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**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA**

JULIE WASHBURN, individually, and on
behalf of all others similarly situated,

Plaintiff,

vs.

PENDLETON WOOLEN MILLS, INC.,
and DOES 1 through 50, inclusive,

Defendants.

CASE NO.: 3:21-cv-06472-VC

**NOTICE OF MOTION AND
UNOPPOSED MOTION FOR FLSA
AND PAGA SETTLEMENT
APPROVAL**

Amended Complaint: October 27, 2021

PLEASE TAKE NOTICE that on June 2, 2022 at 2:30 p.m., at the United State District Court for the Northern District, Courtroom 4, 17th Floor, Plaintiff Julie Washburn (collectively with the Opt-in Plaintiffs, “Plaintiffs”) will move this Court for an Order Granting the Plaintiff’s Unopposed Motion for FLSA and PAGA Settlement Approval. Plaintiff moves this Court for an order as follows: (1) approving the Settlement Agreement pursuant to section 216(b) of the Fair Labor Standards Act (FLSA), (2) approving the manner and form of notice to be sent to the FLSA Collective, (3) approving the request for Service and Individual Settlement Payment to Plaintiff pursuant to the Settlement Agreement, (4) approving the requests for Attorneys’ Fees and Costs pursuant to the terms of the Settlement Agreement, (5) approving the Labor Code Private Attorneys General Act (PAGA) payment as set forth in the Settlement Agreement, (6) approving the release of claims as specified in the Settlement Agreement as binding and effective, and (8) directing that final judgment of dismissal be entered as between Plaintiffs and Defendants.

This Motion is based on this Notice of Motion, the Memorandum of Points and Authorities attached to this Motion, the Declarations, their Exhibits, all pleadings and papers filed herein, the arguments of counsel, and any other matters properly before the Court.

Respectfully submitted,
BRYAN SCHWARTZ LAW

Dated: April 21, 2022

By: /s/ Bryan J. Schwartz
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**PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
UNOPPOSED MOTION FOR FLSA AND PAGA SETTLEMENT APPROVAL**

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I. INTRODUCTION¹

Julie Washburn, on behalf of herself and seventeen other opt-in plaintiffs (collectively, Plaintiffs) in the above-captioned matter, who are or were Store Managers for a retail clothing company, Pendleton Woolen Mills Inc. (“Defendant”), request approval of the settlement agreement. *See* Declaration of Bryan J. Schwartz (“Schwartz Decl.”), Exhibit 1 (“Settlement Agreement”). Plaintiffs contend that they worked unpaid overtime since Defendant misclassified them as exempt under the FLSA, and Plaintiff Washburn asserts Labor Code claims (including under PAGA). Plaintiffs principally allege that Store Managers have not consistently supervised two or more full-time employees or equivalents, and that, without sufficient supervisees, their duties have also been predominantly of a non-exempt nature. Defendant denies Plaintiffs’ allegations, maintaining that white-collar exemptions to FLSA and Labor Code coverage apply. Notwithstanding these robust defenses and the significant litigation risks associated with them, under the Settlement Agreement, Plaintiffs stand to receive an average net recovery of nearly \$16,000 each. Schwartz Decl. at ¶ 7.

The Settlement Agreement requires a total payment of \$437,500, none of which will revert to Defendant. Settlement Agreement, at ¶ B(1)(a). In addition to the substantial cash recovery for all participants, to be distributed based upon their respective total workweeks in the statutory period, Defendant has agreed to significant corporate reforms. Settlement Agreement, at ¶ G(5). These will ensure that each Store Manager is either responsible for supervising two or more full-time employees or their equivalents, or will be reclassified as non-exempt. The Settlement Agreement also provides for a \$5,000 service payment to representative Plaintiff Washburn,

¹ Plaintiffs submit the instant motion and supporting documents on blank paper in accordance with the Standing Order for Civil Cases before Judge Vince Chhabria, at ¶ 29. Plaintiffs will re-file the documents on pleading paper upon request by the Court.

without whom none of the collective members would be obtaining any recovery at all. Settlement Agreement, at ¶ (B)(1)(d). In addition, Defendant does not oppose a request for up to \$145,833.33 for attorneys' fees, representing one third of the total settlement fund. Settlement Agreement, at ¶ (B)(1)(e). Even with this non-opposition, the undersigned request only \$131,250, representing 30% of the total settlement fund, which is less than the actual fees counsel have accrued over the course of this litigation. Schwartz Decl. at ¶ 15. Counsel's costs are a modest \$9,000, and counsel has eliminated the cost of settlement administration, agreeing to administer the settlement in-house. Schwartz Decl. at ¶ 20.

The settlement, reached after a lengthy mediation and extensive arm's length negotiations, is not only adequate, but an excellent result, given the risk, expense, complexity, and likely duration of further litigation. Schwartz Decl. at ¶ 7. As such, it exceeds the standard of review for FLSA settlements, that they be a "fair and reasonable resolution of a bona fide dispute." *Lynn's Food Stores, Inc., v. United States*, 679 F.2d 1350, 1354-1355 (11th Cir. 1982) (*Lynn's Food*); *Slezak v. City of Palo Alto*, No. 16-CV03224-LHK, 2017 WL 2688224, at *2 (N.D. Cal. June 22, 2017). As to the PAGA claims, which were only a minor part of this case, affecting just seven Californians, there was no requirement of a separate allocation, in light of the other benefits of the settlement. Settlement Agreement, Exhibit B; *In re Nordstrom Commission Cases*, 186 Cal.App.4th 576, 579 (2010). Plaintiffs nonetheless allocated 1% of the settlement to settle PAGA claims, an amount greater than those often approved in this District. *See, e.g., Harrison v. Bank of Am. Corp.*, No. 19-CV-00316-LB, 2021 WL 5507175, at *6 (N.D. Cal. Nov. 24, 2021).

Accordingly, Plaintiffs respectfully request that this Court: approve the Settlement Agreement; approve the requested named plaintiff enhancement; approve the requested attorneys'

fees and costs; and enter judgment accordingly. The proposed Order and Judgment, respectively, are attached.

