, 2017) (\$10,000 as PAGA penalties found reasonable); *Franco v.*
17 *Ruiz Food Products, Inc.*, 2012 WL 5941801, at *14 (E.D. Cal. Nov. 27, 2012)
18 (approving PAGA penalties of \$10,000 and noting that amount was in line with
19 settlement approval of PAGA awards in other cases.); *Schiller v. David's Bridal, Inc.*,
20 2012 WL 2117001, at *14 (E.D. Cal. June 11, 2012) (\$7,500 to LWDA reasonable).

21 Regarding the valuation for Plaintiffs' PAGA claim, although the PAGA statute
22 provides penalties at \$100 per employee per pay period for the initial violation, and
23 \$200 for each employee per pay period for each subsequent violation, MSRC will
24 contend that for Plaintiffs to recover for a "subsequent violation," an employer must
25 have notice that it has violated the Labor Code. *Amaral v. Cintas Corp. No. 2*, 163

26
27 ² In accordance with *In re Mercury Interactive Corp. Securities Litigation*, 618 F.3d
28 988, 993 (9th Cir. 2010), Plaintiffs will file their application for attorneys' fees, costs
and Plaintiffs' incentive payments at least 14 days prior to the due date for objections.

1 Cal.App.4th 1157, 1207–09 (2008); *see also* *Trang v. Turbine Engine Components*
2 *Technologies Corp.*, 2012 WL 6618854 (C.D. Cal. Dec. 19, 2012) (“courts have held
3 that employers are not subject to heightened penalties for subsequent violations unless
4 and until a court or commissioner notifies the employer that it is in violation of the
5 Labor Code”). Here, MSRC was not cited for violations, and therefore, theoretically,
6 the \$100 penalty for every pay period applies. Markham Decl., ¶17. However, in
7 practicality, it is unclear the Court would award maximum penalties as there is little
8 guidance as to the standard for determining the amount of appropriate penalties under
9 PAGA. *Amaral, supra*, 163 Cal. App. 4th at 1213 (internal quotations omitted); *see*
10 *also Fleming v. Covidien Inc.*, 2011 WL 7563047, at *4 (C.D. Cal. Aug. 12, 2011).

11 Here, there are 2,550 pay periods within the applicable statute of limitations for
12 Plaintiffs’ unreimbursed expenses claim, and 2,197 pay periods for Plaintiffs’ unpaid
13 time claim. When multiplied by \$100 for the first and subsequent pay periods, this is
14 \$255,000 + \$219,700, or \$474,700 in MSRC’s total exposure for PAGA penalties.
15 Markham Decl., ¶17.

16 As such, the PAGA Payment of \$13,000 represents approximately 2.7% of the
17 total maximum PAGA penalties. This result falls within – or exceeds – the range of
18 other approved PAGA settlements, as courts frequently approve PAGA awards
19 between 0.2% to 2.2% of the total potential penalties. *See e.g., Carrington v. Starbucks*
20 *Corp.*, 30 Cal. App. 5th 504, at 528 (2018) (awarding PAGA penalties of 0.2% of the
21 maximum, or \$5 per pay period); *Ruch v. AM Retail Grp., Inc.*, 2016 WL 5462451, at
22 *2, 7 (N.D. Cal. Sept. 28, 2016) (settlement allocating \$10,000 to PAGA penalties
23 where potential value was over \$5.2 million, resulting in 0.2 percent PAGA recovery
24 approved). Markham Decl., ¶18.

25 These PAGA penalties conform to the courts’ reasoning that “[t]he remedy
26 sought in a PAGA suit consists of civil penalties, not individual or class damages”
27 [*Mendez v. Tween Brands, Inc.*, 2010 WL 2650571, at *4 (E.D. Cal. June 30, 2010)],
28 and in PAGA “[u]nlike class actions, these civil penalties are not to compensate

unnamed employees because the action is fundamentally a law enforcement action.”
See Ochoa-Hernandez v. CJADERS Foods, Inc., 2010 WL 1340777, at *4 (N.D. Cal.
Apr. 2, 2010).

6. Settlement Administration Costs

The parties selected ILYM Group, Inc. as the Settlement Administrator in this action. Settlement Agreement, §I(KK); *see also* Declaration of Lisa Mullins on behalf of ILYM Group, Inc. (“Mullins Decl.”), submitted concurrently with this motion. ILYM Group, Inc. has years of experience in the field of class action administration. Mullins Decl., ¶2, Ex. A. The costs of the Administrator, estimated at \$3,000, will be deducted from the Gross Fund Value. *Id.*, ¶10, Ex. C; Settlement Agreement, §III(H)(4).

