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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

VICTORIA WILSON, individually, and on
behalf of all others similarly situated,

Plaintiff,

vs.

I.K. HOFMANN USA, INC., et al.,

Defendants.

Case No.: 21STCV24628

[Assigned for all purposes to: Hon. Elihu M Berle,
Dept. 6]

CLASS ACTION

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

Date: August 31, 2023
Time: 9:00 a.m.
Courtroom: Dept. SSC-6
Judge: Hon. Elihu M Berle

Action Filed: July 2, 2021
Trial Date: Not Set

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

2 PLEASE TAKE NOTICE that on August 31, 2023, at 9:00 a.m., or as soon thereafter as the
3 matter may be heard, in Department 6 of the above-captioned Court, located at 312 N. Spring Street, Los
4 Angeles, CA, Plaintiff VICTORIA WILSON (“Plaintiff”) will and hereby does move this Court for an
5 order:

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

8 2. Finally approving the JOINT STIPULATION OF CLASS AND
9 REPRESENTATIVE ACTION SETTLEMENT (“Settlement” or “Agreement”);

10 3. Appointing counsel for Plaintiff, Moon & Yang, APC, as Class Counsel;

11 4. Appointing Plaintiff as the Class Representative;

12 5. Approving the use of the proposed notice procedure and related notice form;

13 6. Approving ILYM GROUP, INC. as the third-party administrator;

14 7. Ruling that Settlement Class Members who did not timely submit requests for
15 exclusion from the settlement as set forth in the Agreement have released their claims against
16 Defendant and the other releasees as set forth in the Agreement;

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

20 9. Awarding the sums requested in the Motion;

21 10. Entering a Final Judgment; and,

22 11. Without affecting the finality of the final judgment, reserving continuing
23 jurisdiction over the parties for the purposes of implementing, enforcing and/or administering
24 the settlement as set forth in the Agreement or enforcing the terms of the Final Judgment.

25 Good cause exists to grant this Motion because:

26 1. The Class meets all of the requirements for class certification for settlement
27 purposes under Code of Civil Procedure § 382;

28 2. The Settlement Agreement is a fair, adequate, and reasonable compromise of the

disputed wage and hour claims asserted by Plaintiff;

3. Plaintiff and Class Counsel are adequate to represent the Class;

4. The notice procedures and related forms complied with California Rules of Court 3.766(d) and (e) and this Court's Order granting preliminary approval of the Settlement, and adequately apprised Class Members of their rights and fully comport with due process.

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

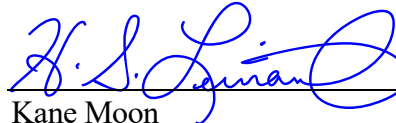
This Motion is based on this Notice of Motion and Motion, the attached Memorandum of Points and Authorities, the Declarations of H. Scott Leviant, Plaintiff, and the Settlement Administrator in support thereof, all papers and pleadings on file with the Court in this action, all matters judicially noticeable,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

Respectfully submitted,

Dated: June 28, 2023

MOON & YANG, APC

By:



Kane Moon
H. Scott Leviant
Mariam Ghazaryan

Attorneys for Plaintiff

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1 **I. INTRODUCTION**

2 Pursuant to California Rules of Court, Rules 3.769, Plaintiff requests that this Court finally
3 approve the class action settlement set forth in the JOINT STIPULATION OF CLASS AND
4 REPRESENTATIVE ACTION SETTLEMENT (“Settlement” or “Agreement”) with Defendants I.K.
5 HOFMANN USA INC. (“I.K. Hofmann”) and LUFTHANSA CARGO AKTIENGESELLSCHAFT
6 (“Lufthansa”) (I.K. Hofmann and Lufthansa are referred to herein as “Defendants”).

7 After informal discovery, the exchange of documents and data, and an arm’s-length mediation
8 session with mediator Steven J. Serratore, Esq., Plaintiff and Defendants (collectively referred to herein
9 as the “Parties”) reached a proposed class action settlement with a gross settlement amount (“GSA”) of
10 **\$400,000.00** in compromise of disputed claims asserted on behalf of the below-defined Class consisting
11 of **178** members. Plaintiff believes this settlement is a fair, adequate, and reasonable compromise of
12 disputed claims for alleged wage and hour violations and penalties asserted in this case.

13 Plaintiff now submits this Motion for Final Approval of Class Action Settlement, along with the
14 Settlement (attached to the Declaration of H. Scott Leviant [“Leviant Decl.”], Exhibit 1 thereto). For the
15 Court’s convenience, below is a summary of the key provisions of the Settlement.

16 **II. THE NOTICE PROCESS IS UNDERWAY**

17 The Notice was issued, and the notice process is underway. The mailing of the notice occurred
18 as scheduled.

19 **III. THE MAJOR TERMS OF SETTLEMENT**

20 The provisions of the proposed Settlement include the following:

- 21 • Defendants agree not to oppose certification for purposes of Settlement (Settlement, ¶
22 VII.19);
- 23 • Settlement Amount: Defendants will pay a maximum of **\$400,000.00**, referred to as the
24 Gross Settlement Amount (or GSA herein), resulting in an estimated average **gross**
25 payment per Class Member of **\$2,247.19** (Settlement, ¶ IV.A; Leviant Decl., ¶ 18.);
- 26 • Class Size: **178** individuals, who worked **14,841** workweeks. (Settlement, ¶ IV.A; Leviant
27 Decl., ¶ 18.)

