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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

Dorcas-Cothy Kabasele, Katia Arrellano, Angel Gonzalez, Mindy Miranda, Saryna De Jesus, Tatiana Brenal, Flor Cruz, Julissa Perez, Elissa Padilla, Ian Lamar, Claudia Benitez, Brittney Hughes, George Maddox, Victoria Henkes, Alexandra Tan, Danielle Quaid, Elizabeth Faaborg, Vincent Hall, Jerrica Labian, Lauren Hall, Ryan Guffey, Kiersten Wong, Brittani Herena, Janet Sanchez, Brittany Sommers, Cheyenne Lopez, Talia Casteneda, Nohely Llamas, Rhonda Prickett, Debbie Harrison,

Plaintiffs,

vs.

ULTA SALON, COSMETICS & FRAGRANCE, INC., a Delaware corporation and DOES 1 – 100, inclusive,

Defendants.

Case No. 2:21-cv-01639-WBS-CKD

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PRELIMINARY APPROVAL OF CLASS
ACTION SETTLEMENT**

Date: March 6, 2023
Time: 1:30 p.m.
Dept.: Courtrooms 5, 14th Floor
Judge: Hon. William B. Shubb

Complaint Filed: September 10, 2021
FAC Filed: September 29, 2021
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Trial Date: None Set

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I. INTRODUCTION

This motion seeks preliminary approval of a global settlement between Plaintiffs Dorcas-Cothy Kabasele, Katia Arrellano, Angel Gonzalez, Mindy Miranda, Saryna De Jesus, Tatiana Brenal, Flor Cruz, Julissa Perez, Elissa Padilla, Ian Lamar, Claudia Benitez, Brittney Hughes, George Maddox, Victoria Henkes, Allexandra Tan, Danielle Quaid, Elizabeth Faaborg, Vincent Hall, Jerrica Labian, Lauren Hall, Ryan Guffey, Kiersten Wong, Brittani Herena, Janet Sanchez, Brittany Sommers, Cheyenne Lopez, Talia Casteneda, Nohely Llamas, Rhonda Prickett, Debbie Harrison, (collectively “Plaintiffs”), and Defendant ULTA Salon, Cosmetics & Fragrance, Inc. (“ULTA”) (together the “Parties”).

Plaintiffs collectively assert 10 causes of action for: (1) failure to pay minimum wage; (2) failure to pay overtime; (3) failure to provide meal breaks; (4) failure to provide rest breaks; (5) failure to pay sick pay; (6) failure furnish accurate itemized wage statements; (7) failure to pay wages due at end of employment; (8) failure to indemnify all necessary business expenditures; (9) violation of business and professions code sections 17200, *et seq.*, and (10) violation of Private Attorneys General Act.

As part of the Settlement, ULTA will pay a total Gross Settlement Amount (“GSA”) of \$1,500,000. The Settlement was reached after more than a year of hotly contested litigation, significant formal and informal exchange of written discovery, depositions, processing, and review of hundreds of thousands of documents and millions of lines of data. Followed by a full-day of private mediation, and additional arms’ length negotiations between counsel facilitated by the mediator, the Parties reached a resolution by acceptance of a mediator’s proposal weeks after their mediation.

The settlement is embodied in the parties’ Class and Representative Action Settlement Agreement and Release¹ (the “Settlement”, “Settlement Agreement” or “SA”). The Settlement benefits an estimated 18,711 current and former non- exempt employees who worked at ULTA stores in the State of California from October 12, 2019 through November 8, 2022 (“Class Period”).

Through this motion, Plaintiffs respectfully request that the Court enter an order: (1) preliminarily approving the Settlement; (2) conditionally certifying the Class for settlement purposes; (3) appointing Simpluris, Inc. as the settlement administrator; (4) approving the Class Notices, and ordering them to be

¹ Capitalized terms herein shall have the same meaning as in the lass and Representative Action Settlement Agreement and Release (“Settlement Agreement” or “SA”), a copy of which is attached as **Exhibit 1** to the Declaration of Robert J. Wassermann (“RJW Dec.”) filed concurrently herewith.

disseminated; (5) authorizing the filing of the proposed Fourth Amended Complaint (Ex. B to the SA, hereinafter “FAC”); and (6) scheduling a hearing for final approval of the class action settlement.

II. PROCEDURAL AND FACTUAL BACKGROUND

A. The Parties.

ULTA is a Delaware corporation that operates a chain of retail beauty stores and salons. ULTA maintains over 150 locations throughout California and employed Plaintiffs and Class Members as non-exempt cashiers, stylists, beauty advisors, counter managers, operations managers, and other similar positions during the Class Period. (FAC ¶ 7-8).

B. Procedural History.

Prior to reaching a global settlement, at issue there were three similar wage and hour class and PAGA representative actions against ULTA : (1) the above-captioned action (the “*Kabasele* action”); (2) *Angel Gonzalez, et al. v. Ulta Salon, Cosmetics & Fragrance, Inc.*, Central District of California, Case No. 2:22-cv-00363-AB-RAO (the “*Gonzalez* action”)^{2 3}; *Katia Arellano v. Ulta Salon Cosmetics & Fragrance, Inc.*, Central District of California, Case No. 5:22-cv-00639-JGB-KKx (the “*Arellano* class action”); and *Katia Arellano v. Ulta Salon, Cosmetics & Fragrance, Inc.*, San Bernardino County Superior Court, Case No CIVSB2209151 (the “*Arellano* PAGA action”).

i. The *Kabasele* Action

On September 10, 2021, Plaintiff Kabasele filed her wage and hour Class action against ULTA in the Eastern District, asserting seven causes of action for: (1) failure to pay overtime; (2) failure to pay sick pay; (3) failure to provide meal breaks; (4) failure to provide rest breaks; (5) failure to furnish accurate itemized wage statements; (6) failure to pay all wages due at end of employment; and (7) violation of Business and Professions Code § 17200. (Dkt. No. 1). On September 9, 2021, Plaintiff Kabasele filed a First Amended Complaint supplementing her allegations. (Dkt. No. 5). On October 13, 2021, ULTA filed a motion to dismiss several causes of action. On November 23, 2021, Plaintiff Kabasele filed a Second Amended Complaint dismissing her first two causes of action and adding a cause of action under the

² The *Gonzalez* action includes the 28 named Plaintiffs identified above.

³ Five *Gonzalez* Plaintiffs remain unresponsive to numerous communication attempts by counsel. Plaintiffs counsel will seek to dismiss: Lauren Hall, Allexandra Tan, Elizabeth Faaborg, Vincent Hall and Janet Sanchez as named representatives by February 3, 2023 if Plaintiffs refuse to cooperate. (SS Dec. ¶ 10).

Private Attorneys General Act (“PAGA”). (Dkt. No. 13). On December 14, 2021, ULTA filed a revised motion to dismiss which was granted subject to leave to amend. (Dkt. Nos. 14 and 20, respectively). On February 15, 2022, Plaintiff Kabasele filed the operative Third Amended Complaint. (Dkt. No. 23).