7. Class Representatives Incentive Payments

MSRC agreed, subject to Court approval, to pay up to \$10,000 from the Gross Fund Value to each Plaintiff for their services as Class Representatives. Settlement Agreement, §I(L). Any portion of the requested Incentive Payments not awarded to the Class Representatives shall be part of the Net Fund Value, to be distributed to Settlement Class Members. *Id.*

B. Settlement Administration

Among the customary duties of the Settlement Administrator, ILYM Group, Inc. will send the Class Notice to Class Members as provided in this Settlement, determine the eligibility for, and the amounts of, any Individual Settlement Payments under the terms of this Agreement, process and distribute Class Members’ payments, and process and mail tax payments to the appropriate state and federal taxing authorities. Mullins Decl., ¶¶4-9. Further, Class Members will also be able to contact the Settlement Administrator by telephone or e-mail, or access the settlement website,³ if they have any Settlement questions or need assistance. *See* Class Notice, attached as **Exhibit A**

³ The website will contain settlement-related documents, including the attorney fee motion when filed, and notice of final judgment.

1 to the Settlement Agreement. Also, any opt-outs from the Settlement or objections must
2 be delivered to the Settlement Administrator. Settlement Agreement, §III(K)(2-4).

3 **C. Proposed Notice Plan**

4 Within 10 business days after the Administrator receives the class data, the
5 Administrator will send the Class Notice to all Class Members via first class mail. *Id.*,
6 §III(K)(2). Before mailing the Notice, the Settlement Administrator will run a check of
7 the Class Members' addresses against those contained in the USPS's National Change
8 of Address database, and take any other appropriate steps to validate the correctness of
9 the addresses provided by MSRC. *Id.* If the Notice is returned with a forwarding
10 address, the Administrator will use the forwarding addresses to locate the missing Class
11 Members, and re-mail the Notice to the correct address. *Id.* For Notices remailed after
12 being returned as non-deliverable, Class Members' deadline to opt out from or object
13 to the Settlement will be the later of: (i) 14 calendar days from the date of re-mailing
14 of the Notice or (ii) the remaining notice period. *Id.*, §I(II). The Settlement
15 Administrator will use all appropriate tracing methods to ensure that the Class Notice
16 is received by all Settlement Class Members. *Id.*, §I(JJ).

17 The Class Notice will summarize the terms of the Settlement Agreement, advise
18 the Class Members of their estimated individual settlement payment(s), and inform
19 Class Members of their right to object to or exclude themselves from the Settlement
20 within 45 days after the Notice mailing. *Id.*, Ex. A. Because this is the California-only
21 class, and the mailing will occur only in California, 45 days to opt out from or object
22 to the Settlement is sufficient. Markham Decl., ¶19. Further, because Class Members
23 worked as Responders (or other response-related employees) in California,
24 communicating with their superiors and colleagues on a daily basis in English, and
25 speaking English was a job requirement, English-only notice is sufficient. *Id.*

26 **V. THE SETTLEMENT SATISFIES THE PRELIMINARY APPROVAL** 27 **CRITERIA**

28 A class action may not be settled without court approval. Fed. R. Civ. P. 23(e).

1 However, there is a strong judicial preference for pre-trial settlement of complex class
2 actions. *Officers for Justice v. Civil Serv. Comm’n of San Francisco*, 688 F.2d 615, 625
3 (9th Cir. 1982); *In re Syncor ERISA Litig.*, 516 F.3d 1095, 1101 (9th Cir. 2008). In
4 determining whether to preliminarily approve a settlement, the court should evaluate
5 the fairness of the settlement in its entirety. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011,
6 1026 (9th Cir.1998). In contemplating the preliminary approval of a proposed
7 settlement, “[t]he recommendations of plaintiffs’ counsel should be given a
8 presumption of reasonableness.” *Knight v. Red Door Salons, Inc.*, No. 08-01520, 2009
9 WL 248367, at *4 (N.D. Cal. Feb. 2, 2009). The trial judge exercises discretion in
10 deciding whether to grant preliminary approval of a class action settlement and “great
11 weight is accorded to [the] judge’s views.” *7-Eleven Owners for Fair Franchising v.*
12 *Southland Corp.*, 85 Cal. App. 4th 1135, 1145 (2000).

13 Preliminary approval is the first of three steps of the settlement approval process.
14 Second is the dissemination of a settlement notice to all class members. Third is a final
15 approval hearing, where the evidence concerning the fairness, adequacy, and
16 reasonableness of the settlement may be presented, and class members may be heard
17 regarding the Settlement. *See* Manual for Complex Litigation, Fourth, § 21.632 (2004).
18 The court does not need to perform a final analysis of the settlement’s fairness to
19 preliminarily approve a proposed settlement. Rather, a more detailed assessment is
20 reserved for the final approval hearing, after class notice has been sent and class
21 members have had the opportunity to object to or opt-out of the settlement. *See* Moore’s
22 Federal Practice, 23.165[3] (3d ed. 2005). Generally, there is an initial presumption of
23 fairness when a proposed settlement, which was negotiated at arms’-length by Class
24 counsel, is presented for court approval. 4 Newberg on Class Actions, § 11.41, p. 90
25 (4th ed. 2002). In approving a settlement where the class has not yet been certified, the
26 court must first determine that a class exists. *Staton v. Boeing Co.*, 327 F.3d 938, 952
27 (9th Cir. 2003), citing *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613, 619-20
28 (1997) (commonality must be shown at a preliminary approval stage, although not

1 necessarily manageability). Then, the Court should examine the settlement as a whole
2 to determine if it is fair, adequate and reasonable. *Id.*, *Hanlon*, *supra*, 150 F.3d at 1019.