II. PROCEDURAL BACKGROUND

Plaintiff Washburn filed the initial Complaint on August 20, 2021, alleging collective and individual claims, and an Amended Complaint on October 25, 2021, to add representative claims under PAGA. (ECF No. 1, 11.) The Court granted the parties' stipulation to conditional FLSA certification on November 22, 2021. (ECF No. 18.) Following conditional certification and notice to the 73 potential collective action members, a total of 18 Store Managers, including Plaintiff, opted into the case, for a participation rate of nearly 25%, a solid affirmative participation rate under the FLSA. *See Rutti v. Lojack Corp.*, No. SACV 06-350 DOC (JCx), 2012 WL 3151077, at **5-6 (C.D. Cal. July 31, 2012) (discussing 7.6% (22 out of 289) opt-in rate in FLSA case, approving fee award after settlement, discussing "the myriad reasons employees have not to opt-in to FLSA collective actions," including *inter alia* inertia, uninformed class members, and fear of retaliation). After exchanging nearly 10,000 pages of document discovery, the parties scheduled an early mediation, attending a nearly 12-hour mediation session with respected wage-and-hour mediator Steve Pearl on February 16, 2022. Schwartz Decl. at ¶¶ 4-5; Exh. 13, Pearl C.V. The mediation resulted in a memorandum of understanding. Schwartz Decl. at ¶ 5. The parties subsequently negotiated the long-form Settlement Agreement, signed by the parties on April 7, 2022, of which the Parties now seek the Court's approval. Schwartz Decl., Exhibit 1.

III. TERMS OF THE SETTLEMENT AGREEMENT

The Settlement Agreement provides for a total settlement fund of \$437,500, to be divided as follows:

- \$287,875 for the Collective, to be allocated based on each Collective Member's workweeks during the statutory period, for an average FLSA distribution of \$15,993 per person (Schwartz Decl., at ¶ 7);
- \$5,000 service payment for Julie Washburn, the named plaintiff (Settlement Agreement, at ¶ B(1)(a));
- Up to \$145,833.33 for attorneys' fees (Settlement Agreement, at ¶ B(1)(e)); attorneys only request \$131,250, less than their lodestar – 30% of the total settlement (Schwartz Decl., at ¶ 15, Exh. 2);
- Up to \$10,000 in litigation costs; attorneys only request \$9,000, approximately 2% of the settlement (Settlement Agreement, at ¶ B(1)(f); Schwartz Decl., at ¶¶ 7, 20, Exh. 3); and
- \$4,375 (one percent) for PAGA claims, with \$3,281.25 (75%) distributed to the Labor Workforce and Development Agency ("LWDA") and \$1,093.75 (25%) distributed to seven aggrieved California employees (Settlement Agreement, at ¶ B(1)(c)(iii)(1); Settlement Exh. B).

Defendant further agrees to the following corporate reforms:

- Defendant will use its best efforts to staff each Store Manager with at least two full-time employees or their equivalents (Settlement Agreement, at ¶ G(5));
- Defendant will assist Store Managers in hiring their budgeted employees (*Id.* at ¶ G(5)); and
- Defendant will reclassify Store Managers who are budgeted for less than two full-time employees or their equivalent as non-exempt under the FLSA and, if applicable, California law (*Id.* at ¶ G(5)).

In exchange for these payments and corporate changes, Plaintiffs agree to an appropriately-tailored release of federal wage claims and California PAGA claims against Defendant. (*Id.* at ¶ C(2)).

IV. THE COURT SHOULD APPROVE THE FLSA AND PAGA SETTLEMENT.

A. The FLSA Legal Standard Favors Approval for a Fair and Reasonable Settlement of a Bona Fide Dispute.

In order to approve the settlement of FLSA claims proposed by an employer and employees, the Court must determine the settlement is a "fair and reasonable resolution of a bona fide dispute" of the claims raised under the FLSA. *Lynn's Food*, 679 F.2d at 1355; *Nen Thio v. Genji, LLC*, 14 F. Supp. 3d 1324, 1333 (N.D. Cal. Aug. 7, 2014). Because it is uncertain how a trier of fact would find the applicability of Defendant's FLSA exemption defenses as to Defendant's Store Managers, the Court should approve a fair and reasonable settlement, like this

one, “in order to promote the policy of encouraging settlement of litigation.” *Lynn’s Food*, 679 F.2d at 1354; *Dahl v. Bay Power, Inc.*, No. 20-CV-07062-HSG 2021 WL 2313388, at *2 (N.D. Cal. May 28, 2021). The settlement reflects a “reasonable compromise” on numerous “bona fide” disputes, including but not necessarily limited to: whether Plaintiffs were misclassified; the appropriate statute of limitations and the availability of liquidated damages; and, the number of overtime hours Plaintiffs actually worked. *See Nen Thio*, 14 F. Supp. 3d 1324.

Courts assessing whether a FLSA settlement is fair and reasonable look to several factors, each of which supports approval in this case:

1. The plaintiff’s range of possible recovery;
2. The stage of proceedings and amount of discovery completed;
3. The seriousness of the litigation risks faced by the parties;
4. The scope of any release provision in the settlement agreement;
5. The experience and views of counsel and the opinion of participating plaintiffs;
6. The possibility of fraud or collusion.

Saleh v. Valbin Corp., No. 17-CV-00593-LHK, 2018 WL 6002320, at *3 (N.D. Cal. Nov. 15, 2018) (quoting *Selk v. Pioneers Mem’l Healthcare Dist.*, 159 F. Supp. 3d 1164, 1173 (S.D. Cal. 2016)).

1. The Settlement Amount Represents a Substantial Portion of Plaintiffs’ Best-Day Recovery.

This Settlement Agreement represents an excellent result for the Plaintiffs. Schwartz Decl. at ¶ 7. The average net recovery per Plaintiff of nearly \$16,000 is well above the typical amount a recovering collective or class member receives in a wage case, years earlier than if Plaintiffs waited to try their case and prevail on any appeals. Schwartz Decl. at ¶¶ 7, 10; *see, e.g., Saleh*, 2018 WL 6002320, at *1 (\$824.06/each); *Gerlach v. Wells Fargo*, 4:05-cv-00585 (ECF Nos. 300, 312, 332) (N.D. Cal. 2007) (copy provided to the Court, Schwartz Decl., Exh. 6) (in misclassification case, \$12.8 million settlement fund for approximately 4,500 class members – gross of \$2,844 per person on average); *Pierce v. Rosetta Stone, Ltd.*, 2013 WL 5402120, at *4 (N.D. Cal. Sept. 26, 2013) (in

misclassification case, settlement of \$600,000, average recovery of \$3,890.63 each for California claimants and \$2,964.29 for FLSA claimants); *Burden v. SelectQuote Ins. Servs.*, 2013 WL 3988771, at *1, 3 (N.D. Cal. Aug. 2, 2013) (in misclassification case, \$750,000 settlement fund, recoveries ranged between \$1,850 and \$3,335); *Carter v. Anderson Merchandisers, LP*, 2010 WL 144067 (C.D. Cal. Jan. 7, 2010) (in misclassification case, \$3.625 million settlement (\$2.617 million net settlement) for 313 FLSA class members and 174 California class members – \$5,374 per person net on average). Settlements in other wage-hour class actions, not alleging misclassification, tend to pay even less. *See, e.g., Mojica v. Compass Group*, No. 13-CV-1754 (C.D. Cal.) (granting preliminary approval to \$5 million settlement for 22,000 food service employees with net settlement fund of \$3,175,834, and only 25% guaranteed pay-out to claimants, with \$144.36 payments to each wage/hour class action member if all participate) (copy provided to the Court, Schwartz Decl., Exh. 7); *O’Sullivan v. AMN Services, Inc.*, No. 12-CV-2125 (N.D. Cal. Feb. 7, 2014) (final approval granted to settlement for \$3 million for a class of 11,685 people (average of \$478 per person)) (copy provided to the Court, Schwartz Decl., Exh. 8). Moreover, the corporate changes may lead to additional overtime wages in the future for Store Managers, not included in the settlement amount, as discussed further *infra*. Schwartz Decl. at ¶ 9.