Ultimately, the *Kabasele* action was set for class certification briefing beginning on September 30, 2022. (Dkt. No. 24). As set forth in greater detail below, between February 2022 and September 2022, Plaintiff Kabasele and ULTA engaged in significant formal discovery.

ii. The *Gonzalez* Action

On August 30, 2021, Plaintiff Gonzalez, provided the Labor Workforce and Development Agency (the “LWDA”) and ULTA with his written notice of PAGA claims, thereby exhausting the administrative requirements of Labor Code § 2699. Declaration of Shawn Sasooness in support of this Motion (“SS Dec.”) (SS Dec. ¶ 4).

On November 19, 2021, the Representative *Gonzalez* Plaintiffs filed their Class and PAGA representative action against ULTA in Los Angeles County Superior Court, Case No. 21STCV42843, alleging ten causes: (1) failure to provide meal periods; (2) failure to provide rest periods; (3) failure to pay overtime; (4) failure to maintain accurate records; (5) failure to pay all wages when due; (6) failure to provide accurate itemized wage statements; (7) failure to reimburse work expenses; (8) failure to timely pay wages upon termination; (9) violation of the Private Attorney Generals Act of 2004; and (10) unfair business practices (the “*Gonzalez*” action). (SS Dec. ¶ 5).

On January 18, 2022, ULTA removed the *Gonzalez* matter to the United States District Court, Central District of California, where it is now pending before the Honorable André Birotte Jr. (SS Dec. ¶ 6) On March 7, 2022, the *Gonzalez*’s Plaintiffs learned through Defendant of the of the earlier-filed *Kabasele* action. (*Id.* ¶ 6). On June 2, 2022, the Court in the *Gonzalez* Action stayed the action pending the outcome of the *Kabasele* Action’s class certification motion pursuant to the first-to-file rule and due to the overlap in the actions’ claims. (*Id.* ¶ 6).

iii. The *Arellano* Class Action

On February 1, 2022, Plaintiff Arellano filed a class action against ULTA in San Bernardino County Superior Court, Case No. CIVSB2202356, alleging claims substantially similar to those in the *Kabasele* and *Gonzalez* Actions. Plaintiff Arellano’s case was removed to the United States District Court

for the Central District of California on April 13, 2022. On July 15, 2022, the Court in the *Arellano Action* stayed the action pending the outcome of the *Kabasele* action's class certification motion pursuant to the first-to-file rule and due to the overlap in the actions' claims.

The *Kabasele*, *Gonzalez*, and *Arellano* Plaintiffs agreed to work together in prosecuting their claims against ULTA and sought a global mediation.

iv. The Arellano PAGA Action

On May 4, 2022, Plaintiff Arellano filed a PAGA action in San Bernardino County Superior Court, entitled *Arellano v. Ulta Salon, Cosmetics & Fragrance, Inc.*, Case No. CIVSB2209151 (i.e., *Arellano* PAGA Action). The *Arellano* PAGA Action is based on the same Labor Code violations as the *Arellano* Class Action. At the Initial Case Management Conference on October 4, 2022, the Parties informed the Court that they had reached a global settlement. The Court set a Further CMC for April 3, 2023.

C. The Claims.

Plaintiffs allege that Class Members were not compensated for all hours worked. This uncompensated off-the-clock time included pre- and post-shift duties such training, assisting customers before and after clocking in/out, COVID screenings, time spent undergoing required daily "bag checks", time spent verifying their punches and schedules, and responding to co-worker inquiries. Accordingly, Plaintiffs allege that Class Members were not paid minimum wage and overtime as appropriate. Plaintiffs further alleged that when Class Members earned non-discretionary bonuses, Defendants miscalculated their regular rate of pay for purposes of overtime. Plaintiffs similarly allege that ULTA miscalculated their regular rate of pay for purposes of sick pay. (FAC ¶ 9-16).

Plaintiffs also allege that Class Members were not provided compliant meal and rest breaks and that ULTA at times failed to pay premiums for those noncompliant breaks. Specifically, that ULTA either (a) failed to pay the premiums or (b) paid the premium(s) only at its employees' base rate of pay rather than their regular rate of pay, without accounting for non-discretionary bonuses. (FAC ¶ 17-24).

Additionally, Plaintiffs alleged that they were not properly reimbursed for certain business expenses, specifically personal cell phones, tools, and, at times, mileage. (FAC ¶ 28).

Because of these violations, Plaintiffs allege that they were not timely paid all wages due and owing to them and that the wage statements they received from ULTA were inaccurate. (FAC ¶ 26-27).

1 Plaintiffs also allege derivative violations of the PAGA and the Business and Professions Code.

2 **D. Identifying the Claims, Marshalling the Evidence, Creating a Damages Model and**
3 **Developing a Strategy for Mediation.**

4 Through independent inquiry, research, and informal discovery, Class Counsel thoroughly and
5 diligently investigated and pursued the Class Claims. This process has included, but not been limited to,
6 (1) obtaining and reviewing Plaintiffs' personnel files, payroll records, and time records; (2) researching
7 the nature and scope of ULTA's operations; (3) identifying, researching, and pleading the appropriate
8 claims, including amending the various actions to assert additional claims as they ripened and/or were
9 discovered; (4) exhausting administrative remedies; (5) identifying, requesting, securing, and reviewing
10 pertinent policies, practices, and procedures; (6) identifying, requesting, and securing the payroll and time
11 records for a statistically significant sampling of more than 1,500 employees (or approximately 10% of
12 the Class); (7) propounding formal and informal discovery to secure relevant policy documents and
13 numerical information regarding the size of the class and the scope of the claims, (9) deposing ULTA's
14 Rule 30(b)(6) designee; (10) obtaining declarations for a number of the named Plaintiffs regarding their
15 claims / experiences; (11) retaining an expert to analyze the payroll and time data provided by ULTA and
16 personally conducting spot checks to ensure the accuracy of the damages calculations; (12) researching
17 and evaluating the scope of additional and/or previous actions and their potential impact on the Class
18 Claims; (13) creating a reliable damages model; (14) developing and implementing a strategy for
19 mediation and settlement; and (15) conferring with ULTA prior to mediation to ensure that neither side
20 was making any erroneous assumptions that might yield inaccurate damages models and/or impede
21 mediation. (RJW Dec. ¶ 7).

22 **E. Mediation, Continued Negotiations and Settlement.**

23 On September 8, 2022, the Parties participated in private mediation with well-respected and
24 experienced wage and hour class action mediator, Joel Grossman, Esq. of JAMS. Despite engaging in a
25 full day of mediation, the Parties were unable to reach a resolution. Negotiations facilitated by Mediator
26 Grossman continued for the next two plus weeks before a mediator's proposal was accepted on September
27 22. The Parties spent several months negotiating the final terms of the Settlement before executing the
28 same on January 18, 2023. At all times, the Parties' negotiations were adversarial, non-collusive, and at

arms' length. (RJW Dec. ¶ 8-11; SS Dec. ¶ 7).

