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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF TULARE

JOSHUA TAYLOR AND FRANK LOMONACO, individually, and on behalf of all others similarly situated,

Plaintiff,

v.

U.S. DAIRY SYSTEMS, INC. DBA AUTOMATED DAIRY SYSTEMS, a corporation; and DOES 1 through 10, inclusive,

Defendants.

Case No. VCU286113

CLASS ACTION

[*Assigned to:* Hon. Nathan D. Ide, Dept. 2]

PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT; MEMORANDUM OF POINTS AND AUTHORITIES

[*Filed concurrently with*: Declaration of Justin F. Marquez in Support of Plaintiffs' Motion for Final Approval of Class Action Settlement; Declaration of Joshua Taylor; Declaration of Frank Lomonaco; Declaration of Taylor Mitzner; [Proposed] Order and Judgment Granting Plaintiffs' Motion for Final Approval of Class Action Settlement]

FINAL APPROVAL HEARING
Date: March 20, 2023
Time: 8:30 a.m.
Dept: 2

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

PLEASE TAKE NOTICE that on March 20, 2023, at 8:30 a.m., Department 2 of the Tulare County Superior Court, 221 South Mooney Boulevard, Visalia, California 93291, pursuant to Code of Civil Procedure § 382 and California Rules of Court 3.769, *et seq*., Plaintiffs Joshua Taylor and Frank Lomonaco ("Plaintiffs") will move the Court for an Order granting final approval of the proposed class action settlement between Plaintiffs and Defendant U.S. Dairy Systems, Inc. dba Automated Dairy Systems. Plaintiffs further move the Court for an Order:

1. Certifying a Class for settlement purposes only;
2. Approving the settlement as fair and reasonable and finding that class members were given notice of the settlement, and advised of their right to participate in the settlement, object to the settlement, or exclude themselves from the settlement, in a reasonable manner;
3. Appointing Plaintiffs Joshua Taylor and Frank Lomonaco as Class Representatives for settlement purposes only, and approving payment of $5,000.00 each to Plaintiffs for their services as the Class Representatives;
4. Appointing Plaintiffs' Counsel, Wilshire Law Firm, PLC, as Class Counsel for settlement purposes only;
5. Approving payment of settlement administrative expenses to Phoenix Settlement Administrators in the amount of $5,975.00.
6. Approving payment of up to $62,500.00 in attorney's fees, which is 33 1/3% of the Settlement Amount of $187,500.00, and costs of $14,950.72 for litigating this action, to Class Counsel;
7. Approving the PAGA Settlement in the amount of $10,000.00, with $7,500.00 to be paid to the California Labor and Workforce Development Agency;
8. Directing that the clerk of the Court to enter the Court's order as a final judgment;
9. Without affecting the finality of the final judgment, reserving continuing jurisdiction over the parties for the purposes of implementing, enforcing and/or administering the Settlement or enforcing the terms of the judgment.

The Motion will be based upon this Notice, the attached Memorandum of Points and Authorities, the Declaration of Justin F. Marquez, the Declaration of Joshua Taylor, the Declaration of Frank Lomonaco, and the Declaration of Taylor Mitzner, filed concurrently herewith, the records and files in this action, and any other further evidence or argument that the Court may properly receive at or before the hearing.

Dated: February 24, 2023

WILSHIRE LAW FIRM

By: ______________________________
Justin F. Marquez
Benjamin H. Haber
Arrash T. Fattahi

Attorneys for Plaintiffs

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I. <u>INTRODUCTION</u>

Plaintiffs Joshua Taylor and Frank Lomonaco ("Plaintiffs") seek final approval of a proposed $187,500.00 non-reversionary, wage and hour class action settlement with Defendant U.S. Dairy Systems, Inc. dba Automated Dairy Systems ("Defendant," and together with Plaintiffs, the "Parties").

The proposed Settlement satisfies all the criteria for settlement approval under California law. A presumption of fairness exists as the Settlement was reached through extensive, mediated arm's-length negotiations, sufficient investigation and discovery allowed Class Counsel to act intelligently, and Class Counsel is experienced in similar wage-and-hour litigation. The Settlement will provide substantial monetary payments to approximately 61 class members. Upon the Court's approval of the settlement, participating class members will receive an **estimated average <u>net</u> payment of $1,377.46**. (Declaration of Taylor Mitzner ["Mitzner Decl."], ¶ 14.) Among the participating class members, the **<u>estimated highest net payment will be $5,388.73</u>** and the estimated lowest net payment will be $36.78. (*Id.*) As of filing this Motion, there are <u>no objections</u> to the settlement, <u>no disputes</u> to the number of workweeks, and no <u>requests for exclusion</u>. (*Id.* at ¶¶ 8-10.) Thus, the proposed Settlement is fair, reasonable, and adequate and is in the best interests of the Settlement Class Members.

Plaintiffs' request for attorneys' fees in the amount of up to $62,500.00 (which is one-third of the total Settlement amount), reimbursement of costs and expenses in the amount of $14,950.72, enhancement awards in the amount of $5,000.00 to each Plaintiff (for a total of $10,000.00), Settlement Administrative Costs of $5,975.00, and a PAGA Settlement of $10,000.00, which includes a 75% allocation to the California Labor and Workforce Development Agency ("LWDA") in the amount of $7,500.00, are also reasonable and thus should be approved by the Court.

Accordingly, Plaintiffs respectfully request the Court grant final approval of the Settlement.

II. <u>SUMMARY OF THE LITIGATION AND SETTLEMENT</u>

A. <u>Plaintiffs' Claims and Relevant Background</u>

This is a wage and hour class and Private Attorneys General Act ("PAGA") (Cal. Lab.