3 **A. The Proposed Class Meets the Qualifications for Certification for**
4 **Settlement Purposes.⁴**

5 A proposed class may be certified for settlement purposes if it satisfies the
6 requirements of Rule 23(a), namely: “(1) numerosity; (2) commonality; (3) typicality;
7 and (4) adequacy of representation.” *Hanlon*, 150 F.3d at 1019 (citing *Amchem*, 521
8 U.S. at 613). Then, a plaintiff must satisfy one of the prongs of Rule 23(b). *True v.*
9 *American Honda Motor Co.*, 749 F.Supp.2d 1052, 1062 (C.D. Cal. 2010). The Parties
10 in this case request certification of the Settlement Class under Rule 23(b)(3). The Class
11 meets all standards for conditional certification:

12 1. An Ascertainable and Numerous Class Exists that can be Determined
13 from Payroll Records

14 Rule 23(a)(1) requires “the class is so numerous that joinder of all members is
15 impracticable.” Generally, “classes of 40 or more are numerous enough” to satisfy this
16 requirement. *Ikonen v. Hartz Mountain Corp.*, 122 F.R.D. 258, 262 (S.D. Cal. 1988).

17 Here, the Class is composed of nearly 100 individuals, who can be identified and
18 located from MSRC’s personnel and payroll records. MSRC will provide the
19 Settlement Administrator with a database with all Class Members’ names and contact
20 information, and further steps will be taken to locate the Class Members for whom the
21 addresses are not current. Settlement Agreement, §II(K)(2). Numerosity is satisfied.

22 2. Common Issues of Law and Fact Exist

23 To certify a class, there must be “questions of law or fact common to the class.”
24 Fed. R. Civ. Proc. 23(a)(2). The Ninth Circuit construes “the requirements of Rule
25 23(a)(2) . . . permissively.” *Hanlon*, 150 F.3d at 1019. To satisfy commonality, even a
26 single common question is sufficient. *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541,
2556 (2011). “As a general rule if the defendant's liability can be determined by facts

27
28 ⁴ MSRC agrees to certify a class for settlement purposes only, and their agreement to
do so shall not be construed as an admission of the propriety of class certification
outside of the settlement context. Settlement Agreement, §III(C).

1 common to all members of the class, a class will be certified even if the members must
2 individually prove their damages.” *Brinker Rest. Corp. v. Super. Ct.*, 53 Cal.4th 1004,
3 1022 (2012). The court only determines whether or not “the theory of recovery
4 advanced by the proponents of certification is, as an analytical matter, likely to prove
5 amenable to class treatment.” *Sav-On Drug Stores*, 34 Cal. 4th 319, 327 (2004).

6 Here, there are common questions of law and fact that apply to Class Members
7 across the board. Those common questions predominate over any individual inquiries,
8 in that “determination of [their] truth or falsity will resolve an issue that is central to
9 the validity of each one of the claims in one stroke.” *Wal-Mart Stores, Inc.*, 131 S.Ct.
10 at 2551. Those questions include: (i) whether or not Class Members were paid for all
11 hours worked, including for on-call time and time spent responding to calls and
12 messages, outside of their work shifts; (ii) whether Class Members were reimbursed
13 for necessarily incurred business expenses, including for personal cell phone and
14 mileage expenses; (iii) Whether or not Class Members were provided with accurate
15 wage statements as required by Labor Code section 226; and (iv) Whether or not
16 Defendant engaged in unfair business practices in violation of the UCL. Thus,
17 commonality is met.

18 3. Plaintiffs’ Claims are Typical of the Claims of Class Members

19 Typicality does not mean that the interests of representative plaintiffs must be
20 identical to those of the absent class members. *Staton v. Boeing Co.*, 327 F.3d 938, 957
21 (9th Cir. 2003). They only need to be “reasonably co-extensive with those of absent
22 class members.” *Parsons v. Ryan*, 754 F.3d 657, 685 (9th Cir. 2014). Further, the
23 representative plaintiff must be a member of the class he seeks to represent. *La Sala v.*
24 *American Sav. & Loan Assn.*, 5 Cal.3d 864, 875 (1971). “Typicality refers to the nature
25 of the claims or defense of the class representative, and not to the specific facts from
26 which it arose or the relief sought.” *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508
27 (9th Cir. 1992).