III. SUMMARY OF THE PROPOSED SETTLEMENT

A. Settlement Consideration

Under the terms of the Settlement Agreement, ULTA and the Released Parties shall be released of all claims asserted in the lawsuit in exchange for ULTA's agreement to pay a non-reversionary GSA of \$1,500,000.00, including the requested deductions for attorneys' fees, litigation costs, settlement administration expenses, the PAGA payment to the LWDA, and Class representative service award, as set forth above. (SA § 4.1). The remaining amount, estimated to be \$849,00 (the "Net Settlement Amount" or "NSA"), will be distributed as to all Class Members who do not timely opt-out following distribution of the Class Notice to the Class ("Participating Class Members") based on the total number of Pay Periods of all Participating Class Members during the Class Period (*Id.* § 6.1). Similarly, the PAGA payment allocated to the Aggrieved Employees will be determined by dividing \$12,500 (25% of the PAGA Payment) by the total number of Pay Periods of all the Aggrieved Employees. (*Id.* § 6.3).

B. Appointment of the Settlement Administrator and Notice Process

After soliciting bids from several reputable settlement administrators, the Parties have selected Simpluris, Inc., a company that has administered thousands of class action settlements, as the Settlement Administrator. Simpluris' bid of \$65,000 was several thousand less than the other administrators' bids, reasonable for an administration of this size, and should be approved. (SA § 1.30; RJW Dec. ¶ 46-47).

No more than 30 days after entry of the Preliminary Approval Order, ULTA shall provide the Settlement Administrator with the Data List for purposes of mailing the Notice of Settlement ("Notice") to Class Members. (*Id.* § 7.1). Within 15 days of receiving the Data List, the Settlement Administrator will mail the Notice to all Class Members by First Class U.S. Mail, using the most current, known mailing address for each Class Member based on the information provided by Defendant. (*Id.* § 7.2).

Any Notices returned as non-deliverable before the Response Deadline shall be re-mailed to the forwarding address affixed thereto within 5 calendar days. Otherwise, the Settlement Administrator will attempt to determine the correct address using a computer-based skip-trace search, and then perform a single re-mailing via First Class U.S. Mail. If the computer-based skip-trace search does not provide a correct address, the Settlement Administrator will attempt to determine the correct address using the Class

Member's Social Security number and any available information provided by Defendant. If the Settlement Administrator is unable to determine the correct address using the Class Member's Social Security number and/or any information provided by Defendant, the Settlement Administrator shall perform a search based on the National Change of Address Database maintained by the United States Postal Service to update and correct any known or identifiable address changes. (*Id.*, § 7.3).

C. Disputes, Objections, and Opt-Outs

Class members will have the opportunity to dispute pay periods listed on their Notices by submitting a written challenge and any supporting documentation to the Settlement Administrator within 45 days of the Notice mailing date. (*Id.* § 8.1; *Id.* **Exhibit A**). The Settlement Administrator will resolve challenges based on Defendant's records but will evaluate any documents or other information presented by the challenging Class Member. (*Id.* § 8.4).

The Notice provides that Class Members who wish to opt-out of the Settlement must send a timely written notice to the Settlement Administrator requesting to opt-out within 45 days of the Notice mailing date. (*Id.* § 8.2.1). Class members who timely request to opt-out will not be entitled to receive a payment, nor be bound by the settlement or have any right to object, appeal, or comment thereon. (*Id.* § 8.2.2). Any Class member may object to the Settlement by submitting an objection to the Settlement Administrator within 45 days of the Notice mailing date. (*Id.* § 8.3.1).

D. Release of Claims

The release contemplated by the Settlement is limited to all the claims that were pled or could have been pled based on the factual allegations in the operative or prior complaints in the Actions, arising during the Class Period, including, but not limited to, any claim for failure to provide meal or rest periods, any claim for failure to pay premiums for non-compliant meal or rest periods, or to pay such premiums at the regular rate, failure to pay minimum wage, failure to pay overtime wages or overtime wages at the regular rate of pay, regular rate violations, failure to reimburse business expenses, failure to pay timely wages during employment, failure to pay accrued wages upon termination of employment, failure to furnish accurate and itemized wage statements, failure to provide any required form of sick leave or sick pay, and failure to maintain accurate records arising under California Labor Code §§ 201, 202, 203, 204, 226, 226.3, 226.7, 227.3, 233, 246, 246.5, 248.2, 248.5, 510, 512, 1174, 1182, 1194, 1194.2, 1197, 1197.1,

1197.5, 1198, 2802 and the California Unfair Competition Law, Business and Professions Code §§ 17200
et seq., and California Industrial Welfare Commission Wage Order No. 7-2001. The released claims
include any remedies for any of the claims described herein, including, damages, penalties of any nature,
restitution, declaratory relief, equitable or injunctive relief, interest, attorneys' fees and costs. (SA § 1.26).
The corresponding PAGA claims for civil penalties that are premised upon the California Labor Code will
also be released by the Plaintiffs. (Id. § 1.27).

Plaintiffs, but not the Class Members, have agreed to a general release of claims. (Id. § 5.3).

E. Payment to the LWDA.

The Settlement Agreement allocates \$50,000 to resolve PAGA claims, 75% (\$37,500) will be paid
to the LWDA and the remaining 25% (\$12,500) will be paid to the Aggrieved Employees. (SA ¶
6.3). The Parties negotiated this amount in good faith, intending to serve the punitive and deterrent
purposes of the PAGA, and it exceeds the range approved by courts in other class actions with PAGA
components.⁴ The LWDA has been notified of the Settlement. (RJW Dec. ¶ 48-49; Ex. 2).

F. Service Payments to the Class Representatives.

Each of the lead Plaintiffs, Dorcas-Cothy Kabasele, Katia Arrellano, Angel Gonzalez will seek
Incentive Awards of \$5,000, and each of the remaining names Plaintiff will seek \$500 (for a combined
amount of \$28,500).

G. Attorneys Fees and Costs of Class Counsel.

Class Counsel will seek fees of up to 33.33% of the GSA as attorneys' fees (or \$500,000) and
actual litigation costs of not more than \$20,000.

IV. THE COURT SHOULD CERTIFY THE CLASS FOR SETTLEMENT PURPOSES UNDER FED R. CIV. P. 23

Plaintiffs seek to certify a settlement class pursuant to Fed. R. Civ. P. 23. Rule 23 requires class
action settlements to satisfy two primary prerequisites for purposes of preliminary approval: (1) that the
class meets the requirements for class certification if it has not yet been certified, *see Hanlon v. Chrysler*

ee, e.g., *Nordstrom Comm'n Cases* (2010) 186 Cal.App.4th 576, 589 (\$0 PAGA allocation approved);
Hopson v. Hanesbrands, Inc. (N.D. Cal. 2008) 2008 WL 338542, at 1 (.03% or \$1,500 PAGA allocation
approved); *In re M.L. Stern Overtime Litig.* (S.D. Cal. 2009) 2009 WL 995864, at 1 (2% or \$20,000
PAGA allocation approved); *Munoz v. UPS Ground Freight, Inc.* (N.D. Cal. 2009) 2009 WL 1626376,
at 1 (2% or \$60,000 PAGA allocation approved).