Code §§ 2699, *et seq.*) representative action. Plaintiffs and the putative class members worked in California as hourly-paid, non-exempt employees for Defendant during the class period. Defendant operates in the agricultural and dairy industry and is headquartered in Jerome, Idaho, but maintains a presence in California with service centers in Escalon, Modesto, and Tulare. (Declaration of Justin F. Marquez in Support of Plaintiffs' Motion for Final Approval of Class Action Settlement ["Marquez Decl."], ¶ 2.)

Plaintiffs allege that Defendant's payroll, timekeeping, and wage and hour practices resulted in Labor Code violations. (*Id.* at ¶ 3.) Plaintiffs allege that Defendant failed to pay for all hours worked by not recording the actual start and end times of shifts for each workday. (*Id.*) Plaintiffs further allege that Defendant failed to include all remuneration in the employees' regular rate of pay for overtime purposes. (*Id.*) Plaintiffs further allege that Defendant failed to provide employees with legally compliant meal and rest periods. (*Id.*) Plaintiffs additionally allege that Defendant failed to indemnify its employees for all necessary business expenditures. (*Id.*) Based on these allegations, Plaintiffs assert claims against Defendant for failure to pay minimum and straight time wages, failure to pay overtime wages, failure to provide meal periods, failure to authorize and permit rest periods, failure to timely pay all final wages at termination, failure to provide accurate itemized wage statements, failure to indemnify employees for expenditures, unfair business practices, and civil penalties under PAGA. (*Id.*) Defendant denies the allegations and contends that its employment practices were at all relevant times compliant with applicable California law.

On February 26, 2021, Plaintiff Taylor filed a putative wage-and-hour class action complaint against Defendant for: (1) failure to pay minimum and straight time wages (Cal. Lab. Code §§ 204, 1194, 1194.2, and 1197); (2) failure to pay overtime wages (Cal. Lab. Code §§ 1194 and 1198); (3) failure to provide meal periods (Cal. Lab. Code §§ 226.7 and 512); (4) failure to authorize and permit rest periods (Cal. Lab. Code §§ 226.7); (5) failure to timely pay final wages at termination (Cal. Lab. Code §§ 201-203); (6) failure to provide accurate itemized wage statements (Cal. Lab. Code § 226); and (7) unfair business practices (Cal. Bus. & Prof. Code §§ 17200, *et seq.*). (*Id.* at ¶ 4.) On February 17, 2022, Plaintiff Taylor filed a First

Amended Class and Representative Action Complaint adding claims for Defendant's alleged failure to indemnify for necessary business expenses and for civil penalties under PAGA, as well as adding Plaintiff Lomonaco as an additional class representative. (*Id.*)

Following the filing of the initial Complaint on February 26, 2021, the Parties exchanged documents and information before mediating this action. (*Id.* at ¶ 5.) Defendant produced a sampling of timekeeping and payroll records for the class members, and also provided documents related to its wage and hour policies and practices during the class period and information regarding the total number of current and former employees. (*Id.*)

After reviewing the documents regarding Defendant's wage and hour policies and practices and analyzing Defendant's timekeeping and payroll records, Class Counsel was able to evaluate the probability of class certification, success on the merits, and Defendant's maximum monetary exposure for all claims. (*Id*. at ¶ 6.) Class Counsel also investigated the applicable law regarding the claims and defenses asserted in the Litigation. (*Id*.) Class Counsel reviewed these records and utilized an expert to prepare a damages analysis prior to mediation. (*Id*.)

B. Settlement Negotiations

On October 20, 2021, the Parties participated in private mediation with experienced class action mediator, Justice Steven M. Vartabedian (Ret.). (*Id.* at ¶ 7.) After extensive negotiations and discussions regarding the strengths and weaknesses of Plaintiffs' claims and Defendant's defenses, the Parties were able to reach a resolution, which was then amended following the Court's continuance of the initial hearing date of Plaintiffs' motion for preliminary approval of the class action settlement. (*Id.* at ¶ 8.) The material terms of the revised Settlement Agreement are attached to the Declaration of Justin Marquez. (*Id.* at ¶ 8, **Ex. 1** [Stipulation of Settlement].)

Class Counsel submitted the proposed Settlement to the LWDA before filing this Motion for Final Approval. (*Id.* at ¶ 12.)

C. Key Terms of the Proposed Settlement

Under the Settlement, Defendant will pay $187,500.00 to resolve this Litigation. This amount is all-inclusive. The Settlement's key terms include:

1. Settlement Class: For settlement purposes only, the Parties agree to the certification of a class pursuant to California Code of Civil Procedure § 382 defined as: "All persons who worked for Defendant in California as an hourly-paid or non-exempt employee during the Settlement Period (together, collectively referred to as the "Class Members")." (Settlement, § I (R).)

2. Settlement Period: The Settlement Period means the period from February 26, 2017 through December 20, 2021. (Settlement, § I (S).)

3. Participating PAGA Members: Participating PAGA Members means all Settlement Class Members who worked for Defendant from February 26, 2020 through December 20, 2021. (Settlement, § I (M).)

4. Gross Settlement Amount: This amount is $187,500.00, for all claims, including wages, interest, the Class Counsel Award, Litigation costs, Settlement Administration Costs, payment to the Labor and Workforce Development Agency ("LWDA") for the alleged PAGA penalties, all other penalties, and the Class Representatives' Service Awards. (Settlement, § I (Q).)

5. No Reversion & Cy Pres: This is a non-reversionary settlement. Settlement checks will be valid for one hundred and eighty (180) days from the date of issuance. Pursuant to California Code of Civil Procedure § 384(a), any unpaid cash residue or unclaimed or abandoned class member funds, *with any interest generated in the account established by the Settlement Administrator*, will be sent to the Los Angeles Trial Lawyers' Charities ("LATLC"), 2708 Wilshire Boulevard, Suite 391, Santa Monica, CA 90403. (Settlement, § XI (C)(2).)