28 Here, Plaintiffs’ claims arise from the same facts and legal theories as the Class

1 Members' claims. Plaintiffs were subject to the same MSRC policies as other Class
2 Members, were on-call outside of their shift time, and answered on-call calls and
3 messages outside of their work shifts, and incurred mileage expenses, just like other
4 members of the Class. Markham Decl., ¶15. Plaintiffs' claims arise from their
5 employment with MSRC in California. Thus, typicality is met.

6 4. Plaintiffs and Class Counsel will Adequately Protect the Interests of the
7 Class

8 Rule 23(a)(4) requires the Class Representative "fairly and adequately represents
9 the interest of the class." The adequacy of representation involves two questions: (1)
10 whether the Representative and her counsel have any conflicts of interest with other
11 class members, and (2) whether the Representative and her counsel will vigorously
12 prosecute the action. *See Staton*, 327 F.3d at 957.

13 Here, Plaintiffs retained counsel with extensive experience in prosecuting wage
14 and hour class actions. Markham Decl., ¶¶27-33; Declaration of Richard E. Quintilone
15 ("Quintilone Decl."), ¶3. In addition, Plaintiffs have the same interests as the rest of the
16 Settlement Class, because they have allegedly been injured in substantially the same
17 manner.

18 **B. Rule 23(b)(3) Factors**

19 In addition to Rule 23(a) requirements, "the proposed class must satisfy at least
20 one of the three requirements listed in Rule 23(b)." *Dukes*, 131 S.Ct. at 2548. Here,
21 Plaintiffs seek certification under Rule 23(b)(3), which calls for two separate inquiries:
22 whether issues common to the class "predominate" over issues unique to individual
23 class members, and whether the proposed class action is superior to other methods
24 available for adjudicating the controversy. Rule 23(b)(3).

25 Here, questions of law or fact common to all Settlement Class Members
26 predominate over questions affecting individual members, because Plaintiffs allege that
27 all Settlement Class Members were subject to MSRC's on-call and reimbursement
28 policies at issue in this action, and were underpaid wages and reimbursements as a
result of these policies and practices. *See also* Section A(2), *supra*. Adjudication of

1 these common questions in one action will preserve the court's time and resources.
2 "Implicit in the satisfaction of the predominance test is the notion that the adjudication
3 of common issues will help achieve judicial economy." *Valentino v. Carter-Wallace,*
4 *Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996).

5 Next, the court considers whether a class action would be superior to individual
6 suits under Rule 23(b)(3) by weighing: (1) the class members' interests in individually
7 controlling the prosecution or defense of separate actions; (2) the extent and nature of
8 any litigation concerning the controversy already begun by or against Class Members;
9 and (3) the desirability or undesirability of concentrating the litigation of the claims in
10 the particular forum. A fourth factor—the difficulties of managing the class action—is
11 not considered when certification is used for purposes of settlement. *Amchem, supra*,
12 521 U.S. at 616; *True, supra*, 749 F.Supp.2d at 1062 n. 12.

13 Here, Settlement Class Members' interests are relatively small, so they are
14 unlikely to prosecute separate actions. Further, to the parties' knowledge, this is the
15 only action against MSRC alleging the claims in this lawsuit. Finally, this forum is
16 appropriate, as MSRC does substantial business, and Plaintiffs work and reside, in this
17 judicial district. Because several issues are common to all Class Members, a class
18 action is superior to numerous individual actions, and the maintenance of this action as
19 a class action will save judicial resources and help avoid inconsistent judgments. *See*
20 *Sav-On Drug Stores*, 34 Cal.4th at 326.

21 Thus, the Court should certify Plaintiffs' class claims for the purposes of this
22 Settlement.

23 **C. The Proposed Settlement is Fair, Adequate, and Reasonable**

24 Under Rule 23(e), the district court must determine whether the proposed
25 settlement is "fundamentally fair, adequate, and reasonable." *Class Plaintiffs v. City of*
26 *Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992). At the preliminary approval stage, the
27 Court's view is "limited to the extent necessary to reach a reasoned judgment that the
28 agreement is not the product of fraud" *Officers for Justice*, 688 F.2d at 625.

1 Generally, the opinions of counsel should be given considerable weight because of
2 counsel's familiarity with the litigation, and previous experience with cases such as this
3 one. *Id.* At this stage the Court considers whether:

4 (1) the proposed settlement appears to be the product of serious, informed,
5 noncollusive negotiations, (2) has no obvious deficiencies, (3) does not improperly
6 grant preferential treatment to class representatives or segments of the class, and
7 (4) falls with the range of possible approval.

8 *In re Tableware Antitrust Litig.*, 484 F.Supp.2d 1078, 1079 (N.D. Cal. 2007) (citing
9 Manual for Complex Litigation, Second, § 30.44 (1985)). This Settlement meets all of
10 these criteria.