Corp., 150 F.3d 1011, 1020 (9th Cir. 1998); and (2) that the settlement is fair, reasonable, and adequate, *see* Fed. R. Civ. P. 23(e)(2). Both requirements are satisfied here.

A. The Settlement Class Satisfies Fed. R. Civ. P. 23(a) and (b)

Rule 23(a) sets out four prerequisites for certification: (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy of representation. Rule 23(b)(3) further provides that a class action may be maintained if “the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.” Here, Plaintiffs seek to provisionally certify, for purposes of settlement, a settlement “Class Members” defined as “all current and former hourly-paid or non-exempt employees who worked for Defendant within the State of California during the time period from October 12, 2019 through November 8, 2022” (SA § 1.1.6).

1. *Rule 23(a)(1) Numerosity*

To be certified a class must be “so numerous that joinder of all members is impracticable[.]” Fed. R. Civ. P. 23(a)(1). Further, “[i]t’s generally accepted that when a proposed class has at least forty members, joinder is presumptively impracticable based on numbers alone.” *In re Banc of Cal. Secs. Litig.*, 326 F.R.D. 640, 646 (C.D. Cal. 2018). Numerosity is easily satisfied because there are approximately 118,000 members in the Settlement Class. *See, Ikonen v. Hartz Mountain Corp.*, 122 F.R.D. 258, 262 (S.D. Cal. 1988) (40 members are numerous enough).

2. *Rule 23(a)(2) Commonality*

For purposes of approving a class action settlement, the requirement to show common questions of fact and law is not an onerous one: a single common question of fact or law will do. *See Franklin v. Midwest Recovery Sys., LLC*, 2021 WL 1035121, at *2 (C.D. Cal. Feb. 5, 2021).

Here, the settlement class satisfies commonality in that all Class members share, *inter alia*, the following legal and factual questions: whether ULTA failed to pay minimum wages; failed to overtime and sick wages and at the correct rate; failed to provide compliant meal and rest breaks; failed to pay premiums at the correct rate; failed to provide accurate itemized wage statements; failed to pay all wages due at end of employment; failed to reimburse all expenses; and whether those violations constitute violations of the PAGA and/or Business and Professions Code. Because Plaintiffs contend all Class

Members were subject to the same alleged violations, commonality is readily satisfied.

3. Rule 23(a)(3) Typicality

Typicality requires that the plaintiffs' claims be typical of the claims of the class. "Under the rule's permissive standards, representative claims are 'typical' if they are reasonably co-extensive with those of absent class members; they need not be substantially identical." *Castillo v. Bank of Am., NA*, 980 F.3d 723, 729 (9th Cir. 2020) (quotation marks omitted). Here, typicality is satisfied because Plaintiffs contend they were subject to the same uniform policies and practices as the Class, and Plaintiffs' claims are the same as claims that could be brought by Class members, and Plaintiffs contend that all would be Class Members even if they weren't Class Representatives.

4. Rule 23(a)(4) Adequacy

Rules 23(a)(4) and 23(g) require that class representatives and class counsel be capable of fairly and adequately representing the interests of the class. "Representation is adequate if (1) the named plaintiffs and their counsel are able to prosecute the action vigorously [;] (2) the named plaintiffs do not have conflicting interests with the unnamed class members; and (3) the attorney representing the class is qualified and competent." *Franklin*, 2021 WL 1035121, at *3. Here, the claims of the Class Members and the named Plaintiffs are virtually coextensive and Class Counsel are aware of no conflict between Plaintiffs and any other Class Member. See *General Tel. Co. v. Falcon*, 457 U.S. 147, 157-8, n. 13 (1982). Additionally, Plaintiffs understand the claims and theories that were alleged in the Actions and have been involved throughout the litigation. ((RJW Dec. ¶ 50; SS Dec. ¶ 9).

Likewise, Class Counsel have no conflicts of interest and have vigorously prosecuted the action on behalf of Plaintiffs and the Settlement Class. Further, Mayall Hurley P.C., SW Employment Law Group APC, and Lavi & Ebrahimian LLP all have significant experience litigating class actions and have been certified by numerous state and federal courts as competent and adequate class counsel. (RJW Dec. ¶ 55-58; SS Dec. ¶ 3).

5. Rule 23(b)(3) Predominance and Superiority

Certification under Rule 23(b)(3) is proper "whenever the actual interests of the parties can be served best by settling their differences in a single action." *Hanlon*, 150 F.3d at 1022 (internal quotation marks omitted). The rule requires two different inquiries, specifically a determination as to whether: (1)

“questions of law or fact common to class members predominate over any questions affecting only individual members[;]” and (2) “a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.” Fed. R. Civ. P. 23(b)(3); *see also Spann v. J.C. Penney Corp.*, 314 F.R.D. 312, 321-22 (C.D. Cal. 2016). In other words, courts must determine whether the focus of the proposed class action will be on the actions and conduct of the defendants rather than the behavior of individual class members. *Hanlon*, 150 F.3d at 1022-23.

Here, Plaintiffs contend that the common questions set forth above predominate over any potential individualized issues. Further, this class action would be a superior method of adjudication compared to a multitude of individual suits. To determine whether the class method is superior to other means of adjudicating the claims of many people, courts consider: (1) the interest of class members in individually controlling the prosecution or defense of separate actions; (2) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (3) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (4) the difficulties likely to be encountered in the management of a class action. Fed. R. Civ. P. 23(b)(3)(A)-(D). Superiority is satisfied here because it would be highly inefficient for thousands of individuals to file individual cases; certification will provide the Class with a viable method of obtaining redress for their relatively modest individual damages; and public policy supports the use of the class action device for enforcement of employment statutes. *Hanlon*, 150 F.3d, 1023.

B. The Settlement is Fair, Reasonable, and Adequate

In deciding whether to approve a proposed class action settlement, the Court must find that the proposed settlement is “fair, reasonable, and adequate.” Fed. R. Civ. P. 23(e)(2); *Officers for Justice v. Civil Serv. Comm’n*, 688 F.2d 615, 625 (9th Cir. 1982). What matters are the unique facts of the case at hand. *See Cotter v. Lyft Inc.*, 176 F. Supp. 3d 930, 942 (N.D. Cal. 2016) (“a trial court must assess the adequacy and reasonableness of a proposed settlement in light of unique facts of the case at hand, in light of the proposed settlement as a whole, and in light of the particular risks involved”).