6. Release as to All Settlement Class Members: The class release is limited to "any and all wage-related claims that were alleged in the Litigation or which could have been alleged in the Litigation based on the facts asserted in the Litigation arising during the Settlement Period[,] including the following claims: (1) all claims alleged in the operative complaint, under any legal theory of liability, for the failure to pay all wages of any kind, including any minimum or straight time wages, owed pursuant to California Labor Code §§ 204, 510, 1194, 1194.2, and 1197, the California Industrial Welfare Commission ("IWC") Wage Orders, or any comparable federal statute under any theory of liability; (2) all claims alleged in the operative complaint, under any

legal theory of liability, for the failure to pay overtime or double time wages owed pursuant to California Labor Code §§ 204, 510, 1194, and 1198, the IWC Wage Orders, or any comparable federal statute under any theory of liability; (3) all claims alleged in the operative complaint, under any legal theory of liability, for the failure to provide meal periods pursuant to California Labor Code §§ 226.7 and 512, and the IWC Wage Orders; (4) all claims alleged in the operative complaint, under any legal theory of liability, for the failure to provide rest periods pursuant to California Labor Code § 226.7, and the IWC Wage Orders; (5) all claims alleged in the operative complaint, under any legal theory of liability, for any penalties of any kind arising from an alleged failure to pay final wages or other amounts allegedly owed to Class Members pursuant to California Labor Code §§ 201-203, as well as California Labor Code §§ 218.5, 218.6, and 1194; (6) all claims alleged in the operative complaint, under any legal theory of liability, for any penalties of any kind arising from an alleged wage statement violation pursuant to California Labor Code §§ 226 and 1174.5; (7) all claims alleged in the operative complaint, under any legal theory of liability, for failure to indemnify employees for expenditures pursuant to California Labor Code § 2802; (8) all claims alleged in the operative complaint, under any legal theory of liability, for violation of Business & Professions Code §§ 17200, *et seq*.; (9) all claims alleged in the operative complaint and Plaintiffs' PAGA letters, under any legal theory of liability, for penalties pursuant to the PAGA (Labor Code §§ 2698, *et seq*.); and (10) all claims alleged in the operative complaint, under any legal theory of liability, for any penalties or any another amounts that could be potentially owed to Class Members during the Settlement Period, including penalties owed pursuant to California Labor Code §§ 210, 226.3, 558, and 1197.1." (Settlement, § VII (A).)

7. <u>PAGA Allocation</u>: The settlement includes $10,000.00 allocated to Plaintiffs' claims under the PAGA, with 75% of which ($7,500.00) being paid to the LWDA and 25% ($2,500.00) being paid to the participating PAGA Members. (Settlement, § XVI.) Class Counsel submitted the proposed settlement to the LWDA before filing this Motion for Final Approval. (Marquez Decl., ¶ 9.)

8. <u>Net Settlement Fund</u>: The "Net Settlement Fund" or "Net Settlement Amount" means the Gross Settlement Amount minus: (1) attorneys' fees and Litigation costs, (2)

Administrative Costs, (3) enhancements to the Named Plaintiffs, and (4) the penalties recoverable pursuant to the PAGA. (Settlement, § I (K.)

9. Distribution Formula: Members of the Settlement Class not opting out will receive a lump sum payment as good and valuable consideration for the waiver and release of claims as set forth in Section D (6), above, in an amount determined by the Settlement Administrator in accordance with the provisions as outlined in Section XI(A) of the Settlement Agreement. Additionally, Participating PAGA Members will receive a distribution of the PAGA penalties pursuant to the formula outlined in the last paragraph of Section XI(A) of the Settlement Agreement.

10. Tax Allocation: Any settlement money paid to Settlement Class Members will be allocated as 33% wages and 67% penalties and interest. (Settlement, § XV.)

11. Class Representative Service Awards: Subject to Court approval, Plaintiffs Taylor and Lomonaco shall be paid enhancement awards in the amounts of $5,000.00 each, as modified by the Court's Order granting preliminary approval of the class action settlement. This amount is for Plaintiffs' time and effort in bringing and presenting the action, and in exchange for a general release of all claims, known or unknown, pursuant to Civil Code Section 1542. (Settlement, § VII (B).)

12. Attorneys' Fees and Costs: The Settlement provides that Defendant will not oppose a fee application of up to 33 1/3% ($62,500.00) of the Gross Settlement Amount, plus out-of-pocket costs not to exceed $15,000.00. (Settlement, § XIII.)

13. Notice of Proposed Class Action Settlement: The Class Notice set forth in plain terms a statement of the case, the terms of the Settlement Agreement, the approximate amount of attorneys' fees, costs, and service awards being sought, and an explanation of how the settlement allocations are calculated. (Mitzner Decl., Ex. A.) Class Members were notified by first-class mail of the settlement. (*Id.* at ¶ 5.) Phoenix Settlement Administrators, the approved Settlement Administrator, undertook its best efforts to ensure that the notice was provided to the class members' current addresses, and skip tracing was performed for all returned envelopes and then notices were re-sent using updated addresses, if applicable. (*Id.* at ¶¶ 3-6.) Notice was also

provided in English and Spanish. (*Id*. at ¶ 5, Ex. A.)

D. <u>**Preliminary Settlement Approval, Class Notice, and Settlement Administration.**</u>

On September 19, 2022, this Court issued its Order Concerning Plaintiffs' Motion for Preliminary Approval of Class Action Settlement, in which the Court granted Plaintiffs' preliminary approval motion, with modifications such that both Plaintiffs' enhancement awards were preliminarily approved for $5,000 each. (Marquez Decl., ¶ 11.)

