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Attorneys for Plaintiffs

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF BUTTE

DANIEL HAYES, individually, and on behalf of all others similarly situated, AUDREY MIGLIACCIO, individually, and on behalf of all others similarly situated, COURTNEY MELVIN, individually, and on behalf of all others similarly situated,

Plaintiffs,

v.

GONZALES PARK, a California corporation, PROJECT FUSION, LLC, a Delaware corporation, and DOES 1 through 10, inclusive,

Defendants

COURTNEY MELVIN, on behalf of the State of California and other aggrieved persons,

Plaintiff,

v.

GONZALES PARK, LLC, a California Limited Liability Company; PROJECT FUSION, LLC, a Limited Liability Company; and DOES 1 through 10, inclusive,

Defendants

Case No.: 21CV02456
Consolidated With Case No.: 22CV01119

CONSOLIDATED CLASS AND REPRESENTATIVE ACTION

[*Assigned to*: Hon. Tamara L. Mosbarger, Department 1]

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; Declarations of Daniel Hayes, Courtney Melvin, and Audry Migliaccio; Declaration of Cassandra Polites; [Proposed] Order]

FINAL APPROVAL HEARING
Date: May 1, 2024
Time: 9:00 a.m.
Dept.: 1

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NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on May 1, 2024 at 9:00 a.m., in Department 1 of the Butte County Court, 1775 Concord Avenue, Chico, California 95928, Plaintiffs Daniel Hayes, Audrey Migliaccio, and Courtney Melvin ("Plaintiffs") will, and hereby do, move for an order as follows:

1. Certifying the Class for settlement purposes;
2. Approving the settlement as fair and reasonable and finding that class members were given notice of the settlement, and advised of their rights to participate in the settlement, object to the settlement, or exclude themselves from the settlement, in a reasonable manner;
3. Appointing Plaintiffs as Class Representative for settlement purposes, and approving a Class Representative Service Award of $10,000 to each Plaintiff;
4. Appointing Plaintiffs' Counsel, Wilshire Law Firm, PLC, as Class Counsel for settlement purposes, and approving payment of $212,500 in attorney's fees, which is 33 1/3% of the Gross Settlement Amount;
5. Approving costs in the amount of $15,924.48 for litigating this action to Class Counsel;
6. Approving payment of administrative expenses to ILYM Group, Inc. as the Settlement Administrator in the amount of $14,770; and
7. Directing that the clerk of the Court to enter the Court's order as a final judgment; and,
8. 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.

This motion will be based on the accompanying Memorandum of Points and Authorities, the Declarations of Justin F. Marquez, Daniel Hayes, Audrey Migliaccio, Courtney Melvin, and Cassandra Polites, and such oral argument as may be heard by the Court, and all other papers on file in this action.

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Dated: April 9, 2024

Respectfully submitted,

WILSHIRE LAW FIRM, PLC

By: /s/ [signature]

Justin F. Marquez
Benjamin H. Haber
Daniel J. Kramer

Attorneys for Plaintiffs and the Putative Class

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiffs Daniel Hayes, Audrey Migliaccio, and Courtney Melvin ("Plaintiffs") seek final approval of a proposed $637,500 non-reversionary, class and representative action settlement Defendants Gonzalez Park, LLC and Projection Fusion, LLC (collectively, "Gonzales Park" or "Defendants," and together with Plaintiffs, the "Parties"). The Settlement will provide substantial monetary payments to approximately 574 class members. And, as set forth more fully below, the proposed Settlement satisfies all the criteria for settlement approval under California law.

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. Upon the Court's approval of the settlement, participating class members will receive an ***average estimated individual net settlement payment of approximately $592.74***, with the ***highest individual net settlement payment to be paid of approximately $1,635.93***. (Declaration of Cassandra Polites of ILYM Group, Inc. Regarding Notice and Settlement Administration ["Polites Decl."], ¶ 16.) As of filing this Motion, there are **no objections to the settlement** and **no request for exclusion**. (*Id.* at ¶¶ 11-12.) Thus, the proposed Settlement is fair, reasonable, and adequate and is in the best interests of the Settlement Class Members.

Final approval of the settlement is warranted as it satisfies all the criteria for approval under California law. As demonstrated in the motion for preliminary approval the proposed Settlement provides excellent benefits to the class, particularly considering the complexities and risks of the case. Accordingly, Plaintiffs request that the Court grant final approval of the proposed Settlement.