In exercising their discretion to approve class action settlements, courts regularly consider whether the settlement is fair, non-collusive, and “all the normal perils of litigation as well as the additional uncertainties inherent in complex class actions.” *In re Beef Indus. Antitrust Litig.*, 607 F.2d 167, 179-80

(5th Cir. 1979). Included in this analysis are considerations of “(1) the strength of the plaintiffs’ case; (2) the risk, expense, complexity, and likely duration of further litigation; (3) the risk of maintaining class action status throughout the trial; (4) the amount offered in settlement; (5) the extent of discovery completed and the stage of the proceedings; (6) the experience and views of counsel; (7) the presence of a governmental participant; and (8) the reaction of the class members to the proposed settlement.” *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 946 (9th Cir. 2011) (quoting *Churchill Village, L.L.C. v. Gen. Elec.*, 361 F.3d 566, 575 (9th Cir. 2004)). Importantly, there is a presumption of fairness “if the settlement is recommended by class counsel after arm’s-length bargaining.” *Wren v. RGIS Inventory Specialists*, 2011 WL 1230826, at *6 (N.D. Cal. Apr. 1, 2011). There is “a strong judicial policy that favors settlements, particularly where complex class action litigation is concerned.” *In re Syncor ERISA Litig.*, 516 F.3d 1095, 1101 (9th Cir. 2008). Applying these factors, the proposed settlement is fair.

Indeed, Ulta had previously entered into a comparable class action settlement in the lawsuit entitled, *Tellez v. Ulta Salon, Cosmetics & Fragrance, Inc.*, 2020 WL 619588 (S.D. Cal. Feb. 10, 2020). In the *Tellez* settlement, Ulta agreed to pay \$1.75 million in exchange for a release of all “wage-and-hour claims arising from their employment with Defendant from August 1, 2014 through October 11, 2019.” *Id.* at *2. In granting final approval of the class action settlement, the Honorable Cathy Ann Bencivengo of the Southern District of California concluded that the class action settlement was “fair, reasonable, and adequate under Rule 23(e).” *Id.* at *6. Notably, the release period in the *Tellez* settlement covered more than **five years** of the liability period, from August 1, 2014 through October 11, 2019, which is significant longer than the release period in this settlement that covers approximately **three years** of the liability period, from October 12, 2019 through November 8, 2022. *Id.* at *2.

1. The Settlement Amount is a Fair Compromise in Light of the Risks

The Settlement represents a fair compromise given the risks and uncertainties presented by continued litigation. As discussed in greater detail below, ULTA vehemently denies any liability and would have continued to assert legal and factual grounds to aggressively defend against itself in this action. (RJW Dec. ¶¶ 29-40). While Plaintiffs remain confident in their claims against ULTA, Plaintiffs found it prudent to secure a substantial recovery on behalf of the Class and avoid the risks of further litigation. Moreover, continued litigation with Defendant would be costly, time consuming, and uncertain in

1 outcome. The Settlement ensures timely relief and a substantial recovery for the Class.

2 The GSA, negotiated at arms'-length, is fair and reasonable in light of the strengths and
 3 weaknesses of Plaintiffs' case against ULTA and their defenses. Moreover, "it is well-settled law that a
 4 cash settlement amounting to only a fraction of the potential recovery does not ... render the settlement
 5 inadequate or unfair" *Officers for Justice*, 688 F.2d at 628. Indeed, "the very essence of a settlement is
 6 compromise, 'a yielding of absolutes and an abandoning of highest hopes.'" *Linney v. Cellular Alaska*
 7 *P'ship*, 151 F.3d 1234, 1242 (9th Cir. 1998). As such, "[t]he fact that a proposed settlement may only
 8 amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement
 9 is grossly inadequate and should be disapproved." *Id.* Accordingly, district courts have found that
 10 settlements for substantially less than the plaintiff's claimed damages were fair and reasonable, especially
 11 when taking into account the uncertainties involved with litigation. *See In re: High-Tech Employee*
 12 *Antitrust Litigation*, Case No. 11-CV-02509-LHK (N.D. Cal. September 2, 2015) (Dkt. No. 1112); *see*
 13 *also Nitsch v. Dreamworks Animation SKG Inc.*, 2017 WL 2423161 (N.D. Cal. June 5, 2017). As
 14 explained in detail in the declarations Counsel Wassermann, Sasooness, and Granberry, the Gross
 15 Settlement Amount is within the range of reasonableness in light of the nature and magnitude of the claims
 16 being settled and the various potential impediments to recovery including the risk of failing to obtain or
 17 maintain class status through trial is substantial, as Defendant has represented it would oppose and, if
 18 granted, move to decertify, class certification as well as file a motion for summary judgment.

19 ***a. Defendant's Maximum and Realistic Exposure to the Class.***

20 With the help of an expert, Class Counsel developed a damages model illustrating ULTA's
 21 maximum exposure and the Class' realistic potential recovery for the alleged violations. Under this model,
 22 ULTA faced up to a maximum of \$2,140,000 in under minimum wage and overtime, \$1,000 in underpaid
 23 overtime (because of the alleged regular rate miscalculation), \$2,000 in underpaid sick pay (because of
 24 the alleged regular rate miscalculation), \$4,480,707 in unpaid meal and rest break premiums, \$13,000 in
 25 underpaid meal and rest break premiums (because of the alleged regular rate miscalculation), \$7,988,352
 26 in statutory penalties for inaccurate wage statements; \$523,000 in unreimbursed business expenses,
 27 \$10,425,345.60 in waiting time penalties, and \$806,522 in interest, for a total of \$26,379,926.60. This
 28 figure a 100% probability of prevailing at certification, defeating ULTA's planned motion for summary

judgment, maintaining certification through trial, prevailing completely after a trial on the merits, and defeating any associated appeals. Under the circumstances, and considering the legal and factual defenses asserted by ULTA, 100% success would be extremely unlikely (RJW Dec. ¶ 14-26).

Because 100% success in litigation is unrealistic, Class Counsel also determined an aggressive, but much more realistic estimate for the potential recovery of the Class. Under this more measured approach, Class Counsel (1) applied a 50% discount to the minimum wage and overtime claims based on (a) ULTA's contention that, as established during discovery, they employed facially valid timekeeping policies (including in re bag checks and COVID screenings), sophisticated timekeeping software, and required Class Members to attest to the accuracy of their punches at all times during the Class Period and (b) the possibility that establishing damages under those circumstances would require individualized calculations rendering certification improper, leaving \$1,070,000, (2) applied no discount to the under paid overtime claim because such is easily calculable, leaving \$1,000, (3), applied no discount to the sick pay claim because such is easily calculable, leaving \$2,000, (4) applied a 75% discount to the unpaid meal and rest break premium claims (a) based on ULTA's contention that, as established during discovery, they employed facially valid meal and rest break policies, sophisticated timekeeping policies, and required Class Members to attest to their punches at all times during the Class Period, (b) paid more than 110,000 premiums during the Class Period (including automatically per their software whenever a noncompliant meal or rest break was recorded), and (c) the possibility that establishing damages under those circumstances would require individualized calculations rendering certification improper, leaving \$1,120,176.75, (5) applied no discount to the under paid meal and rest break premium claims because such is easily calculable, leaving \$13,000, (6) applied a applied a 75% discount to the wage statement claims because they are derivative of Plaintiffs' other allegations and therefore subject to both direct and collateral attack, leaving \$1,997,088; (8) applied a 50% discount to the business reimbursement claim based on ULTA's contention that, as established during discovery, they employed facially valid reimbursement policies, routinely reimbursed Class Members for cell phone use, and had a clear procedure in place for other reimbursements, leaving \$261,500, (9) applied a 75% discount to the waiting time penalties claims because, as established in discovery, because of its contention that any resulting underpayments were not intentional in light of its valid policies and recent changes in the law as well as

the fact that ULTA had already paid 3,203 Class Members more than \$1,430,000 in waiting time penalties during the Class Period, leaving \$2,606,336.40 and (10) assumed 50% interest, leaving \$403,261. Under this more measured model, Class Counsel determined that Class' realistic damages to be \$7,474,362.15. (RJW Dec. ¶ 27).