Altogether, notices explaining class member rights were mailed out to 61 class members in English and Spanish. (Mitzner Decl., ¶¶ 5-6.) To date, only one notice packet (or approximately 1.6% of the class members) remains undeliverable. (*Id.* at ¶ 7.) ***There were no objections to the settlement and no requests for exclusion.*** (*Id.* at ¶¶ 8-9.) If the Court approves the settlement, the participating class members will receive an **estimated average net payment of $1,377.46**, with the <u>**estimated highest net payment being $5,388.73**</u> and the estimated lowest net payment being $36.78. (*Id.* at ¶ 14.)

III. <u>**THE SETTLEMENT MERITS FINAL APPROVAL**</u>

The law favors the settlement of lawsuits, particularly in class actions and other complex cases. (*See e.g., Neary v. Regents of Univ. of California* (1992) 3 Cal.4th 272, 277-81.) Factors to be considered in evaluating a class action settlement include "the strength of plaintiffs' case, the risk, expense, complexity and likely duration of further litigation, the risk of maintaining class action status through proceedings, the experience and views of counsel, the presence of a government participant, and the reaction of the class members to the proposed settlement." (*Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 128.) A presumption that a settlement is fair and reasonable exists where, as here, the following four factors are present: "(l) the settlement is reached through arm's length bargaining; (2) investigation and discovery are sufficient to allow counsel and the court to act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of objectors is small." (*Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 245.)

Whether a class action settlement should be approved is a question committed to the trial court's broad discretion. (*Id.* at pp. 234-35.) In exercising its discretion, the Court should give "[d]ue regard ...to what is otherwise a private consensual agreement between the parties." (*Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1801.) "The inquiry 'must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned." (*Id*. [internal citations omitted].)

A. <u>The Settlement Reflects a Reasonable Compromise.</u>

The Settlement represents a significant percentage of the maximum damages that may have been awarded to the class in this case if they had prevailed at trial. The Settlement, of course, reflects a compromise. The amount of settlement benefits takes into account all the litigation risks related to obtaining class certification, proving Defendant's liability, and proving Class Members' damages. In light of all the defenses asserted by Defendant which posed substantial litigation risks, a compromise effectively awarding Class Members a significant percentage of the maximum value of their claims is eminently fair and reasonable.

Because of the Settlement, and through the efforts of Plaintiffs and Class Counsel, Class Members will receive timely, guaranteed relief and will avoid the risk of an unfavorable judgment.

To be sure, Defendant ultimately has to pay less under the settlement than it would have had to pay if Plaintiffs had achieved a judgment on claims at trial. But an ideal settlement requiring a defendant to pay the full amount of its potential damages is rarely achieved. As the Ninth Circuit has observed, "the very essence of a settlement is compromise, 'a yielding of absolutes and an abandoning of highest hopes.'" (*Officers for Justice v. Civil Service Commission of City and County of San Francisco* (9th Cir. 1982) 688 F.2d 615, 624.) Thus, a proposed settlement "is not to be judged against a hypothetical or speculative measure of what might have been achieved by the negotiators." (*Id*. at p. 625.) A court's "intrusion upon what is otherwise a private consensual agreement negotiated between the parties to a lawsuit must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned." (*Id*.)

B. **The Settlement was Reached After Arms-Length Negotiations Following Informal Discovery.**

The Settlement was reached following extensive negotiations between Class Counsel and Defendant's counsel. (Marquez Decl., ¶¶ 5-8.) Prior to the mediation, Defendant provided Class Counsel with class-wide information and documents, including its wage and hour policies and practices during the class period and an extensive sampling of time and pay records for class members. (*Id.*) After the mediation that was conducted by experienced class action mediator Justice Steven M. Vartabedian (Ret.), the Parties were able to reach a resolution, the material terms of which are encompassed within the Settlement. (*Id.* at ¶¶ 7-8, **Ex. 1**.)

Counsel participated in lengthy arm's-length settlement negotiations that involved numerous discussions, exchanges of information and candid evaluation of the respective Parties' strengths and weaknesses. (*Id*. at ¶ 7.) There is no evidence to suggest that the Parties did not have sufficient information to make informed decisions about the value of this case or that the Settlement is a product of fraud, overreaching or collusion.

C. **Class Counsel Has Extensive Experience in Class Action Litigation**

Class Counsel has considerable experience and has demonstrated competence with litigating wage and hour class actions. (*Id.* at ¶¶ 26-38.) Class Counsel has substantial experience in all facets of litigation in state and federal court, including discovery, law and motion, trial, appeals, arbitration and mediation. Class Counsel has litigated numerous class actions on behalf of plaintiffs and have been lead counsel or otherwise exercised significant case handling responsibilities in numerous cases resulting in millions of dollars in class action settlements. (*Id*.)

Based on Class Counsel's experience as employment and class action attorneys, Class Counsel is eminently qualified to evaluate the strength of Plaintiffs' claims, the strength of Defendant's defenses against certification, the strength of Defendant's defenses on the merits, and the fairness of the Settlement. Their opinion that final approval of the Settlement and Addendum to Settlement Agreement would be in the best interests of class members in light of the significant risks of litigation is entitled to great weight. (*See Kullar, supra,* 168 Cal.App.4th at 129 ["The court undoubtedly should give considerable weight to the competency and integrity of counsel and the involvement of a neutral mediator in assuring itself that a settlement agreement represents an arm's-length transaction entered without self-dealing or other potential misconduct"].)