Plaintiffs’ counsel estimated Plaintiffs’ best-day outcome for their FLSA claims was \$1,303,091.98, making all favorable assumptions for the Plaintiffs. Schwartz Decl. at ¶ 7. This figure was calculated based on extensive interviews with collective members and nearly 10,000 pages of documents reviewed. *Id.* at ¶¶ 4,7. This calculus assumes that Plaintiffs would not only prevail on all claims for FLSA liability, but that Plaintiffs would obtain liquidated damages and a three-year statute of limitations, that Plaintiffs would be able to prove at trial all of the claimed

amounts of overtime worked, and that Plaintiffs would survive a motion to decertify the collective, each of which presented significant risk, as described in greater detail below.

Plaintiffs need not compare the Settlement to an estimated full-relief, best-day outcome in the case if it were fully litigated. *Rodriguez v. West Publ.*, 563 F.3d 948, 965-966 (9th Cir. 2009).

The Ninth Circuit explains:

We are not persuaded ... by Objectors' further submission that the court should have specifically weighed the merits of the class's case against the settlement amount and quantified the expected value of fully litigating the matter....[T]he Seventh Circuit directs courts to ““estimate the range of possible outcomes and ascrib[e] a probability to each point on the range.”” *Id.* However, our approach, and the factors we identify, are somewhat different. We put a good deal of stock in the product of an arms-length, non-collusive, negotiated resolution, *Hanlon [v. Chrysler]*, 150 F.3d 1011, 1027 (9th Cir. 1998)]; *Officers for Justice [v. Civil Serv. Comm’n of San Francisco]*, 688 F.2d 615, 625 (9th Cir. 1982)], and have never prescribed a particular formula by which that outcome must be tested. As we explained in *Officers for Justice*, “[u]ltimately, the district court's determination is nothing more than an amalgam of delicate balancing, gross approximations and rough justice.” 688 F.2d at 625 (internal citation and quotation marks omitted).

Rodriguez, 563 F.3d at 965. Even if the Court looks at possible estimated full relief, the monetary relief provided in this Settlement compares favorably. The \$437,500 settlement amount represents approximately 33% of Plaintiffs’ potential recovery if they were to prevail on every outstanding issue. Schwartz Decl. at ¶ 7. This amount is higher than in many cases and, by any measure, falls squarely within the reasonable range of recovery. Compare this result to *Ma v. Covidien Holding, Inc.*, 2014 WL 360196, at *5 (C.D. Cal. Jan. 31, 2014), in which the court found that a settlement providing “9.1% of the total value of the action [was] ‘within the range of reasonableness.’” *Id.*; see also *O’Sullivan*, 12-CV-2125 (Schwartz Decl., Exh. 8) (approving settlement of \$3 million for 4,246 class members who filed claims where total exposure before penalties and interest was estimated at \$108 million, for a recovery of less than 3% of full relief);

Viceral v. Mistras Grp., Inc., No. 15-CV-02198-EMC, 2016 WL 5907869, at *9 (N.D. Cal. Oct. 11, 2016) (approving settlement representing 7.2% of full relief).

Though the monetary recovery would certainly be enough to warrant approval of the Settlement standing alone, here, there is more. The Settlement provides injunctive relief, aimed at proper classification of Store Managers - a long-term benefit for all current and future Store Managers. Schwartz Decl. ¶ 9; Settlement Agreement ¶ G(5). This additional relief should also be taken into account in evaluating the benefits obtained on behalf of Class Members. *See Laguna v. Coverall N. Am., Inc.*, 753 F.3d 918, 923 (9th Cir. 2014), *vacated on other grounds*, 772 F.3d 608 (court considers that a settlement contains significant benefits for Plaintiffs beyond the cash recovery, in determining whether to approve settlement and fees requested); *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1049 (9th Cir. 2002) (“Non-monetary benefits” to the Class, such as causing the defendant “to change its personnel classification practices,” are “a relevant circumstance” in evaluating a settlement).

2. The Stage of Proceedings Supports Approval.

The Parties were able to assess the value of the claims and the risks of the case sufficiently, and as such the parties have “sufficient information to make an informed decision about settlement.” *Linney v. Cellular Alaska P’ship*, 151 F.3d 1234, 1239 (9th Cir. 1998); *see Willner v. Manpower Inc.*, 2015 WL 3863625, at *4 (N.D. Cal. June 22, 2015). If the parties are sufficiently informed to make a reasoned settlement decision, “this factor will weigh in favor of approval.” *Saleh*, 2018 WL 6002320, at *3. The parties engaged in written discovery, exchanging nearly 10,000 pages of documents before mediation. Schwartz Decl. at ¶ 4. In addition, Plaintiffs’ counsel interviewed the opt-in collective action members and gathered documents from them in order to grasp the strengths and weaknesses of their claims and accurately estimate Defendant’s exposure.

Id. Plaintiffs learned more about their vulnerabilities at the lengthy mediation. *Id.* at ¶ 5. Accordingly, this factor favors approval.

3. Plaintiffs Faced Significant Litigation Risks in the Absence of Settlement.

This matter presented “legal uncertainties at the time of settlement—particularly those which go to fundamental legal issues,” favoring approval. *Browning v. Yahoo! Inc.*, 2007 WL 4105971, at *10 (N.D. Cal. Nov. 16, 2007); *see also In re Anthem, Inc. Data Breach Litig.*, 2018 WL 3872788, at **11, 21 (N.D. Cal. Aug. 15, 2018) (“legal uncertainty supports approval of a settlement”). To achieve recovery absent a settlement, Plaintiffs would have needed to overcome Defendant’s administrative and executive exemption defenses, show willfulness to warrant the longer statute of limitations and support liquidated damages, keep the collective certified to be able to present all opt-ins’ evidence, prove each individual’s claimed unpaid overtime hours, and prevail on all appeals.

a. Plaintiffs would have needed to overcome the administrative exemption.