II. SUMMARY OF THE LITIGATION AND SETTLEMENT

A. Plaintiffs' Claims

This is a consolidated 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 or non-exempt employees for Defendants during the class period. Defendants own and manage a clothing company in Butte County that produces, *inter alia*, private label apparel for companies throughout the United States. (Declaration of Justin F. Marquez in Support of Plaintiffs' Motion for Final Approval of Class Action Settlement ["Marquez Decl."], ¶ 2.)

Plaintiffs allege that Defendants' payroll, timekeeping, and wage and hour practices resulted in numerous Labor Code violations. Specifically, Plaintiffs allege that Defendants failed to, *inter alia*, pay for all hours worked, provide employees with legally compliant meal and rest periods, indemnify employees for all necessary business expenses, and provide timely wages. Based on these allegations, Plaintiffs assert claims against Defendants 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 indemnify for necessary business expenses, failure to timely pay all final wages at termination, failure to provide accurate itemized wage statements, unfair business practices, and civil penalties under PAGA. (*Id.* at ¶ 3.)

On September 30, 2021, Plaintiff Hayes filed a putative wage and hour class action complaint against Defendants for: (1) failure to pay minimum and straight time wages; (2) failure to pay overtime wages; (3) failure to provide meal periods; (4) failure to authorize and permit rest periods; (5) failure to timely pay final wages at termination; (6) failure to provide accurate itemized wage statements; (7) failure to indemnify necessary business expenses; and (8) unfair business practices. (*Id.* at ¶ 4.) Plaintiff Hayes then amended his complaint on January 12, 2022 to add additional class representatives, Plaintiff Melvin and Plaintiff Migliaccio. (Id. at ¶ 4.)

On October 1, 2021, Plaintiff Hayes sent a notice to Defendants and the California Labor & Workforce Development Agency ("LWDA") alleging similar wage and hour violations pursuant to the PAGA. (*Id.* at ¶ 5.) On March 15, 2022, Plaintiffs sent a subsequent joint notice to Defendants and the California LWDA alleging similar violations pursuant to the PAGA.

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Plaintiffs also paid the $75.00 filing fee on the same day. (*Id.* at ¶ 6.) On May 27, 2022, Plaintiff Melvin filed a separate action pursuant to the PAGA for civil penalties. (*Id.*)

On February 22, 2023, the two actions described above were consolidated, with Case Number 21CV02456 being designated as the lead case. (*Id.* at ¶ 7.) Plaintiffs provided conformed copies of both actions to the LWDA. (*Id.*)

B. <u>Discovery and Investigation</u>

Following the filing of the initial Complaint, the Parties exchanged documents and information before mediating this action. (*Id.* at ¶ 8.) Defendants produced a sample of timekeeping and pay records for the class members. (*Id.*) Defendants also provided documents of their wage and hour policies and practices during the class period and information regarding the total number of current and former employees in their informal discovery responses. (*Id.*) In total, Defendants produced policy documents and corresponding time/wage records for approximately 160,000 shifts worked by employees during the class period. (*Id.*)

After reviewing the documents regarding Defendants' wage and hour policies and practices, analyzing Defendants' timekeeping and payroll records, and interviewing Class Members, Class Counsel was able to evaluate the probability of class certification, success on the merits, and Defendants' maximum monetary exposure for all claims. (*Id.* at ¶ 9.) Class Counsel also investigated the applicable law regarding the claims and defenses asserted in the litigation. (*Id.*) Class Counsel reviewed these records and prepared a damage analysis prior to mediation. (*Id.*)

C. <u>Settlement Negotiations and Agreement</u>

On December 7, 2022, the Parties participated in private mediation with experienced class action litigator and mediator Brandon McKelvey, Esq. (*Id.* at ¶ 10.) The mediation was conducted via Zoom. The settlement negotiations were at arm's length and, although conducted in a professional manner, were adversarial. (*Id.*) The Parties went into the mediation willing to explore the potential for a settlement of the dispute, but each side was also prepared to litigate their position through trial and appeal if a settlement had not been reached. (*Id.*) After extensive negotiations and discussions regarding the strengths and weaknesses of

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Plaintiffs' claims and Defendants' defenses, the Parties reached a settlement following the issuance of a mediator's proposal, the material terms of which were subsequently incorporated in the Parties' proposed Settlement Agreement. (*Id.* at ¶ 11, **Ex. 1** [Class Action and PAGA Settlement Agreement and Class Notice].)