- 1 • PAGA Group Size: **133** individuals, who worked **6,879** PAGA workweeks (Leviant Decl.,
2 ¶ 18);
- 3 • PAGA Period: July 26, 2020, through January 15, 2023 (Settlement, ¶ II.29);
- 4 • Escalator Clause: Each Defendant agrees to increase their respective shares of the GSA in the
5 event that the workweeks attributable to that Defendant exceeds a 15% escalation threshold.
6 (the “Escalator Clause”). (Settlement, ¶ IV.A);
- 7 • Kullar/Munoz Analysis: Plaintiff addresses the claims analysis herein, at Part VI.B.3, and
8 in Paragraph 18 of the Leviant Declaration;
- 9 • No Reversion: The Settlement is a *non-reversionary* settlement (Settlement, ¶ IV.A);
- 10 • Certification: Plaintiff addresses certification requisites herein, at Part VI.A. Certification
11 was addressed in more detail in the Motion for Preliminary Approval;
- 12 • No Claim Form: No claim form is required (Settlement, ¶ IV.A);
- 13 • Class Release: The Settlement will release specified wage-and-hour claims for Class
14 Members (those Class Members who do not opt out of the Settlement) as defined by the
15 First Amended Complaint (Settlement, ¶¶ II.9, IV.E.2);
- 16 • PAGA Release: Class Members will release the PAGA Claims set forth in this Action, that
17 were identified in the Operative Complaint and Plaintiff’s LWDA Notice Letter, regardless
18 of whether they opt out of the class portion of the Settlement (Settlement, ¶¶ II.30, IV.E.1);
- 19 • Release Effective Date: The Release is not active until Defendants tender all payments
20 required under the Settlement to the Settlement Administrator (Settlement, ¶ IV.E);
- 21 • Net Settlement Amount Available to the Class: After deducting Class Counsel’s attorneys’
22 fees and costs, service payment to Plaintiff, administration costs, and the PAGA penalty,
23 the remainder will be available for distribution to Class Members who do not opt out, with
24 each Class Member receiving a share based on the number of workweeks each Class
25 Member worked for Defendants within the Class Period. The Net Settlement Amount is
26 estimated to be at least **\$163,680.00**, resulting in an average **net** payment per Class Member
27 of at least **\$919.55**, before any tax withholdings. (Settlement, ¶ II.24);
- 28 • Tax Allocation: The amounts distributed to Class Members will be characterized as 10%

alleged unpaid wages, 45% to penalties and 45% to interest and non-wage damages, and
PAGA Settlement Payments will be allocated as 100% penalties. (Settlement, ¶ IV.D.1.)

- Employer’s Portion of Payroll Taxes Paid Separately: Defendants’ portion of payroll taxes (e.g., FICA, FUTA, etc.) owed on any settlement payments to Class Members that constitute wages will be paid separate and apart from the GSM (Settlement, ¶ II.18);
- Settlement Administrator: The notice portion of the Settlement will be administered by a third-party Administrator, ILYM Group, Inc., and the Parties estimated that the costs of administration should not reasonably exceed \$10,000.00. ILYM’s estimate for settlement administration services in the amount of **\$7,990.00** was selected as the lowest bid from a competitive bidding process. (Settlement, ¶ II.44; ILYM Decl., Exh. C.)
- Class Data for Administration: The Settlement Administrator will receive the Class List within 21 calendar days of Preliminary Approval, use the NCOA database to update the Class List, and then use skip tracing on returned Notices (Settlement, ¶ V.C.1);
- Notice: The Notice will issue within 21 days of receipt of the Class List (Settlement, ¶ V.C.2). The Notice describes how to dispute workweeks, submit an objection in writing, in person, or through an attorney, or request exclusion (Settlement, ¶¶ V.D, V.E);
- Notice Language: Notice will issue in English and Spanish (Settlement, ¶ V.B.1);
- Objections: Objections can be submitted in person, through an attorney, or in writing to the Settlement Administrator, with no pre-requisite to being heard (Settlement, ¶ V.E);
- Exclusion Requests: The procedure for exclusion requests, submitting a request to the Settlement Administrator, is the same as the procedure for submitting a written objection (Settlement, ¶¶ V.D and V.E);
- PAGA Allocation: From the GSA, **\$70,000** will be allocated to settle claims brought pursuant to the California Private Attorneys General Act, Labor Code § 2699 *et seq.* (“PAGA”), and seventy-five percent (75%), or **\$52,500**, will be paid to the California Labor & Workforce Development Agency. (Settlement, ¶¶ II.23.);
- Notice to LWDA: Notice was provided prior to the filing of this Motion. Evidence is attached to the Leviant Declaration;