An analysis of the administrative exemption looks to three elements: (1) the employee’s salary must clear a certain threshold, (2) the employee’s primary duties must consist of the performance of non-manual work directly related to management policies or general business operations; and (3) the employee’s duties must require the exercise of discretion and independent judgment. *See McKeen-Chaplin v. Provident Sav. Bank, FSB*, 862 F.3d 847, 851 (9th Cir. 2017).

Here, Plaintiffs may have given wide-ranging testimony regarding how they spent their days as Store Managers, including how much time they spent on tasks like marketing and supervision as compared to routine retail sales and shop maintenance duties. Schwartz Decl., at ¶ 10. They would also be confronted with the more “exempt”-sounding duties in Defendant’s handbook and other policy documents, contrasted with their own accounts. *Id.* Against this

backdrop, overcoming an administrative exemption defense would be far from certain. Applying the administrative exemption often leads to a fact-intensive, case-by-case determination. *Campbell v. PricewaterhouseCoopers, LLP.*, 642 F.3d 820, 827 (9th Cir. 2011) (“This inquiry will be fact-intensive: ‘It is not possible to lay down specific rules that will indicate the precise point at which work becomes of substantial importance to the management or operation of a business.’”) (internal citation omitted). Consequently, courts have arrived at opposite conclusions as to whether the administrative exemption applies to employees with similar types of positions. *See McKeen-Chaplin*, 862 F.3d at 852 (split between 2d Circuit and 6th Circuit as to applicability of administrative exemption to mortgage underwriters).

Exemption misclassification cases always present a significant risk of losing on the merits, even after extensive litigation, as in *In re Farmers Insurance Exchange*, 481 F.3d 1119, 1132 (9th Cir. 2007) (reversing a \$52.5 million plaintiffs’ verdict, finding claims adjusters exempt). *See also Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142 (2012) (abrogating *In re Novartis Wage and Hour Litig.*, 611 F.3d 141 (2d Cir. 2010)). In *Novartis*, after winning at the Second Circuit, plaintiffs settled for \$99 million – and were granted final approval *less than a month* before the *Christopher* decision, which would have left them empty-handed. Schwartz Decl., Exh. 9 (*Novartis* final approval order). The risk is now greater after the Supreme Court’s decision in *Encino Motors v. Navarro*, where it rejected the longstanding rule that exemptions to the FLSA should be construed narrowly. *See* 138 S. Ct. 1134, 1142 (2018). That the administrative exemption could have nullified Plaintiffs’ claims entirely is a strong factor supporting approval.

b. Plaintiffs would have needed to overcome the executive exemption.

Plaintiffs would also have needed to overcome Defendant’s executive exemption defense. The executive exemption applies to employees who supervise at least two full-time employees or their equivalent (as in, at least 80 hours of employee worktime per week). 29 C.F.R. §541.104(a).

If this matter proceeded, Defendant would dispute the extent to which Store Managers were staffed with supervisees. To defeat the executive exemption, Plaintiffs would have sought to prove that Store Managers lacked adequate supervisory responsibilities in 80% of workweeks, and instead spent their work time performing “nonexempt, manual labor, such as stocking shelves, running the cash registers, unloading trucks, and cleaning the parking lots, floors, and bathrooms.” *Morgan v. Fam. Dollar Stores, Inc.*, 551 F.3d 1233, 1269 (11th Cir. 2008). This showing would be challenging as to many Plaintiffs.

The requirement that employees “customarily and regularly direct the work of two or more other employees” would leave room for Defendant to argue that all Store Managers did so “greater than occasional[ly]” even if less than “constantly.” *Baldwin v. Trailer Inns, Inc.*, 266 F.3d 1104, 1116-1117 (9th Cir. 2001). Store Managers were generally the top on-site employees at their locations, and especially those Store Managers who supervised enough employee hours to qualify for the executive exemption for some workweeks risked losing any potential for recovery. Again, the executive exemption is a strong basis for finding the instant settlement to be fair and reasonable.

c. Plaintiffs would have needed to show willfulness.

Defendant’s good faith defense also might have deprived Plaintiffs of a significant portion of their hoped-for recovery. Under the FLSA, Plaintiffs must prove Defendant’s alleged violations were willful for maximum recovery. *See Alvarez v. IBP, Inc.*, 339 F.3d 894, 910 (9th Cir. 2003). Absent settlement, Defendant might have persuaded the trier of fact that the company lacked the requisite intent, in light of Defendant’s policies providing ostensibly for exempt-level duties for Store Managers, and furthermore, would have argued for decertification of penalty claims based upon individualized willfulness considerations. If Plaintiffs were unable to establish the proper intent, the FLSA statute of limitations would reduce to two years, *i.e.*, cutting damages by 1/3. *See*

29 U.S.C. § 255(a). Defendants successfully asserting a good-faith defense could eliminate Plaintiffs’ liquidated damages, further reducing recovery by half. *See* 29 U.S.C. § 260; *Scalia v. Emp. Sols. Staffing Grp., LLC*, 951 F.3d 1097, 1102 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 1376 (2021) (“The FLSA mandates liquidated damages in an amount equal to the unpaid overtime compensation unless an employer acted in ‘good faith’ and had ‘reasonable grounds’ to believe that it was not violating the FLSA.”); *De Bernardi v. City & Cty. of San Francisco*, No. 18-CV-04597-HSG, 2022 WL 658828, at *6 (N.D. Cal. Mar. 4, 2022) (“Given the uncertainty regarding the recoverability of liquidated damages and the proper statute of limitations, the Court finds that this factor weighs in favor of approval.”). That Plaintiffs are recovering more than a third of their best-day liability calculation assuming they prevailed over all good-faith defenses again favors approval.

d. Plaintiffs faced a decertification risk and may have had to endure long appeals.