The portion of the GSA allocated to Class Claims (\$1,450,000) represents over 20% of the Class' realistic recovery and 5.5% of its maximum potential recovery. *Id.* ¶ 24 and 28. This is a positive result and courts have found settlements less favorable to be fair and reasonable. See e.g., *Cavazos*, 2022 WL 2918361 *6 (settlement of 5.8% of maximum exposure reasonable in light of defendant's financial condition); *In re Mego Fin. Corp. Sec. Litig.* (9th Cir. 2000) 213 F.3d 454, 459 (settlement of 16.67% of potential recovery was fair). Indeed, "it is well-settled law that a cash settlement amounting to only a fraction of the potential recovery does not . . . render the settlement inadequate or unfair." *Officers for Justice v. Civil Service Com'n of City and County of San Francisco* (9th Cir. 1982) 688 F.2d 615, 628. Of course, "the very essence of a settlement is compromise, 'a yielding of absolutes and an abandoning of highest hopes.'" *Linney v. Cellular Alaska P'ship.* (9th Cir. 1998) 151 F.3d 1234, 1242. As such, "[t]he fact that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved." *Id.*

b. ULTA's Defenses and Litigation Concerns

ULTA asserted numerous defenses and planned to employ a multipronged attack aimed at circumscribing both the scope of the Class and the available damages. This included, but was not limited to, vigorously contesting certification, filing a motion for summary judgment aimed at wiping out the ability of large segments of the Class to participate in the Class Action and/or to recover under the Settlement, and appealing any adverse rulings. ULTA also strongly denies all allegations pled, along with all allegations intended to be pled in the operative complaint and contends they implemented written policies and maintained practices that complied with the requirements of the California Labor Code and applicable California Wage Orders.

First, ULTA argued that all minimum and overtime wages were paid in compliance with California law and applicable California Wage Orders. To bolster this argument, ULTA contended that during the Class Period it employed facially neutral timekeeping policies (including in re bag checks and COVID screenings), sophisticated timekeeping software, and required Class Members to attest to the accuracy of

1 their punches. ULTA further argued zero or de minimis unpaid minimum and overtime time wages caused
2 by its bag checks and COVID screenings. Finally, ULTA provided Class Counsel relevant policies and
3 testimony supporting the same. (*Id.* at ¶ 30).

4 Second, ULTA contended that it properly calculated its employees' regular rate of pay for purposes
5 of overtime and that any items excluded from its regular rate calculations were properly excluded as
6 discretionary. Review of ULTA's payroll records showed that virtually every commission, non-
7 discretionary bonus, and other item of compensation identified by Class Counsel was in fact included in
8 ULTA's regular rate calculation. Indeed, only one item was left out and that item was disputed by ULTA.
9 Success on this front would have absolved ULTA from liability entirely as the remainder of Plaintiffs'
10 overtime claims are derivative of the alleged regular rate miscalculation. (*Id.* at ¶ 31).

11 Third, ULTA similarly contended that it did not improperly calculate the Class Members' sick pay
12 further reducing its liability. (*Id.* at ¶ 32).

13 Fourth, ULTA contended that Plaintiffs' meal and rest claims are not appropriate for class
14 certification, because ULTA employed lawful policies to provide non-exempt associates timely and
15 uninterrupted meal and rest breaks throughout the Class Period. ULTA further contended that it had paid
16 more than 110,141 premiums during the Class Period (as a result of sophisticated timekeeping software
17 that automatically paid a premium whenever a non-compliant meal or rest break was recorded). ULTA
18 also required associates to attest to having received compliant meal and rest breaks. Finally, ULTA
19 provided Class Counsel with policies and testimony supporting the same. Accordingly, it was ULTA's
20 position that any time record showing a "non-compliant" meal or rest break would necessarily require
21 individualized inquiries, such as whether the associate voluntarily chose to forego the break. The necessity
22 for such individualized inquiries ULTA contended would destroy commonality, cause individual issues
23 to predominate, and render class certification inappropriate or subject to attack on appeal. See e.g., *Ruiz*
24 *v. Affinity Logistics Corp.*, 2009 WL 648973 * 6 (S.D. Cal. 2009) (where individualized inquiries as to
25 reason breaks were not taken is required, certification may be improper). (RJW Dec. ¶ 33).

26 Fifth, as with Plaintiffs' overtime and sick pay miscalculation claims, ULTA argued that no
27 miscalculations occurred and thus no further sums were owed. (*Id.* at ¶ 34).

28 Sixth, ULTA argued certifiability of the derivative wage statement claims was tied to the
certifiability of the underlying claims and are thus subject to the risks outlined in the preceding sections.

E.g. *Dawson v. Hertz Transporting, Inc.*, 2018 WL 6112623 * 9 (C.D. Cal. 2018); *Lampe v. Queen of the Valley Med. Ctr.*, 19 Cal.App.5th 832, 852 (1st Dist. Cal. 2018). In addition, the wage statement claim is subject to the substantive challenge that requisite injury is lacking because of the wholly derivative nature of the claims and the wage statements accurately outlined the amounts *actually paid* to Class Members. *Maldonado v. Epsilon Plastics, Inc.*, 22 Cal.App.5th 1308, 1336-1337 (2d Dist. Cal. 2018). Success on these arguments would cut their liability by nearly \$8,000,000. (*Id.* at ¶ 35).

Seventh, ULTA defended against Plaintiffs' reimbursement claim by contending that it employed valid reimbursement policies regarding cell phone use, tools, mileage, etc. ULTA further contended that, although cell phone use was not required, it automatically reimbursed employees for the same and maintained procedures which allowed employees to request further reimbursement if they felt ULTA's reimbursements were not satisfactory. Finally, ULTA provided policies and documents supporting the same. (*Id.* at ¶ 36)

Eighth, ULTA argued that it acted in good faith and that its conduct was not willful such that waiting time penalties would have been available to the Class under California Labor Code section 203, respectively.⁵ Recent changes to the law expanding liability to 203 penalties, including *Ferra v. Lowes Hollywood Hotel, LLC* (2021) 11 Cal.5th 858, further bolstered this argument. Since it was only recently established law that meal and rest period premiums constitute "wages" which are required to be paid in full on separation, ULTA is expected to have argued any failures to pay all wages could not have been sufficiently "willful" to justify imposition of waiting time penalties. *Diaz v. Grill Concepts Svcs., Inc.*, 23 Cal.App.5th 859, 868 (2d Dist. Cal. 2018) (holding that failure to pay is not willful if there is uncertainty in the law or employer has good faith argument, based in law or fact, that the wages were not due). It is also anticipated ULTA would raise an argument that the imposition of full waiting time penalties was unconstitutionally excessive in the event the Class prevailed on that claim. Success on his front alone would have cut ULTA's potential liability by more than \$10,400,000. ULTA further

for Justice v. Civil Service Com'n of City and County of San Francisco, 688 F.2d 615, 628 (9th Cir. 1982)" \c 1 . Of course, "the very essence of a settlement is compromise, 'a yielding of absolutes and an abandoning of highest hopes.'" *Linney v. Cellular Alaska P'ship*, 151 F.3d 1234, 1242 (9th Cir. 1998). As such, "[t]he fact that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved.'" *Id.*

demonstrated during discovery that it had already paid 3,203 Class Members more than \$1,430,000 in waiting time penalties during the Class Period. (RJW Dec. ¶ 37).