- Enhancement/Service Awards to Plaintiff: Defendants will not oppose the application for Class Representative Service Payment of up to **\$5,000.00** for Plaintiff, to be paid from the GSA (Settlement, ¶ II.36);
- Fees and Costs: Defendants will not oppose Class Counsel’s application for fees not to exceed 33.33% of the GSA (**\$133,320.00**), and actual costs, in an amount not to exceed **\$15,747.33**, to be paid out of the GSA (Settlement, ¶¶ II.3, II.21);
- Check Void Period: Settlement checks will be valid for 180 days (Settlement, ¶ V.H.7);
- Uncashed Checks: Any settlement checks that are mailed to the Class Members and remain uncashed after 180 days of the date of issuance will be cancelled, and the moneys will be directed to the Controller of the State of California to be held pursuant to the Unclaimed Property Law (Settlement, ¶ V.H.7);
- Judgment Notice: Judgment will be posted on the Settlement Administrator’s website after entry;
- Confidentiality Provisions: The Settlement permits Class Counsel to discuss the Settlement with Class Members (Settlement ¶ VII.8).

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

IV. FACTUAL AND PROCEDURAL BACKGROUND

A. Plaintiff’s Claims

On July 2, 2021, Plaintiff Victoria Wilson brought a putative class action against Defendants, asserting claims for (1) Failure to Pay Minimum Wages (Labor Code §§ 204, 1194, 1194.2 and 1197); (2) Failure to Pay Overtime Compensation (Labor Code §§ 1194 and 1198); (3) Failure to Provide Meal Periods (Labor Code §§ 226.7 and 512); (4) Failure to Authorize and Permit Rest Breaks (Labor Code §§ 226.7); (5) Failure to Indemnify Necessary Business Expenses (Labor Code § 2802); (6) Failure to Timely Pay Final Wages at Termination (Labor Code §§ 201-203); (7) Failure to Provide Accurate Itemized Wage Statements (Labor Code § 226); and (8) California Business & Professions Code §§ 17200, *et seq.* (unfair business competition). (Leviant Decl., ¶ 4.)

On July 26, 2022, Plaintiff sent a letter to the Labor and Workforce Development Agency, pursuant to California Labor Code § 2699.3, providing notice of her intent to seek civil penalties under

1 the Private Attorneys General Act, California Labor Code § 2698, *et seq.* (“PAGA Letter”). The LWDA
2 did not indicate that it intended to investigate the alleged violations referenced in the letter, and the 65-
3 day time period permitted for the LWDA to provide such a notification expired. (Leviant Decl., ¶ 5.) On
4 September 30, 2021, Plaintiff filed a First Amended Complaint adding a cause of action for Private
5 Attorneys General Act penalties under Cal. Labor Code §§ 2698 *et seq.* for the Labor Code violations
6 alleged in the initial complaint. (*Id.*)

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

8 The Parties conducted informal discovery and investigation of the facts and law. Such
9 investigation included, inter alia, the exchange of extensive informal data and discoverable information
10 in preparation for the mediation sessions. (Leviant Decl., ¶ 6.) The Parties have analyzed payroll and
11 other data pertaining to Plaintiff and the Class during the relevant Settlement Period, including but not
12 limited to the numbers of former and current members of each purported subclass within the Class,
13 average workweeks, and average rate of hourly pay. (*Id.*) In addition, Defendants also provided
14 documents reflecting their wage and hour policies and practices during the Settlement Period and
15 information regarding the total number of current and former employees in the Class. (*Id.*)

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

22 **C. Settlement**

23 On November 16, 2022, the Parties participated in an all-day mediation presided over by
24 mediator Steve Serratore, Esq., which led to this Agreement to settle. (Leviant Decl., ¶ 8.) The Parties
25 discussed at length the burdens and risks of continuing with the litigation as well as the merits of claims
26 and defenses. (*Id.*) After the mediation, the Parties then signed a long form settlement agreement (the
27 Agreement). (*Id.*)

28 Plaintiff and Class Counsel are aware of the burdens of proof necessary to establish liability for

the claims asserted in the Action, both generally and in response to Defendants’ defenses thereto. (Leviant Decl., ¶ 9.) Plaintiff and Class Counsel have also taken into account Defendants’ agreement to enter into a Settlement that confers substantial relief upon the Class.