Though the parties stipulated to conditional certification, Defendant indicated its intent to file a motion to decertify this matter (Dkt. No. 15, Joint Case Management Conference Statement), presenting Plaintiffs with additional risk. A decertification motion and appeals could cause major delays in Plaintiffs’ recovery that are avoided by this prompt settlement. *See, e.g., Campbell v. City of Los Angeles*, 903 F.3d 1090, 1120-1121 (9th Cir. 2018) (decertifying an FLSA collective action 14 years after the case was filed); *Brady v. Deloitte & Touche*, 587 Fed.Appx. 363, 364 (9th Cir. Oct. 9, 2014) (affirming order decertifying class in part because defendant produced evidence that employees’ levels of discretion varied greatly depending on the assignment); *see also Williams v. Lockheed Martin Corp.*, 2011 WL 2200631, at *15 (S.D. Cal. June 2, 2011) (“proposed class members participate in design, assist customers, draft policies, and participate in training which also encompass varying tasks with varying levels of complexity and are executed with varying

levels of judgment. Individual inquiries are necessary to determine whether class members are properly categorized as exempt and the need for individual inquiry is not reduced by the presence of centralized control or standard policies governing how employees spend their time.”); *Benedict v. Hewlett-Packard Co.*, 2016 WL 3742342, at **8, 10 (N.D. Cal. July 13, 2016) (“plaintiffs’ attempt to gloss over significant differences in Collective Members’ job duties by relying on their shared Job Title and HP’s blanket exemption policy fails to show that they are similarly situated for several reasons...*e.g.*, whether they exercise independent judgment and discretion in handling cases and in their problem-solving techniques; the depth of their customer relationships; the extent to which they are responsible for training or transferring knowledge internally and externally; and whether on their particular teams they act as team leads or subject matter experts or handle special projects.”). Defendant would argue that Store Managers’ duties and experiences vary from location to location (*e.g.*, some locations are larger than others, with more supervisees and greater management requirements). Area Managers differed in their degree of supervision over Store Managers, as well, Defendant would contend.

Even if Plaintiffs maintained a collective and prevailed at trial, post-judgment appeals could follow. As an example, a wage and hour class action challenging U.S. Bank’s exemption defenses for business banking officers, filed in December 2001, resulted in a substantial verdict for the plaintiffs in September 2008, which was reversed on appeal, and then remanded for reconsideration of class certification and retrial about 13 years after it was commenced, by the California Supreme Court, in *Duran v. U.S. Bank, NA*, 59 Cal.4th 1, 14 (2014). In May 2016, class certification was denied by Alameda County Superior Court. Schwartz Decl., Exh. 4 (Order Denying Class Certification, *Duran v. U.S. Bank, NA*, Case No. 2001035537 (Alameda Cnty. Sup. Ct. May 19, 2016)). The case finally resolved in 2018 after the 160 plaintiffs refiled in federal

court. *See Alila-Katita, et al. v. U.S. Bank, N.A.*, 4:16-CV-03950 (Dkt. #139) (N.D. Cal. June 11, 2018) (Schwartz Decl., Exh. 5). Plaintiffs’ risks as to maintaining certification and prevailing against any appeals favor approval of this settlement now.

e. Plaintiffs would have needed to prove all of their claimed overtime hours.

At mediation, Defendant questioned all of the overtime hours claimed by Plaintiffs and showed time-related records tending to raise doubts about much of the overtime sought to be recovered. Schwartz Decl., ¶ 5. It would have been Plaintiffs’ burden to show all overtime hours they would have claimed. *Anderson v. Mt. Clemens Pottery*, 328 U.S. 680, 686–87 (1946), *superseded by statute on other grounds as recognized by Integrity Staffing Sol'ns, Inc. v. Busk*, 574 U.S. 27 (2014); *Sillah v. Command Int'l Sec. Servs.*, 154 F. Supp. 3d 891, 910 (N.D. Cal. 2015). With allegedly misclassified exempt employees, often there are not supportive records, making Plaintiffs’ position vulnerable on this issue *Brock v. Seto*, 790 F.2d 1446, 1448 (9th Cir. 1986) (“an employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of a just and reasonable inference . . .”).

Plaintiffs could have been successful in proving they were misclassified only to have their overtime claims slashed dramatically, if they were unable to prove all of their time worked to the satisfaction of the trier of fact. If their unpaid overtime was only a couple hours per week, instead of 10 or more, as Plaintiffs had claimed, then the estimated value of the whole case would plummet, making the settlement value of nearly \$16,000 per Plaintiff exceptional – and indeed, possibly more than the full relief many Plaintiffs would have recovered after trial. By their nature, and in the specific circumstances of this case, wage and hour matters, particularly those involving misclassification, carry substantial risk. This factor strongly weighs in favor of approval.

4. The Scope of Release is Narrowly Tailored.

Plaintiffs are agreeing to a narrowly tailored release of claims under the FLSA. Settlement Agreement at ¶ C(2) . Besides the named Plaintiff, for whom a service award is requested, Plaintiffs release is limited to the "facts pled in the" current complaint. *Id.* The Ninth Circuit favors a release like this, of claims based upon the identical factual predicate. *See Chavez v. PVH Corp.*, No. 13-CV-01797-LHK, 2015 WL 581382, at *5 (N.D. Cal. Feb. 11, 2015) (citing, *inter alia*, *Reyn's Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 748 (9th Cir.2006)). This factor favors approval.

5. The Views of Counsel Favor Approval of the Settlement Agreement.

Plaintiffs' counsel believes the Settlement Agreement is an excellent result for the collective, in terms of monetary and non-monetary relief. Schwartz Decl. at ¶ 7. Counsel is highly experienced in wage and hour class and collective actions, having had dozens of settlements approved by this Court and numerous other courts in the Ninth Circuit and around the country. *Id.* at ¶ 24(a-h). In the view of undersigned counsel, this settlement is in the best interests of the Collective as it will result in significant compensation to collective members and future Store Managers, without the very considerable risks of continuing with litigation. *Id.* at ¶¶ 7, 10. Having communicated with collective members, counsel is also aware of their favorable views toward the settlement. *Id.* at ¶ 11. This factor favors approval.

6. The Settlement is the Result of Arm's-Length Negotiations and Bears no Hallmarks of Collusion.

After a substantial document exchange, settlement negotiations were fair, thorough, and occurred at arm's length, through a protracted mediation and for several weeks thereafter. Schwartz Decl. at ¶¶ 5-6. The chance of collusion is "low here because the Settlement was reached through arm's-length negotiations, facilitated by an impartial mediator." *Saleh*, 2018 WL 6002320,

at *5 (citing *City P'shp Co. v. Atl. Acquisition Ltd. P'shp.*, 100 F.3d 1041, 1043 (1st Cir. 1996) (“When sufficient discovery has been provided and the parties have bargained at arms-length, there is a presumption in favor of the settlement.”). This factor favors approval.

As all six factors favor approval of the FLSA settlement here, the Court should grant the motion.