11 1. The Settlement is the Product of Serious, Informed and Noncollusive
12 Negotiations

13 This Settlement is the result of extensive and hard-fought negotiations. Markham
14 Decl., ¶10. Plaintiffs' law firms specialize in plaintiffs'-side class and representative
15 action litigation, and MSRC is represented by seasoned attorneys at Blank Rome LLP.

16 Prior to the mediation, Class Counsel thoroughly analyzed and investigated Class
17 Members' claims and potential damages. Markham Decl., ¶¶8-9, 11. The parties engaged
18 in an exchange of data for mediation purposes. Class Counsel prepared a damages analysis
19 and reviewed pertinent policies and data. *Id.*

20 The investigation of the claims in this case gave both parties a clear view of the
21 strengths and weaknesses of their respective positions. *See Adams v. Inter-Con Sec.*
22 *Sys., Inc.*, 2007 WL 3225466, at *3 (N.D. Cal. Oct. 30, 2007) (preliminarily approving
23 the settlement agreement after finding it was reached through extensive negotiations
24 and plaintiff counsel's thorough investigation of the claims). Based on their knowledge
25 of this action, Plaintiffs determined that the Settlement would constitute the best
26 outcome for the Class Members. Markham Decl., ¶¶12-14. Likewise, MSRC concluded
27 that this action should be settled in the manner and upon the terms and conditions set
28 forth in the Settlement Agreement in order to avoid the expense, inconvenience, and
burden of further legal proceedings, and the uncertainties of trial and appeals.

The parties participated in a mediation before a private neutral with extensive

1 experience in wage and hour class actions. *Id.*, ¶12. That indicates the settlement was
2 free of collusion. “The assistance of a well-respected mediator with substantial
3 experience in employment litigation...supports approval of the settlement.” *Glass v.*
4 *UBS Fin. Servs.*, 2007 WL 221862, at *5 (N.D. Cal. Jan. 26, 2007); *Murillo v. Pac.*
5 *Gas & Elec. Co.*, 266 F.R.D. 468, 479 (E.D. Cal. 2010).

6 The parties have been cooperative, yet aggressive, and displayed capable and
7 experienced advocacy on both sides. Accordingly, “[t]here is ... every reason to
8 conclude that settlement negotiations were vigorously conducted at arms’ length and
9 without any suggestion of undue influence.” *In re Wash. Public Power Supply Sys.*
10 *Sec. Litig.*, 720 F.Supp. 1379, 1392 (D. Ariz. 1989).

11 2. The Settlement has no “Obvious Deficiencies” and Falls within the
12 Approval Range

13 a) California Courts Frequently Approve Class Action Settlements with Similar
14 Recoveries

15 “[T]he very essence of a settlement is compromise, ‘a yielding of absolutes and
16 an abandoning of highest hopes.’” *Officers for Justice*, 688 F.2d at 624 (quoting *Cotton*
17 *v. Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977)). Thus, when evaluating the amount
18 offered in settlement, the Court should consider “the complete package taken as a
19 whole,” and the amount should “not be judged against a hypothetical or speculative
20 measure of what might have been achieved by the negotiators.” *Id.* at 625-28.

21 Courts routinely approve class action settlements where the settlement amount
22 is a lower percentage of the claimed amount of damages. *See Bellinghausen v. Tractor*
23 *Supply Co.*, 303 F.R.D. 611, 623-24 (N.D. Cal. 2014) (finding settlement amount of a
24 wage and hour class action that equaled between 9% and 27% of the total potential
25 liability to be fair, adequate and reasonable given the uncertainty of continued
26 litigation); *Thomas v. Cognizant Technology Solutions U.S. Corp.*, 2013 WL 12371622
27 *6 (C.D. Cal. June 24, 2013) (concluding that settlement between 4 and 5.5% of
28 maximum liability was fair and reasonable); *Viceral v. Mistras Grp., Inc.*, 2016 WL
5907869, at *8 (N.D. Cal. Oct. 11, 2016). *See, e.g., id.* at *7 (preliminarily approving

1 settlement representing 8.1% of the full verdict value in recognition of the “daunting”
2 risks plaintiffs faced in proving their case); *Balderas v. Massage Envy Franchising,*
3 LLC, 2014 WL 3610945, at *5 (N.D. Cal. July 21, 2014) (preliminarily approving a
4 settlement representing 5% of the maximum recovery in light of “the strengths of
5 plaintiff’s case and the risks and expense of continued litigation”). Simply put, “the fact
6 that a proposed settlement may only amount to a fraction of the potential recovery does
7 not mean that [it] should be disapproved.” *7-Eleven Owners, supra*, 85 Cal.App.4th at
8 1150, citing *Linney v. Cellular Alaska P’ship*, 151 F.3d 1234, 1242 (9th Cir. 1998).