D. <u>There Are No Objections To The Settlement or Requests for Exclusion.</u>

No class members have objected to the Settlement or requested exclusion from the Settlement. (Mitzner Decl., ¶¶ 8-9.) The overwhelmingly positive response of the class strongly supports final approval of the Settlement. (*See, e.g., In re Lifelock, Inc. Marketing and Sales Practices Litigation* (D. Ariz. 2010) 2010 WL 3715138, *6 [relatively few objections and requests for exclusion support approval].)

Factors to be considered in evaluating a class action settlement include "the reaction of the class members to the proposed settlement." (*Kullar, supra,* 168 Cal.App.4th at p. 128.) The reaction here has been overwhelmingly positive. Courts have approved class action settlements in lesser circumstances. (*See, e.g., Hughes v. Microsoft Corp.* (W.D.Wash. 2001) 2001 U.S. Dist. LEXIS 5976, 2001 WL 34089697, *8 [court found that the "class members overwhelmingly support[ed] the settlement" where there were over 37,000 notices sent out, 2,745 class members participated in the settlement, "only nine objections were submitted", and there were 86 timely opt-outs and over 20 additional defective or untimely opt-outs, "these indicia of the approval of the class of the terms of the settlement support a finding of fairness under Rule 23"], *citing Hanlon v. Chrysler Corp.* (9th Cir.1998) 150 F.3d 1011, 1027 [despite vigorous objections and appeal by objectors, "fact that the overwhelming majority of the class willingly approved the offer and stayed in the class presents at least some objective positive commentary as to its fairness", court did not abuse its discretion in approving settlement].)

IV. <u>THE COURT SHOULD AWARD PLAINTIFFS THE REQUESTED AMOUNTS OF ATTORNEYS' FEES, COSTS AND ENHANCEMENT PAYMENTS.</u>

Under the Settlement, subject to the Court's approval, Defendant has agreed not to oppose Class Counsel's request for reasonable attorneys' fees in the amount of up to $62,500.00, which is 33 1/3% of the Settlement Amount, and Litigation costs in an amount not to exceed $15,000.00 for litigating this Action, which shall be paid from the Settlement Amount. In addition, Defendant will not oppose an application for the payment of Administrative Costs in the amount up to

$10,000.00 and Class Representative Enhancement payments in the amounts of $5,000.00 to each Plaintiff, to be paid from the Settlement Amount. The proposed attorneys' fees and expenses were disclosed to the Class Members in the Notice of Proposed Class Action Settlement.

"In general, questions whether a settlement was fair and reasonable, whether certification of the class was proper, and whether the attorney fee award was proper are matters addressed to the trial court's broad discretion." (*Wershba, supra,* 91 Cal.App.4th at pp. 234-235.) "Courts recognize two methods for calculating attorney fees in civil class actions: the lodestar/multiplier method and the percentage of recovery method." (*Id.* at p. 254; *Vincent v. Hughes Air West, Inc.* (9th Cir. 1977) 557 F.2d 759, 769.)

A. <u>Counsel Requests an Award of Fees Based on the "Common Fund" Method.</u>

California courts have long awarded attorneys' fees as a percentage of the benefit created by counsel in pursuing claims on behalf of a class. The California Supreme Court held that "when a number of persons is 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 attorneys' fees out of the fund." (*Serrano v. Priest* (1977) 20 Cal.3d 25, 34 [*quoting D'Amico v. Board of Medical Examiners* (1974) 11 Cal. 3d 1.)

Class Counsel intends to seek an award of attorneys' fees on the "percentage of recovery/ common fund" theory. The purpose of the common fund/percentage approach is to "spread litigation costs proportionally among all the beneficiaries so that the active beneficiary does not bear the entire burden alone." (*Vincent v. Hughes Air West, Inc.* (9th Cir. 1977) 557 F.2d 759, 769.) In *Quinn v. State of California* (1995) 15 Cal. 3d 162, 167, the California Supreme Court stated: "[O]ne who expends attorneys' fees in winning a suit which creates a fund from which others derive benefits may require those passive beneficiaries to bear a fair share of the litigation costs." Similarly, in *City and County of San Francisco v. Sweet* (1995) 12 Cal.4th 105, 110, the California Supreme Court recognized that the common fund doctrine has been applied "consistently in California when an action brought by one party creates a fund in which other persons are entitled to share."

The California Supreme Court affirmed in *Laffitte v. Robert Half Int'l Inc*. (2016) 1 Cal.5th

480 that, "when class action litigation establishes a monetary fund for the benefit of the class members, and the trial court in its equitable powers awards class counsel a fee out of that fund, the court may determine the amount of a reasonable fee by choosing an appropriate percentage of the fund created." (*Id*. at p. 503.) The court explained: "The recognized advantages of the percentage method—including relative ease of calculation, alignment of incentives between counsel and the class, a better approximation of market conditions in a contingency case, and the encouragement it provides counsel to seek an early settlement and avoid unnecessarily prolonging the litigation—convince us the percentage method is a valuable tool that should not be denied our trial courts." (*Id.* [internal citations omitted].)

Several courts have expressed frustration with the alternative "lodestar" approach for deciding fee awards, which usually involves wading through voluminous and often indecipherable time records. Commenting on the lodestar approach, Chief Judge Marilyn Hall Patel wrote: "This court is compelled to ask, 'Is this process necessary?' Under a cost-benefit analysis, the answer would be a resounding, 'No!'" (*In re Activision Securities Litigation* (N.D. Cal 1989) 723 F. Supp. 1373, 1375.) The percentage approach is preferable to the lodestar because: (1) it aligns the interests of class counsel and absent class members; (2) it encourages efficient resolution of the litigation by providing an incentive for early, yet reasonable, settlement; and (3) it reduces the demands on judicial resources. (*Id*. at pp. 1378-79.) The Ninth Circuit now routinely uses the percentage of the common fund approach to determine the award of attorney's fees. (*See*, *e.g., In re Pacific Enterprises Securities City and County of San Francisco Litigation* (9th Cir. 1994) 47 F.3d 373, 378-79 [approving attorney's fee of 33 1/3%].)