Finally, ULTA contended that the derivative claims, including those for PAGA penalties, and for restitution/injunctive relief under the UCL, were all (a) dependent upon the substantive claims (and thereby subject to the same attacks), (b) completely duplicative of damages available under other theories, or (c) discretionary, and therefore not likely to be awarded by the court.⁶ (RJW Dec. ¶ 38).

While Class Counsel is confident that certification and success on the merits could have been attained on at least some of the Class' claims, continued litigation was guaranteed to be costly, time consuming, and uncertain in outcome. Appellate proceedings would only further delay and jeopardize recovery by Class Members. Shifting sentiment regarding PAGA claims add yet another layer of concern to continued litigation. By contrast, the proposed Settlement ensures timely relief and substantial recovery for the Class and is superior to other recently approved settlements.⁷ (RJW Dec. ¶ 39; SS Dec. ¶ 8).

2. The Parties Investigated this Matter to Allow Counsel and this Court to Conclude that the Settlement is Fair and Reasonable

As detailed above, the Parties engaged in a significant exchange of substantive information relating to Class Members' claims, including formal discovery, depositions, as well as the exchange of hundreds of thousands of documents and millions of lines of data. Based upon the record that was developed through this investigation and discovery process, Plaintiffs' Counsel were able to estimate class damages and

⁶ See e.g., *Fleming v. Covidien Inc.*, No. ED CV10-01487 RGK (OPx), 2011 WL 7563047 (C.D. Cal. 2011) (reducing PAGA penalties to 18% of the total PAGA amount at stake per the statute).

⁷ District courts have found that settlements for substantially less than the one at issue here were fair and reasonable, especially when taking into account the uncertainties involved with litigation. See e.g., *Rodriguez, supra*, 563 F.3d at 965 (9th Cir. 2009) (approving settlement amounting to 30% of the realistic damages estimated by the class expert; court noted that even if the plaintiffs were entitled to treble damages that settlement would be approximately 10% of the estimated damages); *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 459 (9th Cir. 2000) (settlement equal to 16.67% of the potential recovery was fair under the circumstances). Indeed, "it is well-settled law that a cash settlement amounting to only a fraction of the potential recovery does not . . . render the settlement inadequate or unfair." *Officers for Justice v. Civil Service Com'n of City and County of San Francisco*, 688 F.2d 615, 628 (9th Cir. 1982). Of course, "the very essence of a settlement is compromise, 'a yielding of absolutes and an abandoning of highest hopes.'" *Linney v. Cellular Alaska P'ship*, 151 F.3d 1234, 1242 (9th Cir. 1998). As such, "[t]he fact that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved." *Id.*

1 assess the risks of further litigation. (RJW Dec. ¶ 7). It was only after the parties investigated and evaluated
 2 the strengths and weaknesses of the case and engaged in hard-fought negotiations with the assistance of
 3 an experienced mediator that this settlement was reached. *Id.* at ¶ 9. This litigation, therefore, has reached
 4 the stage where the parties have a clear view of the strengths and weaknesses of their cases sufficient to
 5 support the Settlement. *See Lewis v. Starbucks Corp.*, 2008 WL 4196690, at *6 (E.D. Cal. Sept. 11, 2008)
 6 (“approval of a class action settlement is proper as long as discovery allowed the parties to form a clear
 7 view of the strengths and weaknesses of their cases”).

8 **3. The Settlement was the Product of Informed, Non-Collusive, and Arms’-Length** 9 **Negotiations Between Experienced Counsel**

10 Courts routinely presume a settlement is fair where it is reached through arms’-length bargaining
 11 as it was here. *See Hanlon*, 150 F.3d at 1027. As the U.S. Supreme Court has held, “[o]ne may take a
 12 settlement amount as good evidence of the maximum available if one can assume that parties of equal
 13 knowledge and negotiating skill agreed upon the figure through arms-length bargaining...” *Ortiz v.*
 14 *Fibreboard Corp.*, 527 U.S. 815, 852 (1999). Here, the Settlement is a product of intensive, adversarial
 15 litigation between the parties. In addition, the parties are represented by skilled and experienced counsel
 16 with extensive backgrounds in complex employment litigation and experience litigating and settling
 17 similar class actions. The parties’ settlement negotiations also occurred with the assistance of a well-
 18 respected mediator with significant experience in class actions. (RJW Dec. ¶ 8-11 and 55-58; SS Dec. ¶
 19 7).

20 Moreover, the views of the attorneys actively conducting the litigation are entitled to significant
 21 weight in deciding whether to approve the settlement. *Ellis v. Naval Air Rework Facility*, 87 F.R.D. 15,
 22 18 (N.D. Cal. 1980), *aff’d*, 661 F.2d 939 (9th Cir. 1981). The Parties’ counsel believes that this settlement
 23 is fair, adequate, and reasonable and in the best interests of Class, and should be preliminarily approved.
 24 (RJW Dec. ¶ 39; SS Dec. ¶ 8).

25 **C. The Proposed Notice is Adequate**

26 Fed. R. Civ. P. 23 (c)(2)(B) provides that the Court must direct to class members the best notice
 27 practicable under the circumstances, including individual notice to all members who can be identified
 28 through reasonable effort. The notice must concisely and clearly state in plain, easily understood language:

(1) the nature of the action; (2) the definition of the class certified; (3) the class claims, issues or defenses; (4) that a class member may enter an appearance through counsel if the member so desires; (5) that the Court will exclude from the class any member who requests exclusion, stating when and how members may elect to be excluded; and (6) the binding effect of a class judgment on class members under Rule 23(c)(3). Fed. R. Civ. P. 23(c)(2)(B).

The content of the proposed Class Notice attached as **Exhibit A** to the Settlement Agreement fully complies with due process and Fed. R. Civ. P. 23.

1. The Class Notice is Accurate and Informative

The Class Notice, will inform Class Members of the terms of the Settlement in a clear and neutrally worded manner to avoid prejudice. The Notice will explain the terms of the Agreement, including (i) information regarding the nature of the Actions; (ii) a summary of the principal terms of the Agreement; (iii) the Class Member and Aggrieved Employee definitions; (iv) the total number of Pay Periods each respective Class Member worked for Defendant during the Class Period; (v) the estimated Class Payment (if applicable) from the Net Settlement Amount to each Class Member; (vi) the formula for calculating the settlement payments; (vii) instructions on how to submit Requests for Exclusion, Notices of Objection, and Pay Periods disputes; (viii) the Response Deadline; and (ix) the claims to be released under the Class Settlement. The Notice will be printed in English only, because Class Members can speak, write, and understand English. (SA § 1.19). The Notice provides Class Members with all the necessary information to make an informed decision.