Class Counsel has conducted a thorough investigation into the facts of this case. Based on the foregoing discovery and their own independent investigation and evaluation, Class Counsel is of the opinion that the Settlement is fair, reasonable, and adequate and is in the best interests of the Settlement Class Members in light of all known facts and circumstances, the risk of significant delay, the defenses that could be asserted by Defendants both to certification and on the merits, trial risk, and appellate risk. (*Id.* at ¶ 17.)

D. Preliminary Approval and Overwhelming Support for the Settlement

The Court granted Plaintiffs' Motion for Preliminary Approval of Class Action Settlement on November 15, 2023. (*Id.* at ¶ 13.) Pursuant to Parties subsequent stipulation and Court order, the notice implementation process was continued by approximately 60 days to allow Defendant additional time to obtain the requisite class member information for purposes of sending out the notices. (*Id.*) The deadline for class members to opt out or object to the Settlement is April 11, 2024 and, as of filing this motion, the reaction of the Class to the Settlement has been overwhelmingly positive as evidenced by the fact that **no Class Member has opted out or objected to the Settlement**. (Polites Decl., ¶¶ 11-13.) Plaintiffs will file a supplemental declaration shortly after the response deadline to provide the Court with the final figures regarding whether Class Members, if any, have opted out, objected, or disputed their allocated workweeks in the Settlement. (Marquez Decl., ¶ 14.)

E. Key Terms of the Proposed Settlement

Under the Settlement Agreement, Defendants will pay $637,500 to resolve this litigation. The 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 individuals employed by Defendants in California and classified as an hourly-paid or non-

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exempt employee during the Class Period. (Settlement, §§ 1.5, 1.12.)

2. Class Period: "means the period from September 30, 2017 to February 14, 2023." (Settlement, § 1.12.)

3. Participating Class Members: "means a Class Member who does not submit a valid and timely Request for Exclusion from the Settlement." (Settlement, § 1.35.)

4. Aggrieved Employees: means a person employed by any of the Defendants in California and classified as an hourly-paid or non-exempt employee who worked for Defendants during the PAGA Period of October 1, 2020 to February 14, 2023. (Settlement, §§ 1.4, 1.30, and 1.31.) Every class member is not also an Aggrieved Employee.

5. Gross Settlement Amount: This amount is $637,500 and will be used to pay Individual Class Payments, Individual PAGA Payments, the LWDA PAGA Payment, Class Counsel Fees, Class Counsel Expenses, Class Representative Service Award, and the Administrator's Expenses. (Settlement, § 1.22.) Defendants shall fully fund the Gross Settlement Amount, and also fund the amounts necessary to fully pay Defendants' share of payroll taxes by transmitting the funds to the Administrator no later than 30 days after the Effective Date. (*Id.* at § 4.3.)

6. Uncashed Checks: For any Class Member whose Individual Class Payment check or Individual PAGA Payment check is uncashed and cancelled after the void date (not less than 180 days after the date of mailing), the Administrator shall transmit the funds represented by such checks to the Parties' designated *cy pres* recipient, Koinonia Family Services, subject to the requirements of California Code of Civil Procedure § 384, subd. (b). (Settlement, §§ 4.4.1, 4.4.3.)

7. Release: "All Participating Class Members, on behalf of themselves and their respective former and present representatives, agents, attorneys, heirs, administrators, successors, and assigns, release Released Parties from all claims that were alleged, or reasonably could have been alleged, based on the facts stated in the Operative Complaint and ascertained in the course of the Action during the Class Period, including but not limited to any and all claims for: (1) failure to pay minimum and straight time wages; (2) failure to pay overtime

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wages; (3) failure to provide meal periods; (4) failure to authorize and permit rest periods; (5) failure to timely pay final wages at termination; (6) failure to provide accurate itemized wage statements; (7) failure to indemnify necessary business expenses; and (8) violation of California's Unfair Competition Law, California Business and Professions Code §§ 17200, *et seq*. Except as set forth in Section 5.3 of this Agreement, Participating Class Members do not release any other claims, including claims for vested benefits, wrongful termination, violation of the Fair Employment and Housing Act, unemployment insurance, disability, social security, workers' compensation, or claims based on facts occurring outside the Class Period." (Settlement, § 5.2.) This Release will be deemed effective on the date when Defendants fully fund the entire Gross Settlement Amount and fund all employer payroll taxes owed on the Wage Portion of the Individual Class Payments. (*Id.* at § 5.)