1. The Standard Fee Award in Class Actions Has Resolved Itself As One-Third Of The Recovery In Common Fund Cases.

According to a leading treatise on class actions, "No general rule can be articulated on what is a reasonable percentage of a common fund. Usually 50% of the fund is the upper limit on a reasonable fee award from a common fund in order to assure that the fees do not consume a disproportionate part of the recovery obtained for the class, although somewhat larger percentages are not unprecedented." (*See* Conte & Newberg, Newberg on Class Actions (3rd Ed.) § 14.03.)

Attorneys' fees that are fifty percent of the fund are typically considered the upper limit, with ***thirty to forty percent commonly awarded in cases where the settlement is relatively small***. (*See Id.*; *see also, Van Vranken v. Atlantic Richfield Company* (N.D. Cal. 1995) 901 F. Supp. 294 [stating that most cases where 30-50 percent was awarded involved "smaller" settlement funds of under $10 million].)

The settled-for one-third fee award is consistent with the average fee award in class actions. Indeed, the custom and practice in class actions is to award approximately one-third of a fund as a fee award. (*See Chavez v. Netflix, Inc.* (2008) 162 Cal.App.4th 43, 66, n.11 ["Empirical studies show that, regardless whether the percentage method or the lodestar method is used, fee awards in class actions average around one-third of the recovery."].) Thus, Plaintiffs' fee request is in line with the prevailing guidelines established in California case law and academic literature and is consistent with awards in California. Accordingly, Plaintiffs request that the Court approve the attorneys' fees as negotiated by the Parties and requested herein.

2. This Matter Involves A "Fee-Shifting" Provision of the Labor Code.

Class Counsel is entitled to recover fees under Labor Code § 1194, which provides, in part:

> [A]ny employee receiving less than the legal minimum wage or the legal overtime compensation applicable to the employee is entitled to recover in a civil action the unpaid balance of the full amount of this minimum wage or overtime compensation, including interest thereon, reasonable attorney's fees, and costs of suit.

(Lab. Code § 1194.)

As this litigation culminated in a settlement that provided for a recovery of unpaid wages, including unpaid minimum wages and overtime compensation, Plaintiffs are entitled to recover reasonable attorneys' fees and costs under the California Labor Code.

Class Counsel is also entitled to a fee award under California's private attorney general statute, Code of Civil Procedure § 1021.5. "The award of attorneys fees is proper under Section 1021.5 if '(1) plaintiffs' action 'has resulted in the enforcement of an important right affecting the public interest,' (2) 'a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons' and (3) 'the necessity and financial burden of private enforcement are such as to make the award appropriate.'" (*Press v. Lucky Stores* (1983)

34 Cal.3d 311, 317-318.) The fundamental objective of the statute is "to encourage suits enforcing public policies by providing substantial attorneys' fees to successful litigants in such cases." (*Graham v. DaimlerChrysler Corp*. (2004) 34 Cal.4th 553, 565.)

This action resulted in the enforcement of an important right affecting the public interest, as Plaintiffs sought to enforce Participating Class Members' rights to recover statutory wages arising from Defendant's alleged failure to pay all wages and failure to provide meal and rest breaks. (*See Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1113 [noting that "health and safety concerns" are what motivated the Industrial Welfare Commission to adopt mandatory meal and rest periods].)

This action also conferred a significant benefit on a large class of persons. After Notice was sent to 61 individuals, no Class Member objected to the Settlement or otherwise requested exclusion from the Settlement. The Settlement provides a significant monetary benefit, in that it permits all persons who worked for Defendant during the applicable class period to obtain significant compensation for, *inter alia*, unpaid wages and missed meal and rest periods, which they likely would not have recovered if not for this action.

Finally, the necessity and financial burden of private enforcement render an award appropriate. Without the incentive of an attorneys' fee award, Plaintiff could not have afforded to hire counsel to pursue this case, as the cost of litigating this matter far outweighed Plaintiffs' potential recovery. (*See Ryan v. California Interscholastic Federation* (2001) 94 Cal.App.4th 1033, 1044 ["As to the necessity and financial burden of private enforcement, an award is appropriate where the cost of the legal victory transcends the claimants' personal interest; in other words, where the burden of pursuing the litigation is out of proportion to the plaintiff's individual stake in the matter."].)

3. The Experience, Reputation and Ability of Class Counsel Support the Fee Award.

As demonstrated by their past experience in pursuing class actions on behalf of consumers and employees, Class Counsel possesses considerable expertise in litigating class action matters. Class Counsel has been involved as lead counsel or co-counsel in dozens of class actions resulting in a multitude of beneficial results to class members in California. Because it is reasonable to compensate class counsel commensurate with their skill, reputation and experience, a fee award of one-third of the Settlement Amount is justifiable and considered within the norm in class action practice.

Indeed, Class Counsel's experience in wage and hour class actions was integral in evaluating the strengths and weaknesses of the case against Defendant, negotiating with Defendant's counsel, and evaluating the reasonableness of the settlement. Practice in the narrow field of wage and hour litigation requires skill and knowledge concerning the rapidly evolving substantive law (state and federal), as well as the procedural law of class action litigation. Based on these and other factors, Class Counsel has frequently received fee awards amounting to 33 1/3% of the recovery for the class. Therefore, the requested fee award is reasonable and fair.