B. The PAGA Settlement is Fair and Reasonable.

The Settlement Agreement sets aside one percent (1%) of the total settlement fund for California Plaintiffs’ PAGA claims. Settlement Agreement at ¶ B(c)(iii)(1). A PAGA allocation of this amount is fairly typical, if not on the high end, in a case such as this, where PAGA penalties did not drive settlement negotiations. Schwartz Decl. at ¶ 8. *See, e.g., Vicerol*, 2016 WL 5907869, at **8-9 (0.15% of settlement fund (\$20,000 out of \$12,952,000) was a reasonable PAGA allocation); *Alexander v. FedEx Ground Package Sys., Inc.*, No. 05-CV-00038-EMC, 2016 WL 1427358, at *2 (N.D. Cal. Apr. 12, 2016) (0.7% of settlement fund (\$1.6 million of \$226.5 million)); *Vasquez v. USM, Inc.*, No. 3:13-CV-05449-JD, 2016 WL 612906, at *1 (N.D. Cal. Feb. 16, 2016) (0.67% of settlement fund (\$6,700 of \$1 million).

Here, Plaintiffs’ counsel estimated that Defendant’s maximum exposure under PAGA totaled less than \$45,000, if 100% of penalties had been won, so the \$4,375 for PAGA is meaningful, representing nearly 10% of the best-day PAGA recovery. Schwartz Decl. at ¶ 7. Typically, 100% of penalties are *not* assessed, even after a full trial, and there is a substantial risk of losing outright. California Labor Code Section 2699(e) provides that a court has discretion to award PAGA penalties and to determine the amount of penalties to award. *See also Amaral v. Cintas Corp. No. 2* (2008) 163 Cal.App.4th 1157 (PAGA penalties imposed may be subject to reduction by trial court; increased penalty “for subsequent violation” only triggered after employer has notice of violation). After the 2017 *McDonald’s* trial, plaintiffs won just \$700,270 in PAGA

penalties, which their expert valued at \$41 million. *See Sanchez v. McDonald's*, Case No. BC499888 (Los Angeles Co. Super. Ct. July 6, 2017) (Schwartz Decl., Exh. 10; Exh. 11 (June 12, 2017, *Daily Journal* article concluding “McDonald’s won” after PAGA trial)). That *McDonald’s* plaintiffs achieved less than 2% of claimed PAGA penalties, after a full trial, warrants discounting the PAGA allocation as proposed at this stage in the case, given the very substantial overall result for Plaintiffs. Indeed, PAGA claims may be allocated \$0 properly, under governing California law. *See In re Nordstrom Commission Cases*, 186 Cal.App.4th 576, 579 (2010) (“[T]he trial court did not abuse its discretion in approving a settlement which does not allocate any damages to the PAGA claims.”). As such, the PAGA allocation should be approved.

Plaintiff exhausted with the Labor Workforce and Development Agency (“LWDA”), as required under PAGA, when Plaintiff filed the initial Complaint in this matter. Schwartz Decl. at ¶ 12. The LWDA did not respond. *Id.* at ¶ 2. Plaintiff has also submitted the Settlement Agreement to the LWDA, contemporaneously with the filing of this motion, pursuant to California Labor Code Section 2699(1)(2). *Id.* at ¶ 12.

C. The Method of Notice and Distribution is Fair.

The parties ask the Court to allow Plaintiff to send notice of the Settlement to the FLSA Collective. Settlement Agreement, Exh. C. FLSA Collective Members will have thirty days to withdraw their opt-in consent-to-join forms if they do not wish to participate in the Settlement, using the form attached to the Settlement Agreement as Exhibit D. Each notice will contain personalized information setting forth the total amount of individual workweeks for FLSA Collective Members and their estimated individual payment amounts. Settlement Agreement at D(3), Exh. C. To the extent a FLSA Collective Member disputes any of the information listed on their notice, the FLSA Collective Member may submit any evidence to Counsel showing such

information the member contends should be reflected in the notice. Settlement Agreement at D(3), Exh. C. The parties will meet and confer to attempt to resolve any disputes, and Defendant's records will be presumed determinative. Settlement Agreement at D(3). The notice will also request a completed IRS W-9 for disbursement of the settlement payments, and Defendant will cooperate with Collective Counsel to ensure Social Security Numbers are available to permit appropriate tax reporting. *Id.* The allocations of any FLSA Collective Members who opt out of the Settlement will be allocated *pro rata* to the participating Members at the time of settlement disbursement, with any remaining Reserve Fund amount. Settlement Agreement at ¶ B(1)(b), D(6).

FLSA Collective Members must cash their Individual Payment Amount checks within 120 calendar days after they are mailed by Counsel and Defendant. Settlement Agreement at ¶ E(5). The value of any checks uncashed more than one hundred twenty days after mailing shall be promptly distributed as follows: if more than \$10,000.00 of the payments are uncashed, there will be a second distribution *pro rata* to participating FLSA Collective Members; if less than \$10,000 of the individual payments are uncashed, or any of the second checks are uncashed after ninety days, they will be voided and the amount will be allocated to Legal Aid at Work, a suitable *cy pres* recipient following California's standards. *Id.*; Schwartz Decl. at ¶ 13. The Settlement is non-reversionary. Settlement Agreement at ¶ D(6).

D. The Requested Enhancement Payment to Named Plaintiff Julie Washburn is Appropriate.

The proposed service award payment for Plaintiff Julie Washburn is intended to recognize her initiative, risks, and efforts on behalf of all of the Plaintiffs who are recovering here. A “district court may award an incentive payment to the named plaintiffs in a FLSA collective action to compensate them for work done on behalf of the [collective] class.” *Madrid v. teleNetwork Partners, LTD.*, No. 5:17-CV-04519-BLF, 2019 WL 3302812, at *7 (N.D. Cal. July 23, 2019)

(quoting *Selk*, 159 F. Supp. 3d at 1181); *Jones v. Agilysys, Inc.*, No. C 12-03516 SBA, 2014 WL 2090034, at *3 (N.D. Cal. May 19, 2014) (awarding \$5,000 to six named plaintiffs in FLSA action). In FLSA settlements, as in class settlements, courts in this district have found service awards of \$5,000 to be presumptively reasonable. *Jennings v. Open Door Mktg., LLC*, No. 15-CV-04080-KAW, 2018 WL 4773057, at *9 (N.D. Cal. Oct. 3, 2018) (citing *Harris v. Vector Mktg. Corp.*, Case No. 08-CV-5198-EMC, 2012 WL 381202, at *7 (N.D. Cal. Feb. 6, 2012)). See also, e.g., *Bakhtiar v. Info. Res., Inc.*, No. 17-CV-04559-JST, 2021 WL 4472606, at *9 (N.D. Cal. Feb. 10, 2021); *Perry v. Arise Virtual Sols. Inc.*, No. C 11-01488 YGR, 2013 WL 12174056, at *3 (N.D. Cal. May 15, 2013); *Villegas v. J.P. Morgan Chase & Co.*, No. 09-CV-00261 SBA, 2012 WL 5878390, at *7 (N.D. Cal. Nov. 21, 2012). This is especially true where – as here – the enhancement sought is far less than the average individual recovery, and barely more than 1% of the total settlement fund. Compare, e.g., *Jennings*, 2018 WL 4773057, at **1-2 (\$125,000 gross, \$82,000 net, for 176 opt-ins (\$465.91/each) – approving enhancement awards of \$5,000 and \$3,000 – 6.4% of the total settlement).