8. No Reversion: "None of the Gross Settlement Amount will revert to Defendant." (Settlement, § 3.1.)

9. PAGA Allocation: The settlement includes $20,000 allocated to Plaintiffs' claims under PAGA, with 75% of which ($15,000) being paid to the LWDA and 25% ($5,000) being paid to the Aggrieved Employees. (Settlement, § 1.34.) Class Counsel submitted the proposed settlement to the LWDA before filing this Motion for Preliminary Approval. (Marquez Decl., ¶ 12.)

10. Net Settlement Amount: "Gross Settlement Amount, less the following payments in the amounts approved by the Court: Individual PAGA Payments, the LWDA PAGA Payment, the Class Representatives' Service Payments, Class Counsel Fees Payment, Class Counsel Litigation Expenses Payment, and the Administration Expenses Payment. The remainder is to be paid to Participating Class Members as Individual Class Payments." (Settlement, § 1.28.)

11. Distribution Formula: "An Individual Class Payment [will be] calculated by (a) dividing the Net Settlement Amount by the total number of Workweeks worked by all Participating Class Members during the Class Period and (b) multiplying the result by each Participating Class Member's Workweeks." (Settlement, § 3.2.4.) As to PAGA: "The

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Administrator will calculate each Individual PAGA Payment by (a) dividing the amount of the Aggrieved Employees' 25% share of PAGA Penalties ($5,000) by the total number of PAGA Period Pay Periods worked by all Aggrieved Employees during the PAGA Period and (b) multiplying the result by each Aggrieved Employee's PAGA Period Pay Periods. Aggrieved Employees assume full responsibility and liability for any taxes owed on their Individual PAGA Payment." (Settlement, § 3.2.5.1.)

12. Tax Allocation: "25% of each Participating Class Member's Individual Class Payment will be allocated to settlement of wage claims (the 'Wage Portion'). The Wage Portions are subject to tax withholding and will be reported on an IRS W-2 Form. The 75% of each Participating Class Member's Individual Class Payment will be allocated to settlement of claims for all other forms of recovery [e.g., interest and penalties] (the 'Non-Wage Portion')." (Settlement, § 3.2.4.1.) Defendants will pay their employer-side payroll taxes in addition to and separate from the Gross Settlement Amount. (Settlement, §§ 3.1, 5.)

13. Class Representative Service Award: Subject to Court approval, Plaintiffs shall each be paid a service award not to exceed $10,000.00, for a combined total of $30,000.00. (Settlement, § 3.2.1.) 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 California Civil Code Section 1542. (*Id.* at § 5.1.) If the Court approves a lesser enhancement, then the unapproved portion shall revert into the Net Settlement Amount to be distributed between the Participating Class Members on a pro-rata basis. (Settlement, § 3.2.1.)

14. Attorneys' Fees and Costs: The Settlement provides that Defendants will not oppose a fee application of up to 33 1/3% ($212,500) of the Gross Settlement Amount, plus out-of-pocket costs not to exceed $20,000.00. (Settlement, § 3.2.2.)

15. Notice of Proposed Class Action Settlement: The 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. (Polites Decl., Ex. A.) Class Members were notified by first-class mail of the Settlement. (*Id.,* at ¶ 7.) The Settlement Administrator also undertook its best efforts

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to ensure that the Notice was provided to the current addresses of Class Members, including conducting a national change of address search and re-mailing notices to updated addresses when needed. (*Id*., at ¶¶ 6-8.)

III. THE SETTLEMENT MERITS FINAL APPROVAL

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 Computers, 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. The Settlement Reflects a Reasonable Compromise

A settlement is not judged against what the plaintiff might recover had she prevailed at trial, nor does the settlement have to provide 100% of the damages sought to be fair and reasonable. (*Wershba, supra,* 91 Cal.App.4th at pp. 246, 250 ["Compromise is inherent and necessary in the settlement process…even if the relief afforded by the proposed settlement is substantially narrower

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than it would be if the suits were to be successfully litigated, this is no bar to a class settlement because the public interest may indeed be served by a voluntary settlement in which each side gives ground in the interest of avoiding litigation."].)

The settlement obviates the significant risk that this Court may deny certification of all or some of Plaintiffs' claims. (Marquez Decl., ¶ 15.) While Plaintiffs are confident in the merits of her claims, a legitimate controversy exists as to each cause of action. (*Id.*) Plaintiffs also recognize that proving the amount of wages due to each class member would be an expensive, time-consuming, and uncertain proposition. (*Id.*) Furthermore, even if Plaintiffs obtained certification of all or some of the claims, continued litigation would be expensive, involving a trial and possible appeals, and would substantially delay and reduce any recovery by the class. (*Id.*)

Because of the proposed Settlement, class members will receive timely, guaranteed relief and will avoid the risk of an unfavorable judgment. When considering the risks of litigation, the uncertainties involved in achieving class certification, the burdens of proof necessary to establish liability, the probability of appeal of a favorable judgment, it is clear that the settlement amount of $637,500 is within the "ballpark" of reasonableness, and preliminary settlement approval is appropriate. (*Id.*) ***Indeed, each Settlement Class Member is eligible to receive an average benefit of approximately $592.74, and the highest estimated net payout is expected to be approximately $1,635.93***. (Polites Decl., ¶ 16.)

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B. <u>The Settlement was Reached After Arms-Length Negotiations Following Formal and Informal Discovery</u>

The Settlement was reached over the course of a full-day mediation with experienced employment mediator, Brandan McKelvey, Esq. (Marquez Decl. ¶ 10.) The settlement negotiations were at arm's length and, although conducted in a professional manner. (*Id.*) The parties went into the mediation willing to explore the potential for a settlement of the dispute, but each side was also prepared to litigate their or its position through trial and appeal if a settlement had not been reached. (*Id.*)

Prior to reaching this settlement, Class Counsel conducted formal and informal discovery concerning the claims set forth in the Litigation, such as a sample of class member timekeeping and payroll records, Defendants' policies and procedures concerning the payment of wages, the provision of meal and rest breaks, issuance of wage statements, and providing all wages at separation, as well as information regarding the number of putative class members and the mix of current versus former employees, the wage rates in effect, and the amount of meal and rest period premium wages paid to class members. (*Id.* at ¶¶ 8-9.) In conjunction with their extensive factual investigation, Class Counsel investigated the applicable law regarding the claims and defenses asserted in the Litigation. (*Id*.) Thus, Plaintiffs and their counsel were able to act intelligently and effectively in negotiating the proposed Settlement. (*Id*.)

C. <u>Plaintiffs' Counsel Has Substantial Class Action Experience</u>

Class Counsel also has considerable experience and has demonstrated competence with litigating wage and hour class actions. (Marquez Decl. at ¶¶ 31-44.) 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 Defendants' defenses against certification, the strength of Defendants' defenses on the merits, and the fairness of the Settlement. Their opinion that final approval of the Settlement 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 arms' length transaction entered without self-dealing or other potential misconduct"].)

D. <u>No Objections to the Settlement</u>

No class member has objected to the Settlement, and no class member has requested exclusion from the Settlement. (Polites Decl., ¶¶ 11-12.) The overwhelmingly positive response of the class strongly supports final approval of the Settlement. (*See, e.g., In re Lifelock, Inc.*

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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, the "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," and the court did not abuse its discretion in approving settlement].)

IV. <u>THE COURT SHOULD AWARD PLAINTIFFS THE REQUESTED AMOUNT OF FEES, COSTS AND THE ENHANCEMENT PAYMENT.</u>

Under the Settlement, subject to the Court's approval, Defendants have agreed to pay Class Counsel reasonable attorneys' fees in the amount of $212,500, which is 33 1/3% of the Gross Settlement Amount, costs up to $20,000 for litigating this Action, and enhancement awards of $10,000 to each Plaintiff. Defendants have also agreed that it would not oppose an application for these payments addressed above, and no class member has objected to these amounts.

In common fund cases like this one, the primary method California courts use for calculating attorney's fees is the percentage of the common fund method, which may be followed by a lodestar cross-check. In *Laffitte v. Robert Half Int'l Inc.* (2016) 1 Cal. 5th 480, the California Supreme Court affirmed an award of 33 1/3% of a $19 million wage-and-hour class action settlement with a 2.03 to 2.13 multiplier. (*Id.* at p. 506.) In doing so, the California Supreme Court explained:

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> As to the incentives a lodestar cross-check might create for class counsel, we emphasize the lodestar calculation, when used in this manner, ***does not override the trial court's primary determination of the fee as a percentage of the common fund*** and thus ***does not impose an absolute maximum or minimum on the potential fee award***. If the multiplier calculated by means of a lodestar cross-check is extraordinarily high or low, the trial court should consider whether the percentage used should be adjusted so as to bring the imputed multiplier within a justifiable range, but the court is not necessarily required to make such an adjustment. Courts using the percentage method have generally weighed the time counsel spent on the case as an important factor in choosing a reasonable percentage to apply.

(*Id.* at p. 505, emphasis added; *see also Beaver v. Tarsadia Hotels* (S.D. Cal. Sept. 28, 2017) 2017 WL 4310707, at *9 [applying *Laffitte* standard to fee request for 33 1/3% of common fund].)

A. <u>A Fee Award Based on One-Third of the Common Fund is Standard.</u>

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 at 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% was awarded involved "smaller" settlement funds of under $10 million].)

The settled-for 33 1/3% 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 requested herein.

B. <u>This Matter Involves A "Fee-Shifting" Provision of the Labor Code.</u>

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

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> [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.

(Cal. 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 Settlement Class Members' rights to recover statutory wages arising from Defendants' 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 Wage Commission to adopt mandatory meal and rest periods].)

This action also conferred a significant benefit on a large class of persons. Notice was sent to 574 Settlement Class Members, and no Settlement Class Member requested exclusion. (Polites Decl., ¶¶ 11, 15.) The Settlement provides a significant monetary benefit, in that it permits all persons who worked for Defendants during the applicable class period to obtain compensation for unpaid wages and missed meal and rest periods.

Finally, the necessity and financial burden of private enforcement render an award

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appropriate. Without the incentive of an attorneys' fee award, Plaintiffs 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."].)

C. <u>The Experience, Reputation and Ability of Class Counsel Support the Requested Fee Award.</u>

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 33 1/3% of the Gross Settlement Amount, a percentage considered within the norm in class action practice, is certainly justified here.

Class Counsel's experience in wage and hour class actions was integral in evaluating the strengths and weaknesses of the case against Defendants and 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.

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

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

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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.)

Class Counsel's lodestar is at least $169,325 based on at least 220 hours of work performed thus far. (Marquez Decl., ¶ 22.) Accordingly, the requested fee of $212,500 is reasonable and fair as it is based on an approximate multiplier of 1.25. To be sure, trial courts have substantial discretion in adjusting the lodestar to account for various factors. (*See Lealao v. Beneficial California, Inc.* (2000) 82 Cal.App.4th 19, 26, 39-45; *see also Serrano*, *supra,* 20 Cal.3d at p. 49.) In addition, it has been held that "[m]ultipliers can range from 2 to 4 or even higher." (*See Wershba*, 91 Cal.App.4th at p. 255; *see also Van Vranken*, *supra,* 901 F. Supp. At p. 298 ["[m]ultipliers in the 3-4 range are common in lodestar awards for lengthy and complex class action litigation."] Similar multipliers have been found to be reasonable for Class Counsel. (*See, e.g., Moreno v. Pretium Packaging, L.L.C.* (C.D. Cal. Aug. 6, 2021) No. 8:19-cv-02500-SB, 2021 WL 3673845, *3 [finding Wilshire Law Firm's multiplier of 2.57 reasonable "in light of the contingent nature of recovery, the complexity of the issues, and the result obtained"].)

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*

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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.

For example, Mr. Marquez' hourly rates were recently approved in *Suarez v. Bank of America, N.A.* (N.D. Cal. Jan. 11, 2024), No. 18-cv-01202-LB, 2024 WL150721. There, the court held that "[a]s for the lodestar cross-check, the billing rates are normal and customary for timekeepers with similar qualifications and experience in the relevant market." (*Id.* at p. *3.)

2. The Lawsuit Provided a Public Benefit.

Class Counsel's choice to litigate this matter provided a public benefit to approximately 574 California employees. 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.

3. Applying a Positive Multiplier Is Appropriate.

Once this lodestar figure has been determined, the Court may take into account other "enhancement" factors to adjust the lodestar award. While Plaintiffs seek a modest multiplier of 1.25 here, the overall reasonableness of Plaintiffs' request is underscored by the fact that a significantly higher multiplier would be justified under applicable law.

Contingency fees should be higher than fees for the same legal services paid concurrently with the provision of the services. (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1132-33.) "A lawyer who both bears the risk of not being paid and provides legal services is not receiving the fair market value of his work if he is paid only for the second of these functions. If he is paid no more, competent counsel will be reluctant to accept fee award cases." (*Id.* at p. 1133.) Application of that rule is particularly appropriate where the case is brought to redress important rights of vulnerable persons. (*Id.*) A risk enhancement is "earned compensation; unlike a windfall, it is neither unexpected nor fortuitous. Rather it is intended to approximate market-level compensation for such services which typically pay a premium for the risk of nonpayment or delay in payment of attorney's fees." (*Id*. at p. 1138.)

"Multipliers can range from 2 to 4 or even higher." (*Wershba*, *supra,* 91 Cal.App.4th at p. 255; *see also Sutter Health Uninsured Pricing Cases* (2009) 171 Cal. App. 4th 495, 512 [applying a 2.52 multiplier on a cross-check in an antitrust class action]; *Chavez, supra,* 162 Cal. App. 4th at p. 60 [applying a 2.5 multiplier on a lodestar cross-check]; *Vizcaino v. Microsoft Corp.* (9th Cir. 2002) 290 F.3d 1043, 1051 n.6 ["most" common fund cases apply a multiplier of 1.0-4.0]; *Been v. O.K. Industries Inc.* (E.D. Okla. 2011) 2011 WL 4478766, *11 [citing a study "reporting [an] average multiplier of 3.89 in survey of 1,120 class action cases" and finding that a multiplier of 2.43 would be "per se reasonable"].) The intermediate court in *Laffitte*, after finding that "2 to 4" is a reasonable range for multipliers on a cross-check, affirmed a 2.13 multiplier. (*Laffitte v. Robert Half Int'l* (2014) 231 Cal. App. 4th 860, 881-82.) The intermediate court opinion was affirmed in full by the California Supreme Court in its new decision guiding lower courts on assessing fees.

Factors considered in determining whether a lodestar multiplier is appropriate generally include: (1) the risks presented by the contingent nature of the case; (2) the novelty and difficulty of the questions involved and the skill requisite to perform the legal service properly; (3) the nature of the opposition; (4) the preclusion of other employment by the attorney due to acceptance of the case; and (5) the result obtained and the importance of the lawsuit to the public. (*Serrano, supra,* 20 Cal. 3d at pp. 48-49.) All of these factors favor approval of a multiplier along the lines of those approved in the cases above.

The major consideration in determining the necessity of a multiplier is the contingent nature of the award. (*Ketchum, supra,* 24 Cal.4th at pp. 1132-33.) Further, the possibility of no recovery is only one of the uncertainties involved in taking on such a case. Other uncertainties are the amount that will be recovered, uncertainty as to the cost, both in effort and expenses, and uncertainty about how much time will pass before the recovery is obtained. (*Id.* at pp. 1132-1133, 1138.) Here, Class Counsel have been the only counsel to represent Class Members in this matter and have borne the entire risk and costs of litigation purely on a contingency basis. Class Counsel's outlay of time and money in this case has been significant.

The other factors are also present here. Class Counsel are skilled attorneys who have had success in wage-and-hour class actions. This case required experienced and competent lawyers and expertise in the issues presented herein. Defendants' contentions underscore the risk of prevailing at class certification and trial, and any of these obstacles could have prevented recovery completely. Further, proceeding to trial would have added years to the resolution of this case because of the difficult legal and factual issues raised and the likelihood of appeals. Despite these risks, Class Counsel took this case on a contingency basis. Yet, there are only so many cases that Class Counsel can take at any one time. Consequently, there were other meritorious cases presented to Class Counsel that would have generated substantial fees, but were declined, during the pendency of this action in order to devote the attention necessary to achieve favorable results. (Marquez Decl., ¶ 28.) Considered against the risks of continued litigation, and the importance of the employment rights and a speedy recovery, the relief provided under the Settlement represents a very strong result for the Class.

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E. Costs Are Reasonable.

As of the date of filing this Motion, Class Counsel has incurred around $15,624.48 in costs, and they anticipate incurring at least $300 in combined additional costs up to the time the Court enters a judgment in this action and schedules a hearing on distribution. (Marquez Decl., ¶¶ 30.) Accordingly, Class Counsel respectfully requests reimbursement of up to $15,924.48 in costs. Notably, Defendant has agreed that it will not oppose any cost reimbursement request up to $20,000.00. The categories of costs are set forth in the accompanying Declaration of Justin Marquez, and these costs are easily seen to be both reasonable and necessary.

Counsel can recover "out-of-pocket expenses that 'would normally be charged to a fee paying client'" including costs for "service of summons and complaint, service of trial subpoenas, fee for defense expert at deposition, postage, investigator, copying costs, hotel bills, meals, messenger service and employment record reproduction." (*Harris v. Marhoefer* (9th Cir. 1994) 24 F.3d 16, 19.) Such costs are properly recoverable on motions for settlement approval. (*See Nunez v. BAE Sys. San Diego Ship Repair Inc.* (S.D. Cal. 2017) 292 F. Supp. 3d 1018, 1057; *Rutti v. Lojack Corp.* (C.D. Cal. July 31, 2012) No. CV 06–00350 DOC, 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."].)

F. <u>**The Enhancement Payment to the 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, supra,* 86 Cal.App.4th at p. 412.) 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.) The California Supreme Court has also 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.) Plaintiffs should therefore 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, Defendants agreed to pay Service Awards in the amount of $10,000 to each Plaintiff. This amount is also in exchange for Plaintiffs' general release of all their claims against Defendants. Plaintiffs have submitted declarations demonstrating her devotion to this case, including their efforts assisting counsel in the case, communicating with counsel frequently for litigation, preparing for mediation, and reviewing case-related documents. (*See, generally,* Declarations of Plaintiffs.)

When compared with the amounts awarded in typical class action cases, the amount requested here is particularly reasonable. Indeed, a <u>**2006**</u> study examining the average incentive award given to class action plaintiffs from <u>**1993 to 2002**</u> 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).)

"Since without a named plaintiff there can be no class action, such compensation as may

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be necessary to induce him to participate in the suit." (*Clark v. Am. Residential Services LLC* (2009) 175 Cal. App. 4th 785, 804.) "[T]he rationale for making enhancement or incentive awards to named plaintiffs is that they should be compensated for the expense or risk they have incurred in conferring a benefit on other members of the class." (Id. at 806.) "An incentive award is appropriate 'if it is necessary to induce an individual to participate in the suit."' (*Cellphone Term. Fee Cases* (2010) 186 Cal. App. 4th 1380, 1394, quoting *Clark*, *supra*, 175 Cal. App. 4th at 804.) The "criteria courts may consider in determining whether to make an incentive award include: (1) the risk to the class representative in commencing suit, both financial and otherwise; (2) the notoriety and personal difficulties encountered by the class representative; (3) the amount of time and effort spent by the class representative; (4) the duration of the litigation; and (5) the personal benefit (or lack thereof) enjoyed by the class representative as a result of the litigation." (*Id.* at pp. 1394–95.)

Here, Plaintiffs have the right to move the Court for incentive awards of up to $10,000 each in light of their risk in pursuing this case, time and effort devoted to this case, and the benefit received for the other class members.

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G. <u>Administration Expenses Should be Approved.</u>

ILYM Group, Inc., the Settlement Administrator, estimates that it will incur a total of $14,770 in costs associated with the administration of this Settlement. (Polites Decl., ¶ 19.) These expenses are reasonable, based upon the size of the class, claim and exclusion 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: April 9, 2024

Respectfully submitted,

WILSHIRE LAW FIRM, PLC

By: ______________________

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Benjamin H. Haber
Daniel J. Kramer

Attorneys for Plaintiffs

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PROOF OF SERVICE

Hayes, et al. v. Gonzales Park, LLC, et al.
21CV02456

STATE OF CALIFORNIA)
) ss
COUNTY OF LOS ANGELES)

I, Jorge Grimaldy, 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 jgrimaldy@wilshirelawfirm.com.

On April 9, 2024, 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:

Nathan W. Austin (SBN 219672)
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Attorneys for Defendant

(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 April 9, 2024, at Los Angeles, California.

Jorge Grimaldy

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