9 Here, the Settlement represents 17-18% of the realistic potential exposure for
10 Plaintiffs’ claims, without any risks, costs, and uncertainty of prolonged litigation.
11 Without accounting for the number of workweeks worked during the relevant time
12 period, a **Class Member will receive approximately \$1,655** (or \$11.88 per workweek
13 based on 13,380 total union and non-union member workweeks). This is an excellent
14 result, especially in light of MSRC’s legal and factual defenses, including the
15 likelihood that Plaintiffs’ on-call claim would be dismissed entirely, and when
16 considering that Plaintiffs could face difficulties to establish liability and prevail at
17 certification and trial. Markham Decl., ¶16.

18 *b) This Settlement is an Excellent Result Based on Certification and Liability*
19 *Risks*

20 Plaintiffs recognize several risks to succeeding on the merits and obtaining
21 certification.⁵ Markham Decl., ¶20.

22 Regarding Plaintiffs’ on-call claim, “[a] determination of whether the on-call
23 waiting time is spent predominantly for the employer’s benefit depends on two
24 considerations: (1) the parties’ agreement, and (2) the degree to which the employee is
25 free to engage in personal activities.” *Gomez v. Lincare, Inc.*, 173 Cal.App.4th 508,
26 523 (2009), citing *Owens v. Local No. 169*, 971 F.2d 347, 350–355 (9th Cir. 1992). In

27 ⁵ This is not intended to be a comprehensive list of all of MSRC’s defenses. This section
28 merely analyzes those which Plaintiffs believe to be most significant to their
assessment of settlement value.

1 *Lincare*, the California Court of Appeal held that an agreement that required employees
2 to respond to a call within thirty minutes, and report to a patient's house within two
3 hours, was "not unduly restrictive." *Id.* at 525. Defendant will argue (likely
4 successfully) that Plaintiffs allege no facts that would make their on-call duties any
5 more restrictive than those in *Lincare*, and therefore Plaintiffs have not alleged facts
6 sufficient to be entitled to any compensation for on-call time. If the Parties had not
7 reached a settlement, MSRC would have made a further motion to dismiss on this basis.
8 Additionally, regarding Plaintiffs' off-the-clock claim, MSRC presented evidence that
9 Responders rarely received calls while they were on-call, and that on those rare
10 instances, responses were typically sent by responding to an automated message,
11 lasting mere seconds. Further, MSRC will point to its lawful policies prohibiting off-
12 the-clock work, and specifically a June 2023 policy outlining pay procedures for
13 responding to on-call messages. Markham Decl., ¶21.

14 With respect to their unreimbursed expenses claim, Plaintiffs allege that they
15 needed to use personal cell phones; however, Defendant has argued that Plaintiffs do
16 not explain or allege why they cannot use the employer provided devices for the same
17 purpose. To the extent some Class Members used their personal cell phones, Defendant
18 will argue that the decision to use a personal (as opposed to employer provided) device
19 is a decision made by the employee for the convenience of the employee and is not
20 required, creating individualized issues defeating commonality. MSRC has argued that
21 by providing Class Members with a work phone specifically to use while employees
22 are on call, use of Class Members' personal devices was not required or foreseeable,
23 weakening this claim. *Id.*, ¶22.

24 With respect to mileage, Defendant maintains that Plaintiffs have not alleged
25 mileage that has not been reimbursed, and that MSRC has extensively reimbursed Class
26 Members for mileage during the Class Period. MSRC contends that Plaintiffs have not
27 alleged uncompensated mileage for travelling between locations during their shifts, for
28 example. MSRC maintains that the mileage claim described in the operative complaint

1 is more analogous to an uncompensated commute time to and from work, which is not
2 compensable. *Id.*, ¶23.

3 In regards to the unreimbursed expenses claim on both issues, Plaintiffs will
4 argue that they and Class Members necessarily incurred cell phone and mileage
5 expenses for the benefit of their employer, entitling them to reimbursement under
6 California law. *Herrera v. Zumiez, Inc.*, 953 F.3d 1063, 1077 (9th Cir. 2020). However,
7 MSRC will likely argue that as here, when the use of a personal cell phone is not
8 mandatory – and particularly when employees are provided company-issued phones –
9 no reimbursement is required. *See e.g., Pyara v. Sysco Corp.*, 2017 WL 928715, at *1–
10 2 (E.D. Cal. Mar. 9, 2017) (denying class certification where employees were provided
11 company-issued phones but also communicated with supervisors with their personal
12 cell phones); *Herrera, supra*, 953 F.3d at 1077 (“[T]he employer does not have to
13 indemnify unnecessary extra automobile expenses that are incurred based on the choice
14 of car and fuel.”). Further, to the extent that Plaintiffs and Class Members did not seek
15 reimbursement of these expenses, this claim would be susceptible to summary
16 judgment and would face hurdles in quantifying and proving commonality for
17 certification purposes. *See e.g., Hammit v. Lumber Liquidators*, 19 F. Supp. 3d 989,
18 1001 (S.D. Cal. 2014) (granting summary judgment when employee failed to request
19 reimbursement). Markham Decl., ¶24.