B. <u>While the Lodestar Method is Not Necessary in Common Fund Cases, Courts May Perform a Cross-Check to Award Fees.</u>

"Despite its primacy, the lodestar method is not necessarily utilized in common fund cases." (*Lealao v. Beneficial California, Inc.* (2000) 82 Cal.App.4th 19, 27.) Courts have criticized the lodestar method as a drain on the judicial system and a disincentive on attorneys to take on high-risk, challenging cases. (*Id.* at p. 29.) Indeed, the lodestar approach: "(1) 'increases the workload of an already overtaxed judicial system,' (2) is 'insufficiently objective and produce[s] results that are far from homogenous,' (3) 'creates a sense of mathematical precision that is unwarranted in terms of the realities of the practice of law,' (4) 'is subject to manipulation by judges who prefer to calibrate fees in terms of percentages of the settlement fund or the amounts recovered by the plaintiffs or of an overall dollar amount,' (5) 'encourages lawyers to expend excessive hours, and . . . engage in duplicative and unjustified work,' (6) 'creates a disincentive for the early settlement of cases,' (7) deprives trial courts of 'flexibility to reward or deter lawyers so that desirable objectives, such as early settlement, will be fostered,' (8) 'works to the particular disadvantage of the public interest bar,' and (9) results in 'confusion and lack of predictability.'" (*Id.*)

Although California supports the common fund doctrine, the lodestar method can be used to cross-check fee awards. "It may be appropriate in some cases, assuming the class benefit can be monetized with a reasonable degree of certainty, to "cross-check" or adjust the lodestar in comparison to a percentage of the common fund to ensure that the fee awarded is reasonable and within the range of fees freely negotiated in the legal marketplace in comparable litigation."(*In re Consumer Privacy Cases* (2009) 175 Cal.App.4th 545, 557.)

Applying the lodestar method requires a two-step process. The first step is to multiply the number of hours reasonably expended by a reasonable hourly rate. The second step is to apply a multiplier to the lodestar to take into account various factors. "The purpose of such adjustment is to fix a fee at the fair market value for the particular action. In effect, the court determines, retrospectively, whether the litigation involved a contingent risk or required extraordinary legal skill justifying augmentation of the unadorned lodestar in order to approximate the fair market rate for such services." (*Id.* at pp. 556-57.) "Under certain circumstances, a lodestar calculation may be enhanced on the basis of a percentage-of-the-benefit analysis." (*Id.* at p. 557.)

Wilshire Law Firm's current lodestar is $93,045 based on at least 170 hours of reported work performed by Class Counsel. (Marquez Decl., ¶¶ 15-16.) Accordingly, the requested fee of $62,500.00 is reasonable and fair as it is based on a multiplier of 0.67. There are also additional hours devoted by Class Counsel to this litigation that are not reflected in Class Counsel's request for attorneys' fees, such as future time that will need to be devoted to ensuring the settlement checks are administered properly. (Marquez Decl., ¶ 16.)

1. Class Counsel's Rates Have Been Approved by Several Courts.

Class Counsel provides a declaration to support their lodestar hourly rates. "Affidavits of the plaintiffs' attorney and other attorneys regarding prevailing fees in the community, and rate determinations in other cases, particularly those setting a rate for the plaintiffs' attorney, are satisfactory evidence of the prevailing market rate." (*United Steelworkers of America v. Phelps Dodge Corp.* (9th Cir. 1990) 896 F.2d 403, 407.) Class Counsel has received final approval of their hourly rates in other wage and hour class action settlements. These rates are not opposed or challenged.

2. The Lawsuit Provided a Public Benefit.

Class Counsel's choice to litigate this matter provided a public benefit to 61 California employees. Indeed, California Labor Code section 90.5(a) states:

> It is the policy of this state to vigorously enforce minimum labor standards in order to ensure employees are not required or permitted to work under substandard unlawful conditions…and to protect employers who comply with the law from those who attempt to gain a competitive advantage at the expense of their workers by failing to comply with minimum labor standards.

Moreover, the California Supreme Court stated that "Labor Code section 1194 confirms "a clear public policy ... that is specifically directed at the enforcement of California's minimum wage and overtime laws for the benefit of workers." [citation omitted]." (*Sav-on Drug Stores, Inc. v. Super. Ct*. (2004) 34 Cal.4th 319, 340.) Given the financial risks and numerous attorney hours attendant to the litigation of Plaintiffs' claims, this factor supports Class Counsel's fee request and encourages the private enforcement of legal rights for the general good.

C. <u>Costs Are Reasonable.</u>

Class Counsel requests reimbursement of $14,950.72 in litigation expenses. (Marquez Decl., ¶ 20.) Meanwhile, Defendant has previously agreed that it will not oppose any cost award request up to $15,000. The categories of costs are set forth in the accompanying Declaration of Justin Marquez, and these costs are clearly seen to be both reasonable and necessary.

D. <u>The Enhancement Payments to Plaintiffs are Reasonable.</u>

Named plaintiffs in class action lawsuits "are eligible for reasonable incentive payments to compensate them for the expense or risk they have incurred in conferring a benefit on other members of the class." (*Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles* (2010) 186 Cal.App.4th 399.) Courts routinely grant approval of class action settlement agreements containing enhancements for the class representatives, which are necessary to provide incentive to represent the class and are appropriate given the benefit the class representatives help to bring about for the class. (*See Rodriguez v. W. Publ'g Corp*. (9th Cir. 2009) 563 F.3d 948, 958-59.)

Service awards are particularly important to plaintiffs in wage and hour cases because they promote the important public policies underlying the wage and hour laws. This strong policy is codified in California Labor Code section 90.5, which provides, "it is the policy of this state to vigorously enforce minimum labor standards in order to ensure employees are not required or permitted to work under substandard unlawful conditions…."). Nonetheless, the California

Supreme Court has noted that "retaliation against employees for asserting statutory rights under the Labor Code is widespread," despite anti-retaliation statutes designed to protect employees. *Gentry v. Super. Ct.* (2007) 42 Cal.4th 443, 460-61.) In this context, class representatives should be rewarded for assuming the risk of retaliation for the sake of class members. (*See Frank v. Eastman Kodak Co.* (W.D.N.Y. 2005) 228 F.R.D. 174, 187.)