Based on the foregoing, Plaintiff and Class Counsel have determined that the Settlement set forth in this Agreement is a fair, adequate, and reasonable Settlement and is in the best interests of the Class. (Leviant Decl., ¶ 10.) Solely for the purpose of settling this case, the parties agree that the requirements for establishing class action certification with respect to this class have been met and are met. (*Id.*) If this Settlement is not approved by the Court for any reason, Defendants reserve their rights to contest class certification. (*Id.*) This Settlement, if approved, will result in the termination of the litigation through the entry of the Judgment and the release of all Released Claims for all Class Members, including all within the class definition who have not elected to exclude themselves from the Class. (*Id.*)

V. CLASS DEFINITION

The Class is defined as follows:

“Class” or “Class Member(s)” means all Lufthansa Class Members and I.K. Hofmann Class Members. “Lufthansa Class Members” means all individuals who are currently employed or were formerly employed by Defendant Lufthansa Cargo Aktiengesellschaft in California as hourly non-exempt employees at any time during the Class Period. “I.K. Hofmann Class Members” means all individuals who are currently employed or were formerly employed by Defendant I.K. Hofmann USA, Inc. in California as hourly non-exempt employees and assigned to perform services for Lufthansa Cargo Aktiengesellschaft at any time during the Class Period. “Class Period” means the period from July 2, 2017, through January 15, 2023. (Settlement, ¶ II.3, 4, 5, 8.) “Participating Class Members” are those Class Members who do not submit timely exclusion requests to the Settlement Administrator. (Settlement, ¶ II.34.)

(Leviant Decl., ¶ 34 and Exhibit 1.)

VI. DISCUSSION

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

Under Code of Civil Procedure § 382, class certification is warranted so long as there is a numerous and ascertainable class with a well-defined community of interest and that a “class action proceeding is superior to other means for a fair and efficient adjudication of the litigation.” *See, e.g., Sav-on Drug Stores, Inc. v. Superior Court*, 34 Cal.4th 319, 326, 332 (2004). For purposes of this Settlement only, Defendants stipulated to conditional certification of the proposed class. (Settlement ¶ VII.19.)

1 “The certification question is ‘essentially a procedural one that does not ask whether an action is
2 legally or factually meritorious.’” *Id.*, at 326, quoting *Linder v. Thrifty Oil Co.*, 23 Cal. 4th 429, 439-440
3 (2000). The certification question asks whether the theory of recovery advanced by the plaintiff is likely
4 to prove amenable to class treatment. *See, e.g., Jaimez v. Daihatsu USA, Inc.*, 181 Cal. App. 4th 1286,
5 1298 (2010). As the court noted in *Dunk*, although certification requirements are intended “to protect the
6 interests of the non-representative class members,” that concern is “protected by the trial court’s fairness
7 review of the settlement.” *Dunk v. Ford Motor Co.* 48 Cal. App. 4th 1794, 1807 n. 19 (1996). In view
8 of these standards, *as discussed more thoroughly as part of the preliminary approval motion*, the
9 Settlement Class should be certified for settlement. Code Civ. Proc. § 382; Rules of Court, Rule 3.769(c).

10 **B. The Court Should Approve the Settlement Because It Is a Fair, Adequate, and**
11 **Reasonable Compromise of Disputed Wage Claims in View of Defendants’**
12 **Potential Liability Exposure and the Risks of Continued Litigation**

13 California courts favor settlement. *See, e.g., Stambaugh v. Superior Court*, 62 Cal. App. 3d 231,
14 236 (1976). Unlike most settlements, class action settlements involve a court approval process that exists
15 to prevent fraud, collusion, and unfairness to class members. *Malibu Outrigger Bd. of Governors v.*
16 *Superior Court*, 103 Cal.App.3d 573, 578-579 (1980). This approval process consists of preliminary
17 settlement approval, notice being given to class members, and a final fairness and approval hearing being
18 held at which class members may be heard with respect to the settlement. *Id.* For the reasons discussed
19 below, this Court should finally approve the Settlement and enter Judgment.

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

21 A settlement of class litigation must be reviewed and approved by the court. Rules of Court,
22 Rule 3.769(a). Approval occurs in two steps: (1) an early (preliminary) review and (2) a subsequent
23 (final) review after notice. The present motion seeks *final approval* and entry of a Judgment. To evaluate
24 a settlement, a court must receive “basic information about the nature and magnitude of the claims in
25 question and the basis for concluding that the consideration being paid for the release of those claims
26 represents a reasonable compromise.” *Kullar v. Foot Locker Retail, Inc.*, 168 Cal. App. 4th 116, 133
27 (2008). But the record need *not* contain an explicit statement of the maximum theoretical recovery.
28 *Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles*, 186 Cal. App. 4th 399, 409 (2010).

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

4 A settlement is presumptively fair where it is reached through arms’ length bargaining, based on
5 sufficient discovery and investigation to allow counsel and the court to act intelligently, counsel is
6 experienced in similar litigation, and the percentage of objectors is small. *Dunk*, 48 Cal.App.4th at 1802;
7 *In re Microsoft I-V Cases*, 135 Cal. App. 4th 706, 723 (2006); *7-Eleven Owners for Fair Franchising v.*
8 *Southland Corp.*, 85 Cal. App. 4th 1135, 1146 (2000). In deciding whether to approve a settlement, a
9 trial court has broad powers to determine whether it is fair under the circumstances of the case. *See, e.g.,*
10 *Mallick v. Superior Court*, 89 Cal. App. 3d 434, 438 (1979). In exercising these powers, the overriding
11 concern is to ensure that a proposed settlement is “fair, adequate, and reasonable.” *Dunk*, at 1801,
12 quoting *Officers for Justice v. Civil Serv. Comm’n of San Francisco*, 688 F.2d 615, 625 (9th Cir. 1982).