A district court may look to the following factors to determine the reasonableness of an incentive reward: (1) the actions the plaintiff has taken to protect the interests of the class; (2) the degree to which the class has benefitted from those actions; (3) the duration of the litigation and the amount of time and effort the plaintiff expended in pursuing the litigation; and (4) the risks to the plaintiff in commencing the litigation. *Van Vranken v. Atlanta Richfield Co.*, 901 F.Supp. 294, 299 (N.D. Cal. 1995) (awarding \$50,000 enhancement). Here, none of the Plaintiffs would be benefiting absent Ms. Washburn’s initiative to launch the suit, courageously, even while she was currently working as a Store Manager. Ms. Washburn participated actively in every step of this case, not just initiating the case, but also providing statements, searching for documents and

cooperating with discovery, providing information to help litigate the case, attending the lengthy mediation, and assisting in the settlement discussions thereafter. Declaration of Julie Washburn, at ¶¶ 4-10. In total, Mr. Washburn estimates she spent at least 40 hours assisting in the prosecution of this matter. *Id.* at ¶ 10. Without the named Plaintiff, the opt-in Plaintiffs would likely have received no recovery, especially in light of the significant risks in this case. However, because of her leadership, all Plaintiffs are receiving substantial recovery (nearly \$16,000/each on average, and more than one third of the best-day potential outcome), along with corporate reforms.

Enhancement payments such as these are especially warranted in employment actions, “where the plaintiff is often a former or current employee of the defendant, and thus, by lending [her] name to the litigation, [s]he has, for the benefit of the class as a whole, undertaken the risk of adverse actions by the employer or co-workers.” *DeWitt v. Darlington Cty., S.C.*, No. 4:11-CV-00740-RBH, 2013 WL 6408371, at *14 (D.S.C. Dec. 6, 2013); *see also, e.g., Asare v. Change Grp. of New York, Inc.*, No. 12 CIV. 3371 CM, 2013 WL 6144764, at *15 (S.D.N.Y. Nov. 18, 2013) (plaintiffs “faced the risk that new employers would learn that they were class representatives . . . against their former employer and take adverse action against them. . . . [E]ach time they change jobs, they will risk retaliation in the hiring process.”); *Rutti*, 2012 WL 3151077, at *6 (discussing *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S.Ct. 1325, 1333 (2011), in which the Supreme Court addressed the troubling “fear of economic retaliation” that can force workers “quietly to accept substandard conditions,” dissuading them from participating in lawsuits against their employers). Counsel believes that the requested award is the minimum amount that would viably promote the public policy interest of encouraging people to assert valid wage claims despite fears associated with doing so. Schwartz Decl. at ¶ 23.

The Court should award Plaintiff Washburn the \$5,000 sought also as consideration for the general release that she signed, which is more expansive than the release agreed to by the other Plaintiffs. *See, e.g., Dent v. ITC Serv. Group*, No. 2:12-CV-00009-JCM-VCF, 2013 WL 5437331, at *4 (D. Nev. Sept. 27, 2013) (approving \$15,000 enhancement award out of wage and hour settlement, recognizing that class representative provided general release not provided by other class members).

E. The *Cy Pres* Recipient is Appropriate.

Under *Dennis v. Kellogg Co.*, 697 F.3d 858, 865 (9th Cir. 2013), “to avoid the many nascent dangers to the fairness of the distribution process,” the Ninth Circuit requires “that there be a driving nexus between the plaintiff class and the *cy pres* beneficiaries.” *Id.* (internal quotations omitted). Here, there is. The *cy pres* designee, Legal Aid at Work is a leading non-profit organization based in San Francisco that provides legal services to low-wage workers in California. Schwartz Decl. at ¶ 13. The work of Legal Aid at Work is directly aligned with the purposes of the lawsuit, seeking remedies for workers who suffered wage violations. *Id.* Given Collective Counsel’s extensive contact with Collective Members, is not likely that Members will fail to deposit their settlement checks. *Id.* at ¶ 11, 13. However, in the case that any do not, the next-best destination for such unclaimed funds (after a second distribution to Collective Members) would be Legal Aid at Work.

F. The Requested Attorneys’ Fees and Costs Are Appropriate.

The FLSA calls for the defendant to pay the successful plaintiff’s attorneys’ fees and costs. *See* 29 U.S.C. § 216(b). Here, the Settlement Agreement anticipates Plaintiffs’ Counsel being paid up to one-third of the gross settlement in attorneys’ fees and costs, \$145,833.33. Settlement Agreement at ¶ (B)(1)(e). Nonetheless, undersigned counsel only requests \$131,250, 30% of the fund, which is less than the firm’s lodestar of \$159,445. Schwartz Decl. at ¶¶ 7, 15; Exh. 2. Counsel

requests only \$9,000 in costs, less than the \$10,000 allowed in the Settlement. Settlement Agreement at ¶ B(1)(f); Schwartz Decl. at ¶¶ 7, 20; Exh. 3.

1. The Court Should Award 30% of the Fund in Fees.

The district court has discretion to choose either the percentage-of-the-fund or the lodestar method to determine what constitutes a reasonable fee. *Vizcaino*, 290 F. 3d at 1047. “The lodestar figure is calculated by multiplying the number of hours the prevailing party reasonably expended . . . by a reasonable hourly rate for the region and for the experience of the lawyer. Though the lodestar figure is presumptively reasonable, the court may adjust it upward or downward.” *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 941 (9th Cir. 2011) (internal citations and quotation marks omitted). Where the court employs the percentage-of-the-fund method, 25% of the fund is the benchmark for a reasonable fee award, although this may be adjusted upward or downward based on the circumstances of the case. *Paul, Johnson, Alston & Hunt v. Gaulty*, 886 F.2d 268, 272 (9th Cir. 1989). “[I]n most common fund cases, the award exceeds that benchmark.” *In re Omnivision Techs., Inc.*, 559 F. Supp.2d 1036, 1047 (N.D. Cal. 2008). *Vizcaino* establishes that upward adjustment from the 25% benchmark is warranted where, as here, the fees in a contingency case are below the lodestar incurred and there are exceptional results for the class, with non-monetary benefits also obtained. *Id.*, 290 F.3d at 1048-50 (internal quotations omitted).