Under the Settlement Agreement, subject to the Court's approval, Defendant agreed to pay a Service Award in the amount of $7,500.00 to Plaintiff Taylor and $5,000 to Plaintiff Lomonaco. The Court then modified the Service Award amounts to both be set at $5,000 per the Court's Order granting preliminary approval of the class action settlement. This amount is also in exchange for Plaintiffs' general release of all claims against Defendant. Plaintiffs have submitted declarations demonstrating that they devoted a great deal of time and work assisting counsel in the case, including numerous meetings with Class Counsel and extensive phone calls to discuss the case, case strategy, mediation, and settlement. (*See generally,* Declaration of Plaintiff Joshua Taylor ["Taylor Decl."]; see also *generally,* Declaration of Plaintiff Frank Lomonaco ["Lomonaco Decl."]; *see also* Marquez Decl., ¶¶ 21-25 [highlighting the time and efforts Plaintiffs devoted to this case].)

When compared with the amounts awarded in typical class action cases, the amount requested here is particularly reasonable. Indeed, a **2006** study examining the average incentive award given to class action plaintiffs from **1993 to 2002** found that the "average award per class representative was $15,992 and the median award per class representative was $4,357." (Theodore Eisenberg & Jeffrey P. Miller, "Incentive Awards to Class Action Plaintiffs: An Empirical Study", 53 UCLA L. Rev. 1303, 1308 (2006).) That same study found that named plaintiffs in employment discrimination class actions received an average award of $69,850 and a median award of $31,081, while named plaintiffs in other employment class actions received an average award of $12,121 and a median award of $13,059. (*Id.* at p. 1334.) The authors of the study found that higher awards in employment cases reflected the "courts' wish to make representative plaintiffs whole by compensating them for the high costs of their service to the class, including risks of stigmatization or retaliation on the job." (*Id.* at p. 1308.)

Another factor that supports the awarding of service awards is whether the class representative's service resulted in notoriety or other personal difficulties. (*See, e.g., Schaffer v. Litton Loan Servicing, LP* (C.D. Cal. 2012) 2012 WL 10274679, at *18.) The California Supreme Court has recognized that "retaliation against employees for asserting statutory rights under the Labor Code is widespread," despite anti-retaliation statutes designed to protect employees. (*Gentry, supra,* 42 Cal.4th at pp. 460-61.) In this context, class representatives should be rewarded for assuming the risk of retaliation for the sake of class members. (*See Frank, supra,* 228 F.R.D. at p. 187.)

Here, Plaintiffs have lent their names to this case and thus subjected themselves to public attention. They have also risked their reputation in the community and with regard to future employment opportunities as a result of stepping forward publicly in a class action. When a class representative shoulders some degree of personal risk in joining the litigation, such as workplace retaliation or financial liability, an incentive award is especially important. (*See Staton v. Boeing Co.* (9th Cir. 2003) 327 F.3d 938, 977; *Weeks v. Kellogg Co.* (C.D. Cal. 2013) 2013 WL 6531177, *36.) Plaintiffs have been subject to the rigors of litigation and have had to devote their own time and expenses in participating in the case. (*See generally,* Taylor Decl.; *see generally* Lomonaco Decl.; *see also* Marquez Decl., ¶¶ 21-25.)

E. <u>Administrative Costs Should be Approved.</u>

Phoenix Settlement Administrators., the approved Settlement Administrator, is charging a total of $5,975.00 (which is considerably less than the amount the Settlement provides for) in costs associated with the administration of this Settlement, including future estimated costs involved in completing the administration. (Mitzner Decl., ¶ 17.) These expenses are reasonable, based upon the size of the class and the additional tasks associated with the notice process, tracking, and Class Member payment processing.

V. <u>CONCLUSION</u>

For the foregoing reasons, Plaintiffs respectfully request that the Court grant final approval of the proposed settlement.

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Dated: February 24, 2023

WILSHIRE LAW FIRM

By: ______________________
Justin F. Marquez
Benjamin H. Haber
Arrash T. Fattahi

Attorneys for Plaintiffs

PROOF OF SERVICE

Taylor, et al. v. U.S. Dairy Systems, Inc. dba Automated Dairy Systems, et al.
VCU286113

STATE OF CALIFORNIA)
) ss
COUNTY OF LOS ANGELES)

I, Ashley Narinyans, state that I am employed in the aforesaid County, State of California; I am over the age of eighteen years and not a party to the within action; my business address is 3055 Wilshire Blvd., 12th Floor, Los Angeles, California 90010. My electronic service address is anarinyans@wilshirelawfirm.com.

On **February 24, 2023**, I served the foregoing **PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT; MEMORANDUM OF POINTS AND AUTHORITIES,** on the interested parties by placing a true copy thereof, enclosed in a sealed envelope by following one of the methods of service as follows:

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Attorneys for Defendant U.S. Dairy Systems, Inc. dba Automated Dairy Systems

(X) **BY UPLOAD:** I hereby certify that the documents were uploaded by my office to the State of California Labor and Workforce Development Agency Online Filing Site.

(X) **BY E-MAIL:** I hereby certify that this document was served from Los Angeles, California, by e-mail delivery on the parties listed herein at their most recent known email address or e-mail of record in this action.

I declare under the penalty of perjury under the laws of the State of California, that the foregoing is true and correct.

Executed on **February 24, 2023**, at Los Angeles, California.

Ashley Narinyans
Type or Print Name

Ashley
Signature