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

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

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

19 Here, the Settlement resulted from thorough, arms’ length negotiations between experienced
20 counsel with the assistance of highly regarded mediator Steve Serratore, Esq. (Leviant Decl., ¶¶ 8-10.)
21 With respect to the claims at issue in this case, Plaintiff obtained data from Defendants and then carefully
22 reviewed that information. Counsel for Plaintiff also examined relevant policies and interviewed
23 witnesses in detail about their work experiences and Defendants’ practices. Based on the totality of that
24 review, Plaintiff estimated potential exposure and then estimated risk factors to adjust the reasonable
25 expected outcome. The investigation that Plaintiff’s counsel conducted was sufficient to provide them
26 with enough information to intelligently evaluate the estimated exposure for purposes of negotiating the
27 Settlement in view of the risks discussed below and was sufficient to allow this Court to do the same.
28 *See, e.g., Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 245 (2001).

1 The reaction of the class will not be know until the final approval hearing, so that factor cannot
2 be evaluated until that time.

3 **3. The Settlement Represents a Fair, Adequate, and Reasonable Compromise**
4 **of Class Members' Claims Based on Defendants' Estimated Liability**
5 **Exposure Given the Risks Continued Litigation Would Entail.**

6 The proposed Settlement of \$400,000 offers substantial, timely, and guaranteed payments to
7 Class Members. A settlement is not judged against what might have been recovered had a plaintiff
8 prevailed at trial and does not have to provide 100% of damages sought to be fair and reasonable. "In the
9 context of a settlement agreement, the test is not the maximum amount plaintiffs might have obtained at
10 trial on the complaint, but rather whether the settlement is reasonable under all of the circumstances."
11 *Wershba*, 91 Cal.App.4th at 250.

12 Here, there are serious risks that support the reduced compromise amount. These risks include,
13 but are not limited to: (i) the risk that Plaintiff would be unable to establish liability for unpaid wages, *see*
14 *Duran v. US Bank Nat'l Ass'n*, 59 Cal. 4th 1, 39 & n. 33 (2014) ("*Duran*"); (ii) the risk that Defendants'
15 meal and rest period policies might not ultimately support class certification or a class-wide liability
16 finding; (iii) the risk that uncertainties about the ultimate legality of Defendants' policies and practices
17 could preclude class-wide awards of statutory penalties; (iv) the risk that individual differences between
18 Class Members could be construed as pertaining to liability and not solely to damages; (v) the risk that
19 any civil penalties award under PAGA could be reduced by the Court in its discretion; (vi) the risk that
20 class treatment could be deemed improper as to one or more claims, except for settlement; (vii) the risk
21 that the presence of a client entity and a service provider could have injected issues that required a
22 reduction in the scope of the class or the elimination of a defendant from the action, either voluntarily or
23 involuntarily; and, (viii) the risk that appellate litigation could ensue. (Leviant Decl., ¶ 16.) These risks
24 are non-exhaustive.

25 In light of the uncertainties of protracted litigation, the settlement amount reflects a fair and
26 reasonable recovery for the Class Members. (Leviant Decl. ¶¶ 13-20.) The settlement amount is, of
27 course, a compromise figure. (Leviant Decl. ¶ 17.) By necessity it took into account risks related to
28 liability, damages, and the defenses asserted by Defendants. (*Id.*) Moreover, each Class Member will be

given the opportunity to opt-out of the Settlement, allowing those who feel they have claims that are greater than the benefits they can receive under this Settlement to pursue their own claims. (*Id.*) For the 178 members of the Class, the average **gross** recovery is at least **\$2,247.19** per class member, and the estimated average **net** recovery for each Class Member is approximately **\$919.55**.¹ (*Id.*) Given that Defendants could challenge certification and liability, this is a significant sum to have achieved in settlement. Moreover, a Class Member who worked a greater number of weeks for Defendants will receive a larger share of the Settlement than a Class Member who worked for a shorter amount of time during the class period. (*Id.*)

The maximum calculated plausible exposure is **\$3,765,583.25**, including PAGA penalties. (Leviant Decl., ¶ 18.) However, after analyzing the claims in this matter, Plaintiff has concluded that the Gross Settlement Amount of **\$400,000.00** is about 51% of the **\$776,759.93** estimate of *risk-adjusted* recovery (excluding interest) at this stage in the litigation. (*Id.*) This assessment is based on a carefully constructed model of the current fair value of the case, using estimated risks, average wage rates, numbers of employees, and the amount of time covered by the class period. (*Id.*)

