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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF RIVERSIDE

WAYNE DOUGLAS GILLETTE, on
behalf of himself and all similarly situated,

Plaintiff,

v.

COPAN DIAGNOSTICS, INC.; and DOES 1-
100, inclusive,

Defendants.

Case No.: CVRI-2105284

CLASS and REPRESENTATIVE ACTION

**PLAINTIFF'S NOTICE OF MOTION AND
MOTION FOR PRELIMINARY
APPROVAL OF CLASS SETTLEMENT and
CONDITIONAL CERTIFICATION FOR
SETTLEMENT PURPOSES ONLY;**

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF MOTION;**

**DECLARATION OF MATTHEW S.
DA VEGA IN SUPPORT OF MOTION;**

**DECLARATION OF WAYNE DOUGLAS
GILETTE IN SUPPORT OF MOTION;**

[PROPOSED] ORDER with COVER SHEET

Assigned For All Purposes to the Honorable
Harold Hopp (Dept. 10)

Date: March 22, 2023

Time: 8:30 a.m..

Location: Dept. 10 (Hon. Harold Hopp)

Reservation ID#: 020396507092

1 **TO THIS HONORABLE COURT, ALL INTERESTED PARTIES, and THEIR**
2 **ATTORNEYS OF RECORD PLEASE TAKE NOTICE** that on March 22, 2023 at 8:30 a.m.,
3 or as soon as the matter may be heard, in Department 10 (Hon. Harold Hopp) of the above entitled
4 Court located at Riverside County Superior Court - Historic Courthouse, 4050 Main Street,
5 Riverside, CA 92501, Plaintiff Wayne Gillette (“Plaintiff”) pursuant to California Code of Civil
6 Procedure §382 and California Rules of Court, rule 3.769, *et seq.*, will and does move this Court
7 for an Order granting preliminary approval of the proposed class action and PAGA settlement on
8 the terms and conditions set forth in the Joint Stipulation of Class Action Settlement Agreement
9 and Release (“Settlement Agreement”), a copy of which is attached as **Exhibit 1: Settlement**
10 **Agreement** to the Declaration of Matthew S. Da Vega in Support of Motion (“Da Vega Decl.”).
11 Plaintiff further moves the Court for an Order:

- 12 1. Approving the Stipulation and [Proposed] Order Granting Plaintiff Leave to File a
13 Second Amended Complaint (SAC) (simultaneously filed and served with this
14 Motion), and also attached to the Settlement Agreement (Exhibit 1) as **Exhibit A:**
15 **Second Amended Complaint**, for settlement purposes only;
- 16 2. Preliminarily approving the Settlement in a form similar to Preliminary Approval
17 Order attached to the Settlement Agreement as **Exhibit G: Preliminary**
18 **Approval Order**;
- 19 3. Certifying the proposed Class, for settlement purposes only;
- 20 4. Appointing Plaintiff as “Class Representative”, for settlement purposes only;
- 21 5. Appointing Plaintiff’s Counsel Da Vega Fisher Mechtenberg LLP as Class
22 Counsel, for settlement purposes only;
- 23 6. Approving the proposed Class Notice which is attached to the Settlement
24 Agreement as **Exhibit C: Notice of Class Action Settlement**;
- 25 7. Approving the proposed Workweek Dispute Form (to be sent with the Class
26 Notice) attached to the Settlement Agreement as **Exhibit D: Workweek**
27 **Dispute Form**;

8. Approving the proposed Request for Exclusion Form (to be sent with the Class Notice) attached to the Settlement Agreement as **Exhibit E: Request for Exclusion Form;**
9. Approving the proposed Objection Form (to be sent with the Class Notice) attached to the Settlement Agreement as **Exhibit F: Objection Form;**
10. Approving the method and manner for providing notice and forms to the Class, as well as procedure/forms for requesting exclusion/opting out, making objections, and disputing the number of Class Member's workweeks, as set forth in the Settlement Agreement;
11. Approving the schedule for sending of notices and forms to the Class per the Settlement Agreement;
12. Setting a date and time for Final Approval / Fairness Hearing as soon as possible to consider Final Approval of the Settlement;

Plaintiff seeks class certification of the following class, for settlement purposes only:

The "Class" is defined as:

"All current and former Field Service Engineer employees who physically performed work for Defendants in and outside the state of California from November 19, 2017 until the entry of judgment"

"Class Period" refers to the period of time from November 19, 2017 through the date the Court grants preliminary approval of the Settlement."

This Motion will be made on the grounds that the Parties have reached a settlement subject to approval by this Court, which the Parties believe provides fair, just, and reasonable compensation to the class of Field Service Engineer ("FSE") employees who Plaintiff alleges were misclassified as exempt employees, were not paid for all overtime hours worked, were not paid minimum wage, were not furnished timely/accurate wage statements, and were not paid full wages upon separation/termination, were not provide duty-free meal/rest periods, were not reimbursed necessary business expenses, all in violation of California Labor Codes, California Unfair Business Act, the Private Attorney General Act ("PAGA") and the FLSA. Plaintiff

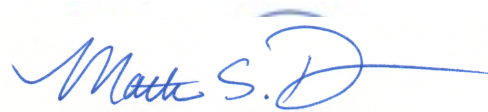
1 desires to give notice of the proposed settlement to the Class Members and hold a hearing as to
2 whether the settlement should be finally approved. The Parties have met and conferred regarding
3 this Motion for the Preliminary Approval of Class Settlement and request the Court to approve it.

4 This Motion is based on the following Memorandum of Points and Authorities in Support
5 of Motion for Preliminary Approval of the Class Settlement, the Declaration of Matthew S.
6 Da Vega in Support of Motion, the Declaration of the Class Representative in Support of the
7 Motion, and all other records and papers on file in this action. Pursuant to Labor Code §
8 2699(1)(2), and the instructions provided by the Department of Industrial Relations on its
9 website, a PDF copy of this motion and the supporting papers will be sent/uploaded
10 electronically to LWDA's website at the time it is filed and served. (See Da Vega Decl., **Exhibit**
11 **2: PAGA Submissions**).

12
13 Dated: February 28, 2023

DAVEGA | FISHER | MECHTENBERG LLP

14
15
16 By: _____



Matthew S. Da Vega
Attorneys for Plaintiff

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	BACKGROUND	3
III.	PROCEDURAL HISTORY	3
IV.	CASE INVESTIGATION, DISCOVERY, NEGOTIATIONS, AND MEDIATION... ..	5
A.	The Parties' Dispute of the Merits of the Case	5
B.	Document and Data Discovery and Expert Analysis	6
C.	Mediation and Settlement	7
V.	CLASS REPRESENTATIVE'S SERVICES TO THE CLASS	7
VI.	KEY TERMS OF THE SETTLEMENT	8
A.	Definition of the Class	8
B.	\$400,000 Gross Settlement Amount.....	8
C.	Released Claims	9
D.	Attorneys' Fees and Incurred Expenses	10
E.	PAGA Penalty Amount, LWDA Payment, and Settlement Administrator	11
F.	Class Representative Enhancement Payment	11
VII.	THE SETTLEMENT IS FAIR, REASONABLE, AND ADEQUATE AND SHOULD BE PRELIMINARILY APPROVED	12
A.	The Settlement Is the Product of Non-Collusive, Arm's-length, and Well-Informed Negotiations	13
B.	The Settlement Agreement Provides Reasonable Compensation for Class Members' Damages in Light of Significant Litigation Risks	14
C.	The Class Settlement Payment Process is Fair and Reasonable	17
D.	The Settlement of Penalties Under the Labor Code Private Attorney General Act of 2004 (PAGA) is Reasonable	18
E.	The Settlement's Provision for Attorneys' Fees, Expenses, and Costs is Reasonable, Fair, and Appropriate Under the Circumstances	18
F.	Class Representative Enhancement Payments Are Reasonable and Routinely Awarded	19
G.	CPT Group Should Be Appointed as the Settlement Administrator	20