20 Further, Defendant would likely argue that where a plaintiff seeks class
21 certification based on allegations that the employer consistently imposed a uniform
22 policy on class member (such as the on-call and expense reimbursement policies), the
23 plaintiff must still demonstrate that the illegal effects of this policy can be proven
24 efficiently and manageably within a class setting. *Duran v. U.S. Bank Nat’l Assn.*, 59
25 Cal.4th 1, 29 (2014); *see also Payton v. CSI Elec. Contractors, Inc.*, 27 Cal.App.5th
26 832, 842 (2018). Markham Decl., ¶25.

27 Lastly, with respect to the wage statement claim, it is derivative of Plaintiffs’
28 unpaid time claim, so if Plaintiffs did not prevail on the underlying claim, then

1 Plaintiffs' derivative claim would also fail. *See Gomez, supra*, 173 Cal.App.4th at 524-
2 25. Also, Defendant will likely assert that wages that were not paid cannot form the
3 basis of the derivative claim based on *Maldonado v. Epsilon Plastics, Inc.*, 22
4 Cal.App.5th 1308, 1336-37 (2018). Markham Decl., ¶26.

5 Thus, when considering the probability of lengthy litigation in the absence of a
6 settlement, the risk that Plaintiffs and Class Members might not have been able to
7 succeed at trial, and the risk that a jury could award damages less than \$325,000, the
8 settlement amount is reasonable. *In re Mego Fin. Corp. Sec. Litig.*, *supra*, 213 F.3d at
9 458; *Sandoval v. Tharaldson Emp. Mgmt., Inc.*, 2010 WL 2486346 (C.D. Cal. June 15,
10 2010), at *7.

11 3. The Settlement does not Improperly Grant Preferential Treatment to
12 Class Representative or Segments of the Class

13 The Settlement payout amount is based on the number of workweeks each
14 Settlement Class Member worked during the class period. Settlement Agreement,
15 §III(G). This formula is realistic because Class Members' individual recovery is
16 proportionate to the amount of time the Class Members were employed with Defendant.
Markham Decl., ¶15.

17 In addition, Plaintiffs will each receive \$10,000 for their time and efforts in
18 representing the Class. *Id.*, §III(M). "Incentive awards [for class representatives] are
19 fairly typical in class actions." *Cellphone Termination Fee Cases*, 186 Cal.App.4th
20 1380, 1393 (2010), citing *Rodriguez v. West Publ'g*, 563 F.3d 948, 958 (9th Cir. 2009).
21 California courts agree that a class representative is entitled to such an award.
22 *Cellphone Termination*, *supra*, 186 Cal.App.4th at 1394. "Since without a named
23 plaintiff there can be no class action, such compensation as may be necessary to induce
24 him to participate in the suit could be thought the equivalent of the lawyers' nonlegal
25 but essential case-specific expenses, such as long-distance phone calls, which are
26 reimbursable." *Clark v. Am. Residential Servs.*, 175 Cal.App.4th 785, 804 (2009),
27 citing *Matter of Cont'l Ill. Sec. Litig.*, 962 F.2d 566, 571 (7th Cir. 1992).

28 Here, the incentive awards to Plaintiffs are based on the extent of Plaintiffs'

1 participation in this action, and not conditioned upon Plaintiffs' support of the settlement.
2 *Cf. Radcliffe v. Experian Info. Solutions, Inc.*, 715 F.3d 1157, 1165 (2013). Throughout this
3 action, Plaintiffs assisted in investigation of the claims, participated in multiple call
4 conferences with counsel, provided and reviewed documents and declarations, and
5 were on standby during mediation. Markham Decl., ¶36. Plaintiffs will provide
6 declarations detailing their efforts, contributions and risks undertaken, concurrently
7 with Plaintiffs' motion for approval of attorneys' fees, costs, and incentive payments.
8 *Id.*

9 Courts frequently award incentive awards higher than the amounts requested
10 here. *Ross v. U.S. Bank Nat'l Ass'n*, 2010 WL 3833922, at *3 (N.D. Cal. Sept. 29,
11 2010) (approving an award of \$20,000 to each of four named plaintiffs based on
12 their contributions to litigation and the risk that being a class representative would harm
13 their reputation); *see also Ridgeway v. Wal-Mart Stores Inc.*, 2017 WL 4071293, at
14 *19 (N.D. Cal., Sept. 14, 2017) (\$15,000 incentive awards for each of the named
15 plaintiffs awarded); *Low v. Trump University, LLC*, 246 F.Supp.3d 1295, 1316 (S.D.
16 Cal. 2017) (\$15,000 incentive award approved where plaintiffs "devoted significant
17 amounts of time and energy" to the action); *Ontiveros v. Zamora*, 303 F.R.D. 356, 365–
18 66 (E.D. Cal. 2014) (granting \$15,000 in incentive award). Thus, the proposed
19 incentive payments are reasonable.