- A reasonably estimated exposure for unpaid wages due to rounding was calculated, with the assistance of an expert, to be approximately **\$28,839.50**. However, with the risk factor discounts for certification and liability proof, the value of that claim is estimated by Plaintiff's counsel to be approximately **\$16,222.22**, assuming certification probability of 75% and merits success at 75%. The settlement of this action was motivated predominantly by data showing rounding of time punches. While rounding law remains unsettled, Plaintiff's counsel has successfully obtained a decision refuting *See's Candy* and is now before the California Supreme Court. The ultimate outcome is uncertain.
- A reasonably estimated exposure for unpaid off-the-clock work (which includes overtime where applicable) was calculated, with the assistance of an expert, to be approximately **\$293,914.25**. However, with the risk factor discounts for certification and liability proof, the value of that claim is estimated by Plaintiff's counsel to be approximately **\$26,452.28**, assuming certification probability of 30% and merits success at 30%. Plaintiff's counsel views the off-the-clock estimate as overly aggressive.
- A reasonably estimated exposure for rest break violations over the class period was calculated at **\$647,788.00**, but with chances of certification and proof of liability (25% and 20% respectively) for a risk-adjusted exposure of **\$32,389.40**. Plaintiff assumes that 100% of the Class missed one rest break per week, an aggressive assumption.
- A reasonably estimated exposure for meal break violations over the class period was calculated at **\$1,079,807.50**, with chances of certification and liability risks (40% and 30%

¹ These amounts are much higher than the estimates at the time of preliminary approval because the final class size is small than previously estimated.

respectively) resulting in a risk-adjusted exposure of **\$129,576.90**. Both Defendants paid meal period premiums, which complicates the liability showing significantly.

- Risk-adjusted penalty recoveries for wage statement and Labor Code § 203 penalties were estimated to be approximately **\$158,456.25** and **\$270,862.88**, respectively, on maximum exposures of **\$281,700.00** and **\$481,534.00**, respectively (75% and 75% respectively, based upon the rounding claim).
- Performing risk-adjusted valuations for all claims yields a total value in the range of **\$633,959.93**, excluding PAGA.² (*Id.*)
- PAGA penalties were calculated as having a maximum realistic exposure of **\$952,000.00**, but a risk adjusted value of **\$142,800.00**, after factoring in risks of reduction in penalties pursuant to Court discretion and the high risk of the inability to prove violations for all aggrieved employees.

The concurrently-filed Declaration of H. Scott Leviant sets forth claim valuation in additional detail. (*See*, Leviant Decl., ¶ 18.)

This result here is fully supportable as reasonable. First, it is important to recognize the wilfulness finding required for Labor Code §§ 203 and 226 is challenging to establish. (Leviant Decl., ¶ 19.) Second, rest break and meal period claims have been challenging to certify for many years, even after *Brinker*. (Leviant Decl., ¶ 19.) Third, the certification rates in California are lower than conventional wisdom holds. *See, Findings of the Study of California Class Action Litigation, 2000-2006* (finding, at page 5, and in Table 9, at page 15, that only 21.4% of all class actions were certified either as part of a settlement *or* as part of a contested certification motion). Here, the estimated certification probabilities are *above* the average rate at which cases were certified in California over the study years, based upon data available through the California Courts websites. (Leviant Decl., ¶ 19.) In sum, well *under* 20% of all cases filed as proposed class actions are ultimately certified by way of a *contested* motion. (*Id.*) The recovery is roughly **11%** of the maximum plausible recovery (estimated to be approximately **\$3,765,583.25**, including PAGA), which falls within the expected outcome under the likelihood of success metric. (*Id.*) It would also be appropriate to evaluate the result by examining only the premium wages at issue (approximately \$2,050,349.25, with no risk reduction), excluding penalties

² In a sense, it is nonsensical to assign specific percentages to future events, but it does provide a specific method for attempting to reduce the concept of “very high risk” or “high risk” to a quantifiable amount. Certification of a claim is typically a binary event. One does not obtain a 20% certification; a claim is either certified or it is not. But the current expected value is best quantified by applying a risk reduction, based on the total experience of counsel.

1 and interest; the settlement is about 20% of the premium wages (unpaid wages, meal period premiums,
2 and rest break premiums) at maximum realistic exposure value.³ This Settlement achieves the goals of
3 the litigation.

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

5 The proposed method of allocating the Settlement to Class Members also is fair. As noted, the
6 Parties agreed to allocate the Settlement Fund between all Class Members based on time worked by the
7 Class Member during the Class Period, in relation to the total amount of time worked by all participating
8 Class Members collectively during the class period. This proposed method is fair and reasonable
9 because each Class Member's actual potential damages vary based on the number of workweeks he or
10 she actually worked. A Class Member who worked a greater number of weeks for Defendants will
11 receive a larger payment under the Settlement than a Class Member who worked for a shorter amount of
12 time during the relevant period. (Leviant Decl., ¶¶ 11, 17.)