2. The Class Notice Satisfies Dues Process

Courts are vested with broad discretion to fashion an appropriate notice program, which must be the best notice practicable under the circumstances. Fed. R. Civ. P. 23(e)(1) and 23(c)(2)(B). The Settlement provides for direct mail notice to each Class Member at his/her last known address based upon Defendant's records, performing additional skip traces as necessary. (SA § 7.2). Because all Class Members are current or former employees of Defendants, for whom Defendants have current or last known addresses as well as SSNs, notice here is simpler and more reliable than in other types of class actions that require published notice to reach unidentifiable class members. The Class Notice and notice plan are consistent with class notices approved by state and federal courts, and under the circumstances here, constitute the best notice

practicable. *Spann*, 314 F.R.D. at 331.

V. THE INCENTIVE AWARDS TO PLAINTIFFS ARE REASONABLE.

Named plaintiffs in class action litigation are eligible for reasonable incentive awards. *Stanton v. Boeing Co.*, 327 F.3d 938, 977 (9th Cir. 2003). Incentive awards are intended to “compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the class action, and, sometimes, to recognize their willingness to act as a private attorney general.” *Rodriguez v. West Publ’g Corp.*, 563 F.3d 948, 958-959 (9th Cir. 2009). Service payments are particularly appropriate in wage-and-hour class actions where plaintiffs undertake a reputational risk by suing former employers. *Rodriguez*, 563 F.3d at 958-959.

Each of the lead Plaintiffs, Dorcas-Cothy Kabasele, Katia Arrellano, Angel Gonzalez will seek Incentive Awards of no more than \$5,000, and each of the remaining names Plaintiff will seek no more than \$500 (for a combined amount of \$28,500). (SA § 4.3). The payments sought are (a) in line with those commonly awarded by courts in similar wage and hour class actions; (b) equal to or less than the Ninth Circuit benchmark (see *Hyunh, supra*, 2017 U.S. Dist. LEXIS 38291, at *11, *27-28 (noting that the benchmark for service awards is \$5,000), (c) collectively just 1.9% of the GSA, and (d) fair, reasonable and appropriate under the circumstances. Plaintiffs, who will fully brief the Court on the propriety of the sought payments at final approval, have demonstrated their commitment to prosecuting this Class Action on behalf of the Class Members by, amongst other things, locating and retaining attorneys, participating in discovery and investigation, filing this action and willingly exposing their names and reputation by filing the Class Action. Plaintiffs have also worked diligently with Class Counsel throughout this entire litigation, including taking numerous calls with Class Counsel, participating in formal and in informal discovery, and participating in the mediation and months of protracted settlement negotiations. RJW Dec. ¶ 50-54; SS Dec. ¶ 9). Further, Class Members will be apprised of this request, may review the moving papers on the Court’s website and the Settlement Administrator’s website, and may object if they so desire. (SA § 8.3; Exhibit A).

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VI. THE PROPOSED FEES AND COSTS TO CLASS COUNSEL ARE REASONABLE.

Plaintiffs, in the settlement of this wage and hour class action, are entitled to payment of attorneys' fees and costs. 29 U.S.C. § 2016(b); Cal. Lab. Code §§ 218.5, 226(e)(1), 1194, and 2699(g); *Early v. Superior Court*, 79 Cal. App. 4th 1420, 1427 (2000). An attorneys' fee award is justified where the legal action has produced benefits by way of a voluntary settlement. *Maria P. v. Riles*, 43 Cal.3d 1281, 1290-91 (1987); *Westside Cmty. For Indep. Living, Inc. v. Obledo*, 33 Cal. 3d 348, 352-53 (1983). At the Final Approval Hearing, Plaintiffs will seek an award of Class Counsel's fees under the common fund doctrine, which is customarily used in awarding fees and costs in settlement of Labor Code class actions and an approved method under California and Federal law. *Wershba*, 91 Cal. App. 4th at 254; *Lealao*, 82 Cal. App. 4th 19, 26-30; *Serrano v. Priest*, 20 Cal. 3d 25, 34 (1977) ("[w]hen a number of persons are entitled in common to a specific fund, and an action brought by a plaintiff or plaintiffs for the benefit of all results in the creation or preservation of that fund, such plaintiff or plaintiffs may be awarded attorney's fees out of the fund."); *see also Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980) ("[A] lawyer who recovers for a common fund . . . is entitled to a reasonable attorney's fee from the fund as a whole."); *Hanlon*, *supra*, 150 F.3d. at 1029. Courts customarily approve attorney's fees of one-third to forty percent of the common fund in comparable wage and hour class actions.⁸

Plaintiffs will seek attorneys' fees of not more than 33.33%, or one-third of the GSA, or \$500,000 (with \$212,500 to be allocated to Mayall Hurley, P.C., \$212,500 to be allocated to SW Employment Law Group, APC and \$75,000 to be Lavi & Ebrahimian, LLP), and declared litigation costs of up to \$20,000. Class Counsel will fully brief the Court on the propriety of the sought fee at final approval. Further, Class Members will be apprised of Plaintiffs' fee request as well as their ability to review their moving papers on the Court's website and the Settlement Administrator's website, and to object if they so desire. (SA § 8.3; Exhibit A).

⁸ *See, e.g., Wren v. RGIS Inventory Specialists*, 2011 WL 1230826 *29 (N.D. Cal. 2011) (approving 42% fee); *Birch v. Office Depot, Inc.*, 2007 WL 9776717 *13 (S.D. Cal. 2007) (awarding a 40% fee); *Singer v. Becton Dickinson and Co.*, 2010 WL 2196104, at *8 (S.D. Cal. 2010) (approving fee award of one-third; award was similar to awards in other cited wage and hour class action cases where fees ranged from 30% to 40%); *Vasquez v. Coast Valley Roofing, Inc.*, 266 F.R.D. 482, 491-92 (E.D. Cal. 2010) (citing 5 recent wage and hour class actions where district courts approved attorney fee awards ranging from 30% to 33%); *Cicero v. Directv, Inc.*, 2010 WL 2991486 *6 (C.D. Cal. 2010) (noting that fees of one-third are common in wage and hour settlements below \$10 million).

1 **VII. CONCLUSION.**

2 For these reasons, Plaintiffs' motion for preliminary approval of the parties' class action Settlement
3 should be granted.

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5 Respectfully submitted,

6 Mayall Hurley, PC
7 SW Employment Law Group, APC
8 Lavi & Ebrahimi LLP

9 Dated: January 20, 2023

10 By: /s/ Robert J. Wassermann
11 Robert J. Wasserman, Esq.
12 Attorneys for Plaintiffs
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