Plaintiffs’ Counsel is requesting 30% of the fund in light of counsel’s lodestar which exceeds 25% of the fund (the benchmark), the exceptional relief for the Collective, and the additional negotiation of injunctive relief, with value for Store Managers in the future that is not reflected in the fund. This 30% is less than the fee awards in many similar actions. *See, e.g., In re Pacific Enterprises Sec. Litig.*, 47 F.3d 373, 379 (9th Cir. 1995) (affirming award of 33% of the common fund); *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 460 (9th Cir. 2000) (affirming

award of 33.3% of the common fund); *In re Activision Sec. Litig.*, 723 F. Supp. 1373, 1375 (N.D. Cal. 1989) (awarding 32.8% of the common fund). Former Chief Judge Wilken of this Court noted that 30% of the common fund is “only modestly more” than the benchmark and collected cases showing that this requested fee is “well within the usual range of percentages awarded in similar cases.” *Vedachalam v. Tata Consultancy Servs., Ltd*, No. C 06-0963 CW, 2013 WL 3941319, at *2 (N.D. Cal. July 18, 2013) (collecting cases, including *In re Heritage Bond Litig*, 2005 WL 1594403, at *18, n.12 (C.D. Cal Jun. 10, 2005) (noting that more than 200 federal cases have awarded fees higher than 30%)). The Court should not hesitate to grant counsel’s fee request, especially because it involves a reduction from the lodestar. *See Chun-Hoon v. McKee Foods Corp.*, 16 F. Supp. 2d 848, 854 (N.D. Cal. 2010) (“a negative multiplier . . . suggests that the negotiated fee award is a reasonable and fair valuation of the services rendered to the class by class counsel.”). Here, counsel requests a 0.8273 multiplier (\$131,250/\$159,445). In *Vizcaino*, 290 F.3d at 1052-54, the Ninth Circuit held that a multiplier of 3.65 was appropriate after surveying 34 common fund cases from 1996 to 2001 with an average multiplier of 3.32.

Moreover, the relief obtained for Collective members is exceptional, as discussed *supra* Section IV.A.1 (citing cases), with an average recovery of approximately \$16,000/person, far more than in many comparable wage cases. A research study published online, conducted by NERA Economic Consulting, surveying wage-and-hour settlements over the course of many years, found that the median settlement per plaintiff was \$3,546 in 2019, the last year studied – up from \$1,829 the year before. *See* Schwartz Decl., Exh. 12, https://www.nera.com/content/dam/nera/publications/2020/PUB_Wage_and_Hour_Settlements_060220.pdf, at p. 7 (last viewed Apr. 12, 2022). By this measure, the instant settlement is more than 4.5x the normal recovery per person, and is being recovered without the protracted delays

that often occur in such litigation. *Vizcaino*, 290 F.3d at 1050 n. 5 (“in many instances, it may be a relevant circumstance that counsel achieved a timely result for class members in need of immediate relief.”).

Counsel undertook nearly 400 hours of work (to date) entirely without compensation until now, with Plaintiffs’ success never guaranteed, as discussed *supra*, Section IV.A.3. White-collar exemption misclassification cases are risky and can lead to protracted battles over each opt-in plaintiff’s duties and overtime hours worked – the former are typically characterized as exempt in official policies, and the latter are not tracked and often disputed. Undertaking hundreds of hours of work with a risk of no compensation is especially difficult at a small firm like Bryan Schwartz Law, where any case undertaken requires turning away other opportunities which might have an easier road to compensation. *See Boyd v. Bank of Am. Corp.*, No. SACV 13-0561-DOC, 2014 WL 6473804, at *10 (C.D. Cal. Nov. 18, 2014) (“Firms of this size face even greater risks in litigating large class actions with no guarantee of payment. The Court finds that the considerable risk in this case due to the uncertain legal terrain, coupled with Counsel’s contingency fee arrangement, weigh in favor of an increase from the benchmark rate.”); *see also, e.g., Singer v. Becton Dickinson & Co.*, 2010 WL 2196104, at *8 (S.D. Cal. June 1, 2010) (awarding an attorney fee higher than the benchmark of 25%, among other factors supporting the upward departure, “class counsel took this case on a contingent fee basis and had to forego other financial opportunities to litigate it for more than two years”).

Finally, awarding merely the benchmark instead of the 30% requested would fail to take account of the non-monetary benefits conferred by the litigation, with Defendant committing to fully staffing Store Managers with supervisees, so they are not required to do so many hours of menial work, or to reclassifying them, so they begin to receive overtime. *Vizcaino*, 290 F.3d at

1049 (holding “Incidental or non-monetary benefits conferred by the litigation are a relevant circumstance,” and discussing authorities).

2. The Court Should Award Plaintiffs’ Modest Litigation Costs.

Counsel’s costs of \$9,000 are reasonable and the Court should award them. Schwartz Decl. at ¶ 20; Exh. 3. “Attorneys may be compensated for reasonable out-of-pocket expenses incurred and customarily charged to their clients, as long as they were ‘incidental and necessary to the representation’ of those clients.” *Mitland Raleigh-Durham v. Myer*, 840 F. Supp. 235, 239 (S.D.N.Y. 1993) (citation omitted). Under the common fund doctrine, Plaintiffs’ Counsel are entitled to reimbursement of all reasonable out-of-pocket expenses and costs in prosecution of the claims and in obtaining a settlement. *Vincent v. Hughes Air West, Inc.*, 557 F.2d 759, 769 (9th Cir. 1977). Here, Plaintiff’s costs include items that were necessary to litigate this case including: mediation fees; court and process server fees; postage and carrier fees; electronic research costs; and printing. Schwartz Decl., Exh. 3. These are reasonable and standard expenses. *See, e.g., Rutti*, 2012 WL 3151077, at *12 (“Expenses such as reimbursement for travel, meals, lodging, photocopying, long-distance telephone calls, computer legal research, postage, courier service, mediation, exhibits, documents scanning, and visual equipment are typically recoverable.”).

Indeed, Counsel is maximizing recovery for the Collective by undertaking administration of settlement payments in-house, instead of paying an administrator to mail to 18 Plaintiffs. Schwartz Decl. at ¶ 20. The costs sought should be awarded.

V. CONCLUSION

For the reasons stated above, Plaintiffs respectfully request that this Court approve the Settlement Agreement, including Plaintiff Washburn’s enhancement and requested attorneys’ fees and costs. A proposed order and proposed judgment are filed contemporaneously herewith.

Respectfully submitted,

BRYAN SCHWARTZ LAW

Dated: April 21, 2022

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