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

14 The proposed enhancement to Plaintiff is intended to recognize the substantial initiative and
15 significant efforts on behalf of the Class. Courts routinely approve incentive awards to compensate
16 named plaintiffs for the services they provide and the risks they incur, often in much higher amounts than
17 that sought here. Factors considered when awarding an incentive include the actions the plaintiff has
18 taken to protect the class, the degree to which the class has benefitted, the amount of time and effort the
19 plaintiff expended in the litigation, the risk to the class representative in commencing suit (financial and
20 otherwise), the notoriety and personal difficulties encountered, the duration of the litigation, and the
21 personal benefit (or lack thereof) enjoyed by the plaintiff as a result of the litigation. *Clark v. Am.*
22 *Residential Servs. LLC*, 175 Cal. App. 4th 785, 804 (2009). Here, Plaintiff contributed time to the
23

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

1 prosecution of this matter, including assistance prior to the mediation with information and substantial
2 time conferring with counsel over the course of this litigation and before it was filed. (Wilson Decl., ¶¶ 5-
3 20; Leviant Decl., ¶ 33.) The \$5,000.00 enhancement also recognizes risks Plaintiff took for the Class to
4 be personally liable for costs incurred regardless of litigation success, as well as the personal risk of
5 facing intrusive discovery and potential disclosure to future employers that Plaintiff sued an employer,
6 making future employment less uncertain. The accompanying Declaration confirms Plaintiff's efforts.

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

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

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

19 The California Supreme Court removed any lingering doubt about the use of the percentage of
20 the fund method to award attorney's fees in California Courts. *Laffitte v. Robert Half Intern. Inc.*, 1 Cal.
21 5th 480, 503 (2016).⁴ Thus, this Court may and, as strongly encouraged by the California Supreme
22 Court, *should* award attorney's fees to Plaintiffs' counsel based upon the percentage methodology.

23 "Empirical studies show that, regardless whether the percentage method or the lodestar method is
24 used, fee awards in class actions average around one-third of the recovery." *Chavez v. Netflix, Inc.*, 162
25

26 ⁴ The Supreme Court also corrected the misconception that *Dunk* should be viewed as expressing
27 doubt about the use of the percentage method: "The *Dunk* court, while finding the percentage method
28 inapplicable to the settlement before it due to the lack of a readily valued common fund, did not purport
to bar its usage generally in common fund cases." *Laffitte*, 1 Cal. 5th at 501.

Cal. App. 4th 43, 47 n. 11 (2008). This is also consistent with Plaintiffs' counsels' experience in these types of cases. Here, Plaintiff's attorneys request attorneys' fees of **\$133,320.00** (33.33% of the GSA), and costs of **\$15,747.33**, which includes payment for two mediations, filing fees, Case Anywhere, and other expenses, including the upcoming costs. (Leviant Decl., ¶ 32.) Given the efforts and risks, and the results, these amounts warrant *final approval*.

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

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

Here, Class Counsel's billed lodestar exceeds \$119,947.00, billed at the attorneys' customary hourly rates (and omitting about 10 hours of time that were not billed by Mr. Leviant). (Leviant Decl., ¶ 32.) The actual lodestar is estimated to exceed \$127,897.00. (Leviant Decl., ¶ 32.) The request for **\$133,320.00** in attorneys' fees, which is **1.11** times the final *billed* lodestar and **1.04** times the *estimated* final lodestar, is reasonable under the lodestar method.

(1) Class Counsel's Hours Are Reasonable

In determining whether the number of hours was reasonable, the court must determine that "the time spent was reasonably necessary and that [] counsel made 'a good faith effort to exclude from the fee request hours that are excessive, redundant, or otherwise unnecessary.'" *Jordan v. Multnomah County*, 815 F.2d 1258, 1263 n.8 (9th Cir. 1987). The court should defer to the lawyer's judgment as to how much time he was required to spend on the case. *Moreno v. City of Sacramento*, 534 F.3d 1106, 1112

(9th Cir. 2008) (“[l]awyers are not likely to spend unnecessary time on contingency fee cases in the hope of inflating their fees. The payoff is too uncertain, as to both the result and the amount of the fee.”). Here, Counsel expended a prudent amount of time to achieve the excellent result. (Leviant Decl. ¶ 32.)

(2) Class Counsel’s Hourly Rates Are Reasonable

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

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

c) Class Counsel’s Costs Are Reasonable

The Settlement Agreement provides for reimbursement of costs not to exceed \$18,000.00. Moon & Yang, APC seeks costs in the amount of \$15,747.33. (Leviant Decl., ¶ 32 and Exh. 2.) These costs were reasonably incurred in prosecuting the Action on behalf of the Class Members and should be approved by the Court. Accordingly, Class Counsel respectfully requests the Court approve total costs in the amount of **\$15,747.33**. (Leviant Decl., ¶ 32 and Exh. 2.)

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

ILYM, which has been selected due to its competitive bid, estimates that administration can be performed for **\$7,990.00**. In counsel’s experience, based on similar wage-and-hour actions, an estimated cost of **\$7,990.00** is a fair and reasonable amount for administration fees, is below the \$10,000 estimate, and should be approved. (Leviant Decl., ¶ 34.)

8. The PAGA Allocation is Reasonable

The ultimate decision as to the amount of PAGA penalties is always up to the discretion of the Court. Labor Code § 2699(e)(2) states: “In any action by an aggrieved employee seeking recovery of a

1 civil penalty available under subdivision (a) or (f), a court may award a lesser amount than the maximum
2 civil penalty amount specified by this part if, based on the facts and circumstances of the particular case,
3 to do otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory.”