20 4. The Stage of the Proceedings is Sufficiently Advanced to Permit
21 Preliminary Approval of the Settlement

22 "A court is more likely to approve a settlement if most of the discovery is
23 completed because it suggests that the parties arrived at a compromise based on a full
24 understanding of the legal and factual issues surrounding the case." *Nat'l Rural*
25 *Telecommunications Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523 at 527 (C.D. Cal. 2004).
26 However, the settlement can be approved even in the absence of any discovery, if other
27 factors are satisfied. *In re TD Ameritrade Account Holder Litig.*, 2011 WL 4079226,
28 at *6 (N.D. Cal. Sept. 13, 2011). The bottom line is that "the parties have sufficient
information to make an informed decision about the settlement." *Durham v. Cont'l*

1 *Cent. Credit, Inc.*, 2011 WL 90253, at *3 (S.D. Cal. Jan. 10, 2011), citing *Linney v.*
2 *Cellular Alaska P'ship*, 151 F.3d at 1239.

3 Here, before settling this action, the parties had a sufficient understanding of
4 their respective claims and defenses. The parties engaged in informal discovery prior
5 to mediation. Plaintiffs reviewed MSRC's policies, Plaintiffs' employment records,
6 and also time and payroll records for a 25% sample of Class Members. *See* section III,
7 *supra*; Markham Decl., ¶13. Before mediation, Class Counsel had investigated
8 Plaintiffs' claims, examined documents and data, and performed damages calculations.
9 *Id.*, ¶10. At the time the parties engaged in mediation, they knew and understood their
10 respective positions. As a result of the work performed in this case, the real value of
11 the classes' claims was well known, and Class Counsel determined that the Settlement
12 with MSRC is fair, reasonable, adequate, and in the best interest of the Class. *Id.*, ¶¶11,
13 37; *see also Young v. Polo Retail, LLC*, 2007 WL 951821, at *4 (N.D. Cal. Mar. 28,
14 2007).

15 **VI. THE PROPOSED NOTICE TO THE CLASS SHOULD BE**
16 **APPROVED**

17 If the Court concludes after a preliminary evaluation of the settlement that the
18 relief offered and notice provided are fair and adequate, the Court should order that the
19 class notice be provided. Manual for Complex Litig., Fourth, § 21.632 (2004) at 321.
20 The threshold requirement regarding the sufficiency of the class notice is whether the
21 means proposed for distributing the notice are reasonably calculated to apprise the class
22 of the pendency of the action, the proposed settlement, and the right to opt out or object
23 to the settlement. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173 (1974); *Mullane v.*
24 *Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 315 (1950).

25 Here, the Notice is more than sufficient, because it gives Class Members, in easy
26 to understand and clear language: (1) basic information about the action and the
27 Settlement; (2) an estimate of workweeks Class Members worked during the Class
28 Period, and an explanation how Class Members can dispute this calculation; (3) an

1 explanation how the payout from the Settlement will be calculated for each Class
2 Member, and an estimate of the Class Member's Individual Payment(s); (4) an
3 explanation how Class Members can exercise their right to opt-out from, or object to,
4 the Settlement; (5) an explanation that any claims against MSRC that could have been
5 litigated in this Action will be released if the Class Member does not opt out; (6) name
6 of Class Counsel and information regarding attorneys' fees and costs; (7) the date of
7 the Fairness Hearing and an explanation of eligibility to appear at the Fairness Hearing;
8 and (8) contact information where Class Members can obtain additional information.
9 See Ex. A (proposed Class Notice).

10 Thus, the Notice plan is fair and adequate and complies with the requirements of
11 Rule 23.⁶

12 VII. CONCLUSION

13 Counsel for the parties thoroughly investigated Plaintiffs' claims before settling
14 this case. In the judgment of both parties, the proposed Settlement is a fair and
15 reasonable compromise of the issues in dispute in light of the strengths and weaknesses
16 of each party's case. After weighing the substantial, certain and immediate benefits of
17 this Settlement against the uncertainty of further litigation, the parties believe the
18 proposed Settlement is fair, reasonable and adequate. Plaintiffs' motion should,
19 respectfully, be granted.

20 Dated: November 6, 2023

Respectfully submitted,

21 **THE MARKHAM LAW FIRM**

22
23 /s/ David R. Markham

David R. Markham

24 Maggie Realin

25 Lisa Brevard

26 *Attorneys for Plaintiffs*

27
28 ⁶ CAFA notice is not required as the number of Class Members is less than 100. See 28 USC § 1332(d)(5)(B).