VIII. THE COURT SHOULD CONDITIONALLY CERTIFY A PROVISIONAL SETTLEMENT CLASS	21
IX. THE COURT SHOULD APPROVE THE PROPOSED CLASS NOTICE	23
X. A FINAL APPROVAL/FAIRNESS HEARING SHOULD BE SCHEDULED.....	25
XI. CONCLUSION	25

TABLE OF AUTHORITIES

CASES

Federal Cases

<i>Bibo v. Fed. Exp., Inc.</i> (N.D. Cal. Apr. 21, 2009) 2009 WL 1068880	23
<i>Collins v. Cargill Meat Solutions Corp.</i> (E.D. Cal. 2011) 274 F.R.D. 294	17
<i>City of Detroit v. Grinnell Corp.</i> (1974) 495 F.2d 488	16
<i>Chu v. Wells Fargo Investments, LLC</i> (N.D. Cal. Feb. 16, 2011) 2011 WL 672645	15
<i>Cotter v. Lyft, Inc.</i> (N.D. Cal. 2016) 193 F.Supp.3d 1030	18
<i>Deaver v. Compass Bank</i> (N.D. Cal. Dec. 11, 2015) 2015 WL 8526982	15
<i>Franco v. Ruiz Food Prod., Inc.</i> (E.D. Cal. Nov. 27, 2012) 2012 WL 5941801.....	18
<i>Gardner v. GC Servs., LP</i> (S.D. Cal. Apr. 2, 2012) 2012 WL 1119534	17
<i>Harris v. Vector Mktg. Corp.</i> (N.D. Cal. Apr. 29, 2011) No. C-08-5198 EMC, 2011 WL 1627973	13
<i>In re Wells Fargo Loan Processor Overtime Pay Litig.</i> (N.D. Cal. Aug. 2, 2011) 2011 WL 3352460	16
<i>In re High-Tech Employee Antitrust Litig.</i> (N.D. Cal. Sept. 2, 2015) No. 11-CV-02509-LHK, 2015 WL 5158730	20
<i>Linney v. Cellular Alaska P'ship</i> (9th Cir. 1998) 151 F.3d 1234, 1239	14
<i>McNeal v. RCM Techs. USA Inc.</i> (C.D. Cal. Mar. 16, 2017) 2017 WL 1807595	21
<i>Nat'l Rural Telecommunications Coop. v. DIRECTV, Inc.</i> (C.D. Cal. 2004) 221 F.R.D. 523	16
<i>Nelson v. Avon Prod., Inc.</i> (N.D. Cal. Feb. 24, 2017) 2017 WL 733145	18
<i>Officers for Justice v. Civil Serv., Commission</i> (9th Cir. 1982) 688 F.2d 615	16
<i>Ogbuehi v. Comcast of California/Colorado/Florida/Oregon, Inc.</i> (E.D. Cal. June 9, 2015) 2015 WL 3622999	17
<i>Singer v. Becton Dickinson & Co.</i> (S.D. Cal. June 1, 2010) 2010 WL 2196104	20
<i>Smith v. CRST Van Expedited, Inc.</i> (S.D. Cal. Jan. 14, 2013) 2013 WL 163293	19
<i>Taylor v. Shippers Transp. Express, Inc.</i> (C.D. Cal. May 14, 2015) 2015 WL 12658458.....	18
<i>Thieriot v. Celtic Inc. Co.</i> (N.D. Cal. Apr. 21, 2011) 2011 WL 1522385	19, 20

1	<i>Van Bronkhorst v. Safeco Corp.</i> (9th Cir. 1976) 529 F.2d 943	12
2	<i>Wren v. RGIS Inventory Specialists</i> (N.D. Cal. Apr. 1, 2011) 2011 WL 1230826.....	15
3	<u>State Cases</u>	
4	<i>7-Eleven Owners for Fair Franchising v. Southland Corp.</i> (2000) 85 Cal.App.4th 1135	13
5	<i>Brinker Rest. Corp. v. Superior Court</i> (2012) 53 Cal.4th 1004.....	22
6	<i>Capitol People First v. Dep't of Developmental Servs.</i> (2007) 155 Cal.App.4th 676	23
7	<i>Cartt v. Superior Court</i> (1975) 50 Cal.App.3d 960	23
8	<i>Citizens of Humanity, LLC v. Ramirez</i> (2021) 63 Cal.App.5th 117	22
9	<i>Dunk v. Ford Motor Co.</i> (1996) 48 Cal.App.4th 1794	12, 13
10	<i>Hasty v. Elec. Arts, Inc.</i> (San Mateo Cty. Super. Ct., Sept. 22, 2006) No. CIV 444821	20
11	<i>In re Cellphone Fee Termination Cases</i> (2010) 186 Cal.App.4th 1380	19
12	<i>In re Consumer Privacy Cases</i> (2009) 175 Cal.App.4th 545	19
13	<i>Johnson v. GlaxoSmithKline, Inc.</i> (2008) 166 Cal.App.4th 1497.....	22
14	<i>Laffitte v. Robert Half Int'l Inc.</i> (2016) 1 Cal.5th 480	18
15	<i>Linder v. Thrifty Oil Co.</i> (2000) 23 Cal.4th 429	21, 23
16	<i>McGhee v. Bank of America</i> (1976) 60 Cal.App.3d 442	23
17	<i>Meewes v. ICI Dulux Paints</i> (Los Angeles Cty. Super. Ct. Sept. 19, 2003) No. BC265880.....	20
18	<i>Potter v. Pacific Coast Lumber Co.</i> (1951) 37 Cal. 2d 592.....	12
19	<i>Rebney v. Wells Fargo Bank</i> , (1990) 220 Cal.App.3d 1117	16
20	<i>Wershba v. Apple Computer, Inc.</i> (2001) 91 Cal.App.4th 224	13, 14, 16, 22, 24
21	<i>Williams v. Superior Court</i> (2013) 221 Cal.App.4th 1353	22
22	STATUTES	
23	<u>State Statutes</u>	
24	California Code of Civil Procedure §382	ii
25	California Labor Code § 2699 (i)	4, 18
26	California Labor Code § 2699.3	4
27	California Private Attorney General Act of 2004..	ii, iii, 1, 4, 5, 7, 8, 9, 11, 14, 18, 21, 24
28		

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RULES

Cal. Rules of Court, rule 3.764(e) 21

Cal. Rules of Court, rule 3.766 (d) 24

Cal. Rules of Court, rule 3.769 (d) 21

Cal. Rules of Court, rule 3.769 (f)(g)ii, 2, 12, 20, 24, 25

SECONDARY SOURCES

Manual for Complex Litigation § 21.63 (4th ed. 2004)..... 2

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

On behalf of himself and similarly situated individuals, Plaintiff Wayne Gillette (“Plaintiff” or “Class Representative”) respectfully moves for preliminary approval of a **\$400,000 (Four Hundred Thousand Dollars)** settlement of the class and PAGA claims asserted in this lawsuit against Defendant Copan Diagnostics, Inc. (“Defendant” or “Copan”) or together with the Plaintiff, the “Parties”. The Parties to the Lawsuit vigorously disagree on the merits of the case. Class certification, liability and damages are all sharply disputed. Nevertheless, after litigation, investigation, numerous interviews, exchange of extensive information, data, documents, and a mediation before a neutral, professional mediator skilled in California employment laws, the Parties reached an informed agreement to settle the class and PAGA claims pursuant to the Joint Stipulation of Class Action Settlement and Release (“Settlement Agreement”) (See Da Vega Decl., **Exhibit 1: Settlement Agreement**).

The Parties’ investigations and interchange of information enabled them to conduct meaningful and prolonged negotiations, with a keen eye towards the strengths and weaknesses of their positions and the value of the claims. In particular, the Parties exchanged data (i.e. documents and spreadsheets of all alleged Class Members employment data during the damages period) and Plaintiff completed expert analyses of the data (i.e. estimates of potential damages for various claims if proven), which informed their views of the case, and ultimately helped set the parameters for settlement talks. All negotiations were conducted at arm’s-length and were facilitated by a highly experienced class action and employment mediator, Michael Loeb of JAMS (<https://www.jamsadr.com/loeb/>) on August 2, 2022.

At mediation the Parties agreed to basic terms of a potential resolution of claims codified in a Confidential Memorandum of Understanding (“MOU”) and eventually the Settlement Agreement. The Settlement represents a good value for the Class and provides an estimated average gross settlement payment of approximately **\$9,020 (pre-tax) to each of the 25 Class Member**. The fact that the Parties were able to reach a favorable settlement without additional years of risky and costly litigation presents substantial benefits to the Class Members and

1 promotes judicial economy. As detailed in these papers, the Parties believe the Settlement is the
2 best possible outcome of this matter, especially given the substantial risks and delays associated
3 with litigation.

4 Therefore, Pursuant to California Rules of Court, Rule § 3.769, Plaintiff now seeks, and
5 Defendant do not oppose, preliminary approval of the settlement. See Manual for Complex
6 Litigation (“MCL”) § 21.63 (4th ed. 2004). In order to effectuate the settlement and the
7 resolution of this action, Plaintiff respectfully moves the Court for an Order:

- 8 1. Approving the Stipulation and [Proposed] Order Granting Plaintiff Leave to File a
9 Second Amended Complaint (SAC) (simultaneously filed and served with this
10 Motion), and also attached to the Settlement Agreement (Exhibit 1) as **Exhibit A:
11 Second Amended Complaint**, for settlement purposes only;
- 12 2. Preliminarily approving the Settlement in a form similar to Preliminary Approval
13 Order attached to the Settlement Agreement as **Exhibit G: Preliminary Approval
14 Order**;
- 15 3. Certifying the proposed Class, for settlement purposes only;
- 16 4. Appointing Plaintiff as “Class Representative”, for settlement purposes only;
- 17 5. Appointing Plaintiff’s Counsel Da Vega Fisher Mechtenberg LLP as Class
18 Counsel, for settlement purposes only;
- 19 6. Approving the proposed Class Notice attached to the Settlement Agreement as
20 **Exhibit C: Notice of Class Action Settlement**;
- 21 7. Approving the proposed Workweek Dispute Form (to be sent with the Class
22 Notice) attached to the Settlement Agreement as **Exhibit D: Workweek Dispute
23 Form**;
- 24 8. Approving the proposed Request for Exclusion Form (to be sent with the Class
25 Notice) attached to the Settlement Agreement as **Exhibit E: Request for
26 Exclusion Form**;
- 27 9. Approving the proposed Objection Form (to be sent with the Class Notice) attached
28 to the Settlement Agreement as **Exhibit F: Objection Form**;

- 1 10. Approving the method and manner for providing notice and forms to the Class, as
- 2 well as procedure/forms for requesting exclusion/opting out, making objections,
- 3 and disputing the number of Class Member's workweeks, as set forth in the
- 4 Settlement Agreement;
- 5 11. Approving the schedule for sending of notices to the Class per the Settlement
- 6 Agreement;
- 7 12. Setting a date and time for the Final Approval/Fairness Hearing as soon as possible
- 8 to consider Final Approval of the Settlement.

9 **II. BACKGROUND**

10 Plaintiff and Class Members are current and former Field Service Engineers ("FSEs") in

11 the Field Service Department of Defendant Copan Diagnostics which is headquartered in

12 Murrieta, CA (Riverside County). Plaintiff alleges that he and other FSEs were misclassified as

13 exempt from overtime/salaried employees by Defendant and not paid overtime wages for

14 overtime hours worked while performing work both in and outside California. Plaintiff alleges

15 Class Members worked for Defendant Copan by traveling to/from various client's facilities,

16 including in/at physical locations in California, to repair Defendant's diagnostic equipment.

17 Despite being given the misleading job title of "Field Service Engineer" the Class Members

18 are/were not engineers and their job duties/work is/was largely manual labor (working with their

19 hands and tools) related to the inspections and repairs of Copan's diagnostic equipment

20 (automated microbiology equipment). Plaintiff further alleges that Defendant failed to pay

21 minimum wage, failed to keep and provide accurate and timely records of wages earned and

22 other legally mandated records, and failed to pay Plaintiff and Class Members whose

23 employment has terminated (voluntarily resigned and/or were terminated) a final payment of his

24 or her wages in a prompt and timely manner in conformity with California Labor Codes.

25 **III. PROCEDURAL HISTORY**

26 **November 19, 2021 (Original Complaint Filed and PAGA Notice Sent):** Plaintiff filed

27 his original complaint and provided written PAGA notice (California Labor Code §§ 2699 *et*

28 *seq.*) via online submission and certified mail to the Labor and Workforce Development Agency

1 ("LWDA") and to Defendant (LWDA Case No.: LWDA-CM-852456-21). It included the
2 specific provisions of the Labor Code alleged to have been violated, and the facts and theories to
3 support the alleged violations, pursuant to Labor Code §2699.3.

4 Plaintiff's complaint alleged 5 causes of action, including:

- 5 1. Failure to Pay Overtime Wages,
- 6 2. Failure to Pay Minimum Wage,
- 7 3. Failure to Furnish Timely/Accurate Wage Statements,
4. Failure to Pay All Wages Due at Discharge in Timely Manner,
5. Unlawful Business Practices.

8 **The Putative Class Definition:** Plaintiff originally defined the class as:

9 *"All current and former Field Service Engineer employees who physically*
10 *performed work for Defendants in the state of California from November*
11 *19, 2017 until the entry of judgment."*

12 Plaintiff is a member of the proposed class and representative of other Field Service
13 Engineer employees and is acting on behalf of their interests. Plaintiff believes the class includes,
14 but is not limited to, both Field Service Engineer employees who have been misclassified as
15 exempt (collectively "Field Service Engineers"), as well as employees with other related job
16 titles.

17 **December 20, 2021 (Defendant Served with Original Class Complaint):** Defendant
18 Copan served with complaint.

19 **January 24, 2022 (First Amended Complaint [FAC] with PAGA cause of action filed
20 and served):** Plaintiff's FAC filed and served later in February 2022.

21 **March 9, 2022 (Parties Agree to Class-wide Mediation):** The Parties agreed to mediate
22 the matter on class basis. Defendant agreed to produce data related to the putative class for the
23 purposes of mediation.

24 **March 29-30, 2022 (Defendant filed/served answer to FAC):** Defendant's answer was
25 filed/served.

26 **April 12, 2022 (The Parties Agreed to use Mediator Michael Loeb):** The parties
27 discussed potential mediators. The parties eventually agreed upon using JAMS mediator Michael
28 Loeb and the date for mediation as August 2, 2022.

1 **August 2, 2022 (Date of Mediation Proceedings):** The Parties participated in an all-day
2 mediation with JAMS Mediator Michael Loeb. At the mediation the Parties reached a tentative
3 settlement of the class and PAGA claims pending this Court’s approval. The Parties executed a
4 confidential Memorandum of Understanding (MOU) regarding settlement. The Parties then
5 executed the long form settlement in the form of a Joint Stipulation of Class Action Settlement
6 and Release (see Da Vega Decl., Exhibit 1: Settlement Agreement). As part of the settlement
7 discussions and eventual settlement agreement/release the Parties agreed to include additional
8 California based labor code claims and a Fair Labor Standards Act (FLSA) claim (and thus why
9 those claims have been included in the simultaneously filed Stipulation and Proposed Order to
10 file Second Amended Complaint for settlement purposes) to meet the requirements of *Amaro v.*
11 *Anaheim Arena Management, LLC* (2021) 69 Cal.App.5th 521, so as to “ensure that class
12 releases do not extend to claims that are beyond the scope of the allegations in the complaint”.
13 The settling plaintiff may release FLSA claims arising from the same facts even though the
14 settlement adopts California’s “opt-out” class procedure rather than the FLSA’s “opt-in”
15 procedure. The FLSA’s procedure governs who can be a Plaintiff not the scope of a permissible
16 release. *Amaro* at 539-540.

17 **January 1, 2023 (FSEs reclassified by Defendant as Non-Exempt/Hourly Employees):**
18 Defendant Copan Diagnostics reclassified FSE employees as non-exempt from overtime wages.

19 **IV. CASE INVESTIGATION, DISCOVERY, NEGOTIATIONS and MEDIATION**

20 The Parties vigorously investigated and debated the claims asserted against Defendant.
21 Plaintiff’s Counsel began their investigation into the claims long before the case was filed.
22 Plaintiff’s Counsel interviewed and obtained discovery/documents from various current and
23 former FSE employees regarding their experiences working for Defendant. (Da Vega Decl. ¶16.)
24 After the Lawsuit was initiated, the Parties’ Counsel engaged in informal discovery/data
25 production, discussions and negotiations before reaching this Settlement. (*Id.*) Early in the
26 litigation process the Parties’ Counsel began having regular discussions regarding the claims,
27 discovery, production of data, and the possibility of a mediation and settlement. (*Id.*)

28 **A. The Parties’ Dispute of the Merits of the Case.**

1 Throughout the litigation, Defendant have denied Plaintiff's allegations, and further have
2 denied the case is appropriate for class certification. (Da Vega Decl. ¶17.) Further, in addition to
3 generally denying the allegations, Defendant have contended that the Field Service Engineers
4 ("FSEs") are/were exempt employees and not misclassified, that Defendant paid these FSEs
5 correctly for all hours worked, provided compliant wage statements, and paid them correctly upon
6 separation. On the other hand, Plaintiff alleges that the FSEs were misclassified as exempt
7 employees and as FSE employees were subject to the same policy and practice promulgated by
8 Defendant throughout the Class Period. (*Id.*) Plaintiff alleges they were misclassified as exempt
9 employees and not paid for overtime hours worked. As part of the investigation into the claims,
10 Class Counsel interviewed current and former FSE employees and reviewed various documents
11 and handbooks related to FSE employees work for Defendant. (*Id.*) This investigation was crucial
12 to the Parties' dispute over both the merits of the case, as well as with respect to the appropriate
13 scope of the Class. (*Id.*)

14 **B. Document and Data Discovery and Expert Analysis**

15 Plaintiff and Defendant informally exchanged extensive documents and multiple data
16 points for the class (i.e. data for all class members of class period including job titles, wages
17 (salaries and bonuses), wage rates, weeks/shifts worked, start/end dates, hours worked in and
18 outside California, etc.) which at the time of filing includes approximately **25 Class Members**.
19 (Da Vega Decl. ¶18.) Plaintiff retained experts Desmond, Marcello & Amster - Valuation and
20 Litigation Consultants (www.dmavalue.com) ("Plaintiff's Expert"), to examine the data for
21 mediation. (*Id.*) Based on analysis of the data, Plaintiff made various assessments of the data,
22 unpaid overtime hours/wages, correct pay rates, minimum wage violations, interest, penalties,
23 FLSA unpaid overtime wages, and calculated the potential damages. (*Id.*) Further, Plaintiff's
24 Counsel provided Defendant with Plaintiff's position as to those calculation of damages at
25 mediation. (*Id.*) Those expert calculations estimate Defendant's potential liability for alleged:

- 26 (1) California (CA) unpaid overtime wages at \$504,650;
27 (2) CA Interest on those unpaid overtime wages at \$101,826;
28 (3) CA Waiting time Penalties at \$73,360;

1 (4) CA Wage Statement Violation Penalties at \$15,550;

2 (5) CA Minimum Wage Violation Penalties at \$38,550,

3 (6) FLSA unpaid overtime wages at \$454,927

4 **Total Liability = \$1,190,864 (of which \$129,460 is CA penalties)**

5 The 25 putative Class Members worked approximately 9,280 shifts. If you take the
6 Estimated Net Settlement Amount of approximately \$225,500 divided by 9,280 shifts it equals
7 approximately \$24.29 of unpaid wages per shift. Further, the minimum shift(s) work by any Class
8 Members was 40 shifts, while the maximum worked by any Class Member was 1,130 shifts. The
9 overall average was approximately 371.2 shifts per Class Member. (Da Vega Decl. ¶18.)

10 **C. Mediation and Settlement**

11 On August 2, 2022 the Parties engaged in a full day of mediation with the experienced
12 JAMS employment and class action mediator Michael Loeb. (Da Vega Decl. ¶19.) After
13 exchanging data, documents, and other evidence the Parties met for a full-day mediation via Zoom
14 video conference with Plaintiff's counsel in-person with Plaintiff Gillette. The mediation was
15 attended by Plaintiff's Counsel and the class representative, Wayne Gillette, Defense counsel, and
16 Defendant's representative(s). The Parties ultimately executed a confidential memorandum of
17 understanding ("MOU") after the mediation, which included a term to settle the class and PAGA
18 claims for the Gross Settlement Amount of **\$400,000 (Four Hundred Thousand Dollars)**,
19 subject to Court approval. (*Id.*) The Parties then later finalized the terms of the settlement in a
20 long form Joint Stipulation of Class Action Settlement and Release (aka the "Settlement
21 Agreement"). (*Id.*)

22 **V. CLASS REPRESENTATIVE'S SERVICE TO THE CLASS**

23 Plaintiff Wayne Gillette was the driving force behind this class action. (Da Vega Decl., ¶
24 20.) Plaintiff played a critical role in retaining Matthew Da Vega and Matthew Fisher of
25 Da Vega Fisher Mechtenberg LLP and providing information regarding his legal claims to make
26 them successful. (*Id.*) Plaintiff has experience as a Field Service Engineer ("FSE") employee and
27 knew other putative class members that in turn provided additional information in support of the
28 legal claims. With their help Plaintiff's counsel was able to gather additional evidence, and

1 contact additional putative class members. (*Id.*) Together, the Plaintiff worked dozens of hours to
2 help Plaintiff's counsel, sacrificing his personal time and reputation to make the case successful.

3 In fact Plaintiff's counsel spoke to other witnesses who were afraid to participate in
4 litigation for fear that it might result in damage to their careers. (Da Vega Decl., ¶ 21.) Plaintiff
5 and witnesses feared that by initiating or participating a class action lawsuit might risk their future
6 job opportunities. Despite this Plaintiff stepped up and worked diligently in support of the case.
7 (*Id.*) Plaintiff has had numerous meetings and telephone conversations with Class Counsel to aid
8 in the initial investigation, factual development, mediation, and resolution of this case. (*Id.*) He
9 also reached out to and communicated with other FSE employees about their work for Defendant,
10 and encouraged by Plaintiff, other FSE employees contacted Class Counsel to provide information
11 about their time at Defendant. (*Id.*) In sum, the Settlement could never have been achieved
12 without Plaintiff's service on behalf of the Class. (*Id.*)

13 **VI. KEY TERMS OF THE SETTLEMENT**

14 The Settlement provides for a significant settlement payment to each Class Member. In
15 exchange, Class Members will release claims, which were asserted or could have been asserted in
16 the Lawsuit based on the facts alleged in support of the class and PAGA claims.

17 **A. Definition of the Class**

18 Under the Settlement Agreement, the "Class" is defined as follows:

19 The "Class":

20 "All current and former Field Service Engineer employees who physically performed
21 work for Defendant in the State of California from November 19, 2017, until the entry of
22 judgment." "Class Member(s)" refers to a member(s) of the Class." (Settlement
Agreement §1.1)

23 "Class Period" refers to the period of time from November 19, 2017 through the date the
Court grants preliminary approval of the Settlement. (Settlement Agreement §1.7)

24 "Settlement Class Members" is defined to mean those Class Members who have not
25 "opted out" of the Class Settlement by submitting a timely and valid Request for
Exclusion. (Settlement Agreement §1.35)

26 **B. \$400,000 Gross Settlement Amount**

27 The Settlement provides for Defendant to make a maximum payment of **\$400,000 (Four**
28 **Hundred Thousand Dollars)** in settlement of all class and PAGA claims in the case, including

1 the Class Counsel Award, all Settlement Administration Costs, the PAGA Penalty Amount, all
2 settlement payments to Settlement Class Members, and the Class Representative Enhancement
3 Payment. (the “Gross Settlement Amount”) (Settlement Agreement §§1.16.; 2.1.)

4 The “Individual Settlement Amount Calculations” payment to the Class Members will be
5 based on the approximate number of Workweeks each Settlement Class Member worked during
6 the Class Period. The Settlement Administrator will determine the total number of Workweeks
7 worked by all Class Members during the Class Period and then divide that Net Settlement Fund by
8 the number of Total Workweeks to derive the “Workweek Value”. Then for each Settlement
9 Class Member the Settlement Administrator shall multiply the number of their Workweeks
10 worked during the Class Period by the Workweek Value to determine each Settlement Class
11 Members Individual Settlement Amount. The Individual Settlement Amount(s) will be allocated
12 for tax purposes as follows: Thirty-Three (33%) of each Individual Settlement Payment will be
13 allocated as wages; Thirty-Three (33%) will be allocated interest, and Thirty-Four (34%) as
14 penalties. The portion allocated to wages will be reported on an IRS Form W-2 and the portions
15 allocated to non-wages (interest and penalties) will be reported on an IRS Form 1099 by the
16 Settlement Administrator. (Settlement Agreement § 7.1)

17 The portion of the Net Settlement Amount allocated to the Class shall be all-in and
18 settlement checks will be sent to all Settlement Class Members. Any settlement checks not cashed
19 after 120 days from the date of the class-wide distribution shall be void, and the Settlement
20 Administrator shall, as soon as practicable, redistribute such remaining funds pro-rata to
21 Settlement Class Members who have cashed their original checks sent during the initial
22 distribution in a second distribution. If after the second distribution there remains any uncashed
23 monies the Settlement Administrator will send it to the California State Controller’s Unclaimed
24 Property Division in accordance with California Unclaimed Property Laws. (Settlement
25 Agreement §7.4)

26 **C. Released Claims**

27 *Released Claims:* Under the terms of the Settlement Agreement, upon Final Approval by
28 the Court, and subject to Defendant's deposit of the Gross Settlement with the Settlement

1 Administrator, Plaintiff and each Settlement Class Member shall be bound by the Settlement, and,
2 at the same time, will have released the Released Parties from the Released Claims. The
3 “Released Claims” with respect to the “Released Parties” (defined below) are, “all known and
4 unknown claims losses, damages, liquidated damages, penalties, interest, liabilities, causes of
5 action, civil complaints, arbitration demands or suits which arise from the facts asserted in the
6 Action, including, without limited to the foregoing, all claims under the Fair Labor Standards Act
7 (FLSA) for all worked performed inside and/or outside of California by any Class Members, the
8 California Labor Code as alleged in the Action, including violations for meal periods, rest breaks,
9 unpaid overtime and minimum wages, timely payment of wages, wage statements, waiting time
10 penalties, unreimbursed necessary business expenses, penalties under the Private Attorneys
11 General Act sections 2698, et seq., and violations of California Unfair Competition Law (Cal.
12 Bus. & Prof. Code §§ 17200, et seq.), the laws of the principal places of work (“Home States”) of
13 the Class Members, or other remuneration whether sought under statute, tort, contract or as an
14 unfair business practice, released by Plaintiff and each of the Settlement Class Members, on
15 behalf of themselves and each of their heirs, representatives, successors, assigns and attorneys,
16 which shall be fully, finally and forever released, relinquished and discharged. (“Released
17 Claims.”)” (Settlement Agreement §1.30)

18 *Released Parties:* The term “Released Parties” means, “Copan and any parents,
19 subsidiaries, and affiliates thereof, including, without limitation, Copan Italia S.p.A., a company
20 organized under the laws of Italy, and, with respect to each of them, their predecessors or
21 successors; and, with respect to each such entities, all agents, employees (current and former),
22 officers, shareholders, owners, directors, insurers, attorneys, or assigns thereof, including, without
23 limitation, Norman Sharples, Gabriela Franco, and Brandi Swartz. (Settlement Agreement §1.31)
24 The Settlement Agreement also provides Defendant with a general release from named Plaintiff,
25 including a Civil Code § 1542 waiver. (Settlement Agreement §2.6)

26 **D. Attorneys’ Fees and Incurred Expenses**

27 Under the terms of the Settlement Agreement, Class Counsel will move for reasonable
28 attorney’s fees, not exceeding one-third (33%) or **\$132,000 (One Hundred and Thirty Two**

1 **Thousand Dollars)** of the Gross Settlement Amount (\$400,000). (Settlement Agreement § 2.2).
2 Class Counsel will also seek reimbursement of reasonable expenses incurred by Class Counsel in
3 connection with the Lawsuit, not exceeding **\$20,000 (Twenty Thousand Dollars)**. (*Id.*) The
4 Court need not rule on Class Counsel's fees and expenses now; a formal application will be filed
5 prior to and to be heard at the same date and time as the Final Approval Hearing. As will be
6 explained in detail in the application, the requested fees and costs are eminently reasonable
7 considering the amount of time and expenses incurred by Class Counsel in this case. In that
8 application for fees and costs Class Counsel will provide a lodestar cross check and itemization of
9 costs so that the court can see the requests are reasonable. (Da Vega Decl., ¶ 28.)

10 **E. PAGA Penalty Amount, LWDA Payment, and Settlement Administrator.**

11 **\$5,000 (Five Thousand Dollars)** of the Gross Settlement Fund is allocated to be paid for
12 the resolution of potential PAGA claims (the "PAGA Penalty Amount"). (Settlement Agreement
13 §1.27). Pursuant to PAGA, 75% of that amount, **\$3,750 (Three Thousand Seven Hundred and**
14 **Fifty Dollars)**, is to be paid to the California Labor and Workforce Development Agency (the
15 "LWDA Payment") and 25% to the PAGA Group, **\$1,250 (One Thousand Two Hundred and**
16 **Fifty Dollars)**, (the "PAGA Group Amount"). (Settlement Agreement §§1.20, 1.25, 1.26, 1.27).
17 Prior to the Final Approval/Fairness Hearing, Class Counsel will apply to the Court for payment
18 from the Gross Settlement Fund to compensate the Settlement Administrator, CPT Group, Inc., for
19 fees and costs associated with the administration of the settlement (not exceeding **\$7,500 [Seven**
20 **Thousand Five Hundred Dollars]**)(the "Settlement Administration Costs"). (Settlement
21 Agreement §§ 1.2, 1.3). (Da Vega Decl., ¶ 29.)

22 **F. Class Representative Enhancement Payment**

23 Pursuant to the terms of the Settlement, Class Counsel will seek an Enhancement Payment
24 of **\$10,000 (Ten Thousand Dollars)** for the Class Representative. (Settlement Agreement §§1.8,
25 2.3) The Court need not rule on the Class Representative Enhancement Payment now; a formal
26 application will be filed prior to the Final Approval/Fairness Hearing. As will be explained in
27 detail in the application, the requested Enhancement Payment is reasonable and justified based on
28 the significant time, effort and risks the Class Representative incurred in bringing this case on

1 behalf of the Class, as well as the substantial benefits the resulting Settlement provides the Class.
2 The proposed Class Representative Enhancement Payment represents only .025% of the total
3 Gross Settlement Amount and will not significantly reduce the awards of the Class Members.
4 Public policy strongly supports service awards to plaintiffs in employment class actions, and they
5 are routinely granted by courts in this state and around the country. Such awards compensate
6 plaintiffs for the efforts and risks they have undertaken on behalf of the Class, without which no
7 settlement would be possible. And, they provide an incentive for other employees to bring cases
8 that vindicate the public interest in the lawful payment of wages. (Da Vega Decl., ¶30.)

9 **VII. THE SETTLEMENT IS FAIR, REASONABLE, AND ADEQUATE AND SHOULD**
10 **BE PRELIMINARILY APPROVED**

11 The law favors settlements, especially of class actions. See *Potter v. Pacific Coast*
12 *Lumber Co.* (1951) 37 Cal. 2d 592, 602; *Van Bronkhorst v. Safeco Corp.* (9th Cir. 1976) 529 F.2d
13 943, 950. To ensure there is no “fraud, collusion or unfairness to the class,” class claims can only
14 be settled through Court review and approval. *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th
15 1794, 1801. The trial court is required to determine whether the “settlement is fair, adequate and
16 reasonable,” and has “broad discretion” in making this assessment. *Id.* Nevertheless, “[d]ue regard
17 should be given to what is otherwise a private consensual agreement between the parties.” *Id.*

18 At this stage, the Court is making a preliminary assessment of whether the Settlement
19 appears to be fair, adequate, and reasonable and, thus, whether notice to the class of the settlement
20 terms and conditions and the scheduling of a final approval hearing is worthwhile. See Cal. Rules
21 of Court, rule 3.769; 4 NEWBERG ON CLASS ACTIONS § 13:13 (5th ed. 2014). (“The goal of
22 preliminary approval [of a class settlement] is for a court to determine whether notice of the
23 proposed settlement should be sent to the class, not to make a final determination of the
24 settlement’s fairness.”) “The general rule is that a court will grant preliminary approval where the
25 proposed settlement is neither illegal nor collusive and is within the range of possible of
26 approval.” 4 NEWBERG ON CLASS ACTIONS § 13:10 (5th ed. 2014). See also *Harris v. Vector*
27 *Mktg. Corp.* (N.D. Cal. Apr. 29, 2011) No. C-08-5198 EMC, 2011 WL 1627973, at *7 (“the Court
28 may grant preliminary approval of a settlement and direct notice to the class if the settlement (1)

1 appears to be the product of serious, informed, non-collusive negotiations; (2) has no obvious
2 deficiencies; (3) does not improperly grant preferential treatment to class representatives or
3 segments of the class; and (4) falls within the range of possible approval.”)

4 Following notice to the Class, the Court will make a final determination regarding the
5 fairness of Settlement. In making this evaluation, courts consider and balance a number of
6 factors, including:

7 [T]he strength of plaintiffs’ case, the risk, expense, complexity and likely duration
8 of further litigation, the risk of maintaining class action status through trial, the
9 amount offered in settlement, the extent of discovery completed and the stage of
10 the proceedings, the experience and views of counsel, the presence of a
governmental participant, and the reaction of the class members to the proposed
settlement.

11 *Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 244–45 (quoting *Dunk v. Ford*
12 *Motor Co.*, *supra*, 48 Cal.App.4th at 1801). Nevertheless, a presumption of fairness exists when:
13 (1) the parties reached a settlement through arm’s-length bargaining; (2) the parties conducted
14 sufficient investigation and discovery to allow counsel and the Court to act intelligently; (3)
15 counsel are experienced in similar litigation; and, (4) the percentage of objectors is small. *Dunk*,
16 *supra*, 48 Cal.App.4th at 1802.

17 **A. The Settlement Is the Product of Non-Collusive, Arm’s-length, and Well-**
18 **Informed Negotiations**

19 In reaching the Settlement Agreement, counsel on both sides relied on their respective
20 substantial litigation experience in similar employment class actions, and thorough analysis of the
21 legal and factual issues presented in this case. Information obtained through Class Member
22 interviews and informal discovery informed Plaintiff’s assessment of the strengths and
23 weaknesses of the case and the benefits of the Settlement Agreement. The document and data
24 exchanges have allowed the Parties to closely evaluate the claims in this case, and the benefits of
25 the proposed Settlement Agreement. *See 7-Eleven Owners for Fair Franchising v. Southland*
26 *Corp.* (2000) 85 Cal.App.4th 1135, 1150 (“[I]n the context of class action settlements, formal
27 discovery is not a necessary ticket to the bargaining table where the parties had sufficient
28

1 information to make an informed decision about settlement.”) (quoting *Linney v. Cellular Alaska*
2 *P'ship* (9th Cir. 1998) 151 F.3d 1234, 1239).

3 The Parties initially engaged in a full day of mediation, which resulted in an agreement to
4 certain terms of resolution. Further, even after a deal was reached in the form of a confidential
5 MOU, the Parties continued to engage with each other in regards to the terms of the long form
6 Settlement Agreement. The fact that the Settlement “was the product of extensive and hard-
7 fought adversarial negotiations between the parties” and only reached with the assistance of an
8 experience mediator is a strong indication that the settlement process was fair and non-collusive.
9 See *Wershba v. Apple Computer, Inc.*, *supra*, 91 Cal.App.4th at p. 245.

10 **B. The Settlement Agreement Provides Reasonable Compensation for Class**
11 **Members’ Damages in Light of Significant Litigation Risks**

12 Class and PAGA Members will share in an “Estimated Net Settlement Amount” of
13 approximately **\$225,500 (Two Hundred and Twenty Five Thousand Five Hundred Dollars)**
14 (\$400,000 Gross Settlement Amount minus attorney fees [-\$132,000], estimated attorney costs
15 [-\$20,000], estimated class administration costs [-\$7,500], service award [- \$10,000] and PAGA
16 Group Amoun [-\$5,000 of which includes \$3,750 to be paid to the State of California/the LWDA
17 Payment and \$1,250 to be paid to the PAGA Group/the PAGA Group amount], to be distributed
18 to the Settlement Class Members. This is a good recovery for the class of approximately 25 FSE
19 employees. **The average Class and PAGA Member will receive a total pre-tax award of**
20 **approximately \$9,020** (\$225,500 [Estimated Net Settlement Amount] divided by 25 Class
21 Members = \$9,020/per class member).

22 The amount of the Settlement is reasonable given: (1) the difficulty of the claims, (2) the
23 degree of risk and uncertainty involved in further litigation, (3) the amount of time that would
24 pass before Plaintiff and the Class Members would see the fruits of any class verdict in their favor,
25 (4) ability of Defendants to pay, and (5) the amount of alleged under-paid overtime wages.
26 Defendant assert numerous legal and factual grounds for defending this action and, protracted
27 litigation could lead to potential insolvency, and thus no recovery for any Class Member. Further,
28

absent this Settlement, Defendant would have vehemently contested the propriety of class treatment both through motion practice regarding class certification and through any trial.

While Plaintiff remains confident that were this case to proceed in litigation, he would successfully move for class certification, defeat decertification, and prove his claims at trial, Plaintiff recognizes there are considerable risks, and that misclassification as exempt and “off-the-clock” class actions are particularly challenging. See *Deaver v. Compass Bank* (N.D. Cal. Dec. 11, 2015) 2015 WL 8526982, at *7 (approving class settlement in part because of the “difficulties [in] certifying the class and establish liability on the merits of Plaintiff’s [off-the-clock] claims”); *Cf. Chu v. Wells Fargo Investments, LLC* (N.D. Cal. Feb. 16, 2011) 2011 WL 672645, at *4 (ruling that class certification risk weighed in favor of settlement approval, recognizing that “the outcome of plaintiffs’ case was far from certain, particularly in light of several recent decertification orders and denials of certification in similar wage and hour class actions.”)

Further, even if Plaintiff succeeded in proving at trial that Defendant should be liable for FSE employees being misclassified as exempt and working “off the clock”/unpaid for overtime hours, Plaintiff would still have the challenge of proving misclassification and the extent of hours worked/unpaid. Given the nature of a misclassification case not all the information sought to be analyzed by Class Counsel could be found in documented records. Instead, Plaintiff’s Expert analyzed potentially unpaid overtime and penalties based on the estimates of the testimony/declarations of Plaintiff and Class Members and assumptions from evidence provided by Class Members and Defendant’s data. Based on Class Counsel’s investigation and Plaintiff Expert’s experience from other cases, Plaintiff believes his assumptions are reasonable. Nevertheless, Plaintiff is very cognizant that Defendant would challenge the assumptions as aggressive. Indeed, Defendant disputes that the evidence establishes a pattern and practice of wage and hour violations (e.g., misclassification, failure to pay minimum wage, failure to pay overtime, etc.). The Court could ultimately reject, either in whole or in part, Plaintiff’s model for analyzing the existence of “off-the-clock”/unpaid overtime work thus mooting his and class claims and damages potentially leading to no recovery. See *Wren v. RGIS Inventory Specialists* (N.D. Cal. Apr. 1, 2011) 2011 WL 1230826, at *7 (risk associated with “challenges to their expert

witnesses and damages calculations” supported approval of settlement in off-the-clock class action); *In re Wells Fargo Loan Processor Overtime Pay Litig.* (N.D. Cal. Aug. 2, 2011) 2011 WL 3352460, at *6 (recognizing that the potential difficulty in proving “off-the-clock” hours is a significant risk which supports approval of class settlement).

Based on his current analysis, Plaintiff believes – and Defendant denies - that in the best-case scenario, they would prove that the Class Members were misclassified as exempt and owed on average a few hours of unpaid overtime wages each week (see Damage Analysis above). However, “[t]he proposed settlement is not to be judged against a hypothetical or speculative measure of what might have been achieved had plaintiffs prevailed at trial.” *Wershba v. Apple Computer, Inc., supra*, 91 Cal.App.4th at p. 246.

A settlement need not obtain 100 percent of the damages sought in order to be fair and reasonable. (See *Rebney v. Wells Fargo Bank, supra*, 220 Cal.App.3d at p. 1139 [settlements found to be fair and reasonable even though monetary relief provided was “relatively paltry”]; *City of Detroit v. Grinnell Corp., supra*, 495 F.2d at p. 455 [settlement amounted to only “a fraction of the potential recovery”].) *Id.* at 250. See also *Officers for Justice v. Civil Serv., Commission* (9th Cir. 1982) 688 F.2d 615, 624, 628 (recognizing that “the very essence of a settlement is compromise, a yielding of absolutes and an abandoning of highest hopes” and that “[i]t is well-settled law that a cash settlement amounting to only a fraction of the potential recovery will not per se render the settlement inadequate or unfair.”) (internal quotation omitted).

Considering the significant challenges faced by Plaintiff including Defendant's legal and factual defenses, there is a great risk the Class would do substantially worse in litigation than under the Settlement or receive nothing at all. Further, absent a settlement, Class Members might not receive any recovery at all or may not see any recovery until after years of litigation, including appeals. See *Nat'l Rural Telecommunications Coop. v. DIRECTV, Inc.* (C.D. Cal. 2004) 221 F.R.D. 523, 526 (“In most situations, unless the settlement is clearly inadequate, its acceptance and approval are preferable to lengthy and expensive litigation with uncertain results.”) (internal quotation omitted).

On the other hand, the average Class Member FSE employee will receive **approximately \$9,020** under the Settlement. This is a good recovery similar to many other wage and hour actions brought on behalf of hourly paid workers. *See e.g. Ogbuehi v. Comcast of California/Colorado/Florida/Oregon, Inc.* (E.D. Cal. June 9, 2015) 2015 WL 3622999, at *7, 10 (approval of wage settlement where the average non-exempt/hourly class member was receiving \$531.67); *Gardner v. GC Servs., LP* (S.D. Cal. Apr. 2, 2012) 2012 WL 1119534, at *4 (average settlement award for the non-exempt/hourly employee class was “around several hundred dollars” – “a good result for the class”); *Collins v. Cargill Meat Solutions Corp.* (E.D. Cal. 2011) 274 F.R.D. 294, 302 (preliminary approval of wage settlement where the average non-exempt/hourly class member was receiving \$685). In sum, the Settlement provides meaningful, prompt relief for the disputed wage and hour violations and is well within the range of reasonableness.

C. The Class Settlement Payment Process is Fair and Reasonable

All Settlement Class Members will be eligible to receive a share of the Estimated Net Settlement Fund based upon the number of Workweeks s/he worked as a FSE employee during the Class Period. (*See* Settlement Agreement §§1.18, 1.21, 1.23, 1.35, 7.1) This method of distribution is reasonably designed so that Settlement Class Members who worked more workweeks and thus, Plaintiff alleges, would have larger overtime claims will receive a larger share of the Settlement. Significantly, the proposed payment process ensures that the maximum possible Estimated Net Settlement Fund will actually be received by Settlement Class Members. As stated in the Class Notices and Forms, the Settlement Class Members need not take any further action to receive a Settlement payment other than cash the settlement checks they receive in the mail. Class Members who may be hesitant to take affirmative action to claim monies from Defendant will not face the barrier of taking affirmative action to recover their portion of the Settlement. If they do not opt-out of the settlement they will simply receive a check in the mail that they can deposit/cash. Any settlement checks not cashed after 120 days from the date of the class-wide distribution shall be void and the sums correlating to those checks not cashed and any residual amounts shall be redistributed among the Settlement Class Members who earlier cashed their checks sent during the initial distribution (Settlement Agreement §7.4).

1 **D. The Settlement of Penalties Under the Labor Code Private Attorney General**
2 **Act of 2004 (PAGA) is Reasonable**

3 The settlement of the PAGA claim for **\$5,000** (1.25% of \$400,000 Gross Settlement
4 Amount) is within the range of reasonable PAGA settlement amounts. *See, e.g. Nelson v. Avon*
5 *Prod., Inc.* (N.D. Cal. Feb. 24, 2017) 2017 WL 733145, at *2 (approving class settlement of \$1.8
6 Million with \$10,000 attributed to PAGA claim); *Taylor v. Shippers Transp. Express, Inc.* (C.D.
7 Cal. May 14, 2015) 2015 WL 12658458, at *19 (approving payment of \$50,000 for PAGA
8 penalties from a \$11 Million class settlement, finding that “[t]he proposed PAGA payment is
9 greater than awards deemed reasonable and approved in other cases,” and citing cases); *Franco v.*
10 *Ruiz Food Prod., Inc.* (E.D. Cal. Nov. 27, 2012) 2012 WL 5941801, at *14 (approving PAGA
11 payment of \$10,000 from a \$2.5 Million class settlement, finding the “amount comports with
12 settlement approval of PAGA awards in other cases,” and citing cases); *Cotter v. Lyft, Inc.* (N.D.
13 Cal. 2016) 193 F.Supp.3d 1030, 1037 [preliminarily approving class action settlement allocating a
14 PAGA set-aside worth a fraction of the PAGA claim’s potential value, where the defendant’s
15 obligations were “genuinely unclear” and there was no evidence the defendant acted deliberately
16 or negligently failed to learn about its obligations].) Pursuant to Labor Code § 2699(i), the
17 LWDA will receive 75% of this amount (**\$3,750**), and the remaining 25% (**\$1,250**) will be shared
18 by the PAGA Group. (Settlement Agreement §§ 1.19, 1.20, 1.25, 1.26, 1.27).

19 **E. The Settlement’s Provision for Attorneys’ Fees, Expenses, and Costs is**
20 **Reasonable, Fair, and Appropriate Under the Circumstances**

21 In connection with Final Approval/Fairness Hearing, Class Counsel will apply to the Court
22 for reasonable attorney’s fees and costs. The Settlement Agreement allows Counsel to seek one-
23 third (33%) of total Settlement fund (**\$132,000**) in attorney fees. Fee awards of 33% are
24 commonly awarded by courts. *See, e.g. Laffitte v. Robert Half Int’l Inc.* (2016) 1 Cal. 5th 480, 503
25 (affirming fee award of one-third of the common fund in a wage and hour class action and
26 recognizing the following advantages in using the percentage method: “relative ease of
27 calculation, alignment of incentives between counsel and the class, a better approximation of
28 market conditions in a contingency case, and the encouragement it provides counsel to seek an

1 early settlement and avoid unnecessarily prolonging the litigation”) (internal quotation omitted);
2 *In re Consumer Privacy Cases* (2009) 175 Cal.App.4th 545, 558 (“Empirical studies show that,
3 regardless whether the percentage method or the lodestar method is used, fee awards in class
4 actions average around one-third of the recovery.”) (internal quotation omitted); *Smith v. CRST*
5 *Van Expedited, Inc.* (S.D. Cal. Jan. 14, 2013) 2013 WL 163293, at *5 (recognizing the California
6 benchmark for fee awards in class actions as 33%).

7 The Court need not rule on Class Counsel’s fees and costs now; a formal application will
8 be filed prior to the Final Approval Hearing. As will be explained in detail in the application,
9 including a lodestar cross-check, a fee award of one-third (33%) of the Settlement fund is
10 reasonable and well-justified in consideration of the risks Class Counsel has undertaken in
11 pursuing this case on a contingency basis and the good result achieved on behalf of the Class.
12 Class Counsel expended significant time and resources on this matter and will continue to do so
13 over the next approximate six months as they oversee the administration of the Settlement. Class
14 Counsel will further request reimbursement of their incurred, reasonable costs, **not exceeding**
15 **\$20,000**. See *Thieriot v. Celtic Inc. Co.* (N.D. Cal. Apr. 21, 2011) 2011 WL 1522385, *7 (“Class
16 counsel are entitled to reimbursement of reasonable out-of-pocket expenses.”)

17 **F. Class Representative Enhancement Payments Are Reasonable and**
18 **Routinely Awarded**

19 Prior to the Final Approval Hearing/Fairness Hearing, Class Counsel will file a motion
20 seeking a reasonable Class Representative Enhancement Payment for the Class Representative.
21 The Court need not rule on this request now. At present, it is sufficient for the Court to determine
22 that the award provided for in the Settlement Agreement does not render the overall Settlement
23 inherently unfair and is not an obstacle to preliminary approval.

24 Courts routinely approve service (“incentive” or “enhancement”) awards to compensate
25 class representatives for the services they provide and the risks they incur during class litigation.
26 See *In re Cellphone Fee Termination Cases* (2010) 186 Cal.App.4th 1380, 1393 (“incentive
27 awards are fairly typical in class action cases . . . and are intended to compensate class
28 representatives for work done on behalf of the class, to make up for financial or reputational risk

undertaken in bringing the action, and, sometimes, to recognize their willingness to act as a private attorney general.”)

At the Final Approval Hearing/Fairness Hearing, Class Counsel will ask the Court to approve an Enhancement Payment of **\$10,000 for the Class Representative**. Based on Class Representative’s significant time, effort and risks incurred in bringing this case on behalf of the Class, as well as the substantial benefits the resulting Settlement provides the Class, the requested service awards should ultimately be found to