4 Prior to the issuance of *Moniz v. Adecco USA, Inc.*, 72 Cal. App. 5th 56 (2021), the only sources
5 of persuasive guidance as to how to assess the reasonableness of a PAGA allocation were found in
6 federal court decisions addressing that question. In their view, a PAGA allocation, even if a small
7 portion of the total settlement, could be reasonable if the settlement of the underlying wage and hour
8 claims is robust and serves the deterrent purpose of the PAGA statute. *O’Connor v. Uber Technologies,*
9 *Inc.*, 201 F.Supp.3d 1110, 1135 (N.D. Cal. 2016) (“By providing fair compensation to the class members
10 as employees and substantial monetary relief, a settlement not only vindicates the rights of class
11 members as employees, but may have a deterrent effect upon the defendant employer and other
12 employers, an objective of PAGA.”); *see also Visceral v. Mistras Group*, 2016 WL 5907869 *9 (N.D.
13 Cal. 2016) (applying O’Connor’s sliding scale approach) *Moniz* then provided explicit confirmation that
14 this was an appropriate measure of reasonableness of a PAGA settlement. *Moniz*, 72 Cal. App. 5th at 77.
15 *Moniz* also held it appropriate to consider of the settlement furthers “PAGA’s purposes to remediate
16 present labor law violations, deter future ones, and to maximize enforcement of state labor laws.”

17 As to the first set of elements (the class-type analysis), it is embodied in Plaintiff’s discussion of
18 the adequacy of the settlement generally. Here, the expense, complexity and likely duration of future
19 litigation was to some extent an unknown, but the nature of the work performed by Class Members
20 suggested difficulties going forward. However, what is certain is that to adequately establish the
21 violations that would support a substantial penalty, tremendous time and expense would be invested.

22 The second element (the PAGA purposes element) is also satisfied here. As held by *Moniz*,
23 PAGA’s purposes include (1) remediation of present labor law violations, (2) deterrence of future
24 violations, and (3) maximization of enforcement of state labor laws. Here the allocation of a major
25 portion of settlement funds to class members still advances the goal of labor law violation remediation.
26 The allocation of a major portion of settlement funds to class members also deters future violations. This
27 is a \$400,000 settlement, not a trivial sum. Deterrence is fulfilled. Finally, allocation of a major portion
28 of settlement funds to class members still advances the goal of enforcement of state labor law. This

1 settlement is, by definition, a response to alleged violations of state labor laws, balanced against risks.

2 In addition, there is no evidence that a court or a commissioner had informed Defendants that any
3 conduct violated the Labor Code. *Amaral v. Cintas Corp.*, 163 Cal. App. 4th 1157, 1209 (2008); *Willis*
4 *v. Xerox Bus. Servs., LLC*, 2013 WL 6053831, *7-8 (E.D. Cal. 2013) (“Under California law, courts have
5 held that employers are not subject to heightened penalties for subsequent violations until and unless a
6 court or commissioner notified the employer that it is in violation of the Labor Code.”) And in *Cotter*,
7 the court found a significant reduction of the PAGA claim would be appropriate because “[t]his does not
8 appear to be a case where a company has deliberately sought to evade the law.” *Cotter v. Lyft, Inc.*, 176
9 5 F. Supp. 3d 930, 941 (N.D. Cal. 2016).

10 Finally, the PAGA allocation is fair. The LWDA is receiving **\$52,250.00**. The Class is
11 receiving, net, an estimated **\$163,680.00** for the releases for eight theories of recovery (excluding the
12 \$12,750.00 as the aggrieved employees’ share of the PAGA Allocation). The allocation to the LWDA is
13 not unfair and satisfies the policies underlying California’s wage and hour laws.

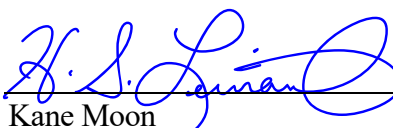
14 **VII. CONCLUSION**

15 For all the foregoing reasons, because the Class meets the requirements for certification, because
16 the Settlement bears all requisite indicia of fairness, and because the notice procedure complied with
17 Rule 3.766 and due process, this Court should grant this Motion for Final Approval.

18 Respectfully submitted,

19 Dated: June 28, 2023

MOON & YANG, APC

20 By: 
21 Kane Moon
22 H. Scott Leviant
23 Mariam Ghazaryan

24 Attorneys for Plaintiff

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

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

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

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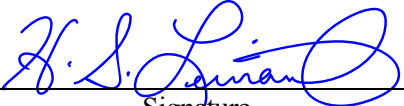
Attorneys for Defendant LUFTHANSA
CARGO AKTIENGESELLSCHAFT

☒ **BY ELECTRONIC SERVICE:** Based on a court order or an agreement of the parties to accept electronic service, I caused the documents to be sent to the persons at the electronic service addresses listed above via third-party cloud service CASEANYWHERE. I did not receive an error message.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this **June 28, 2023** at Los Angeles, California.

H. Scott Leviant

Type or Print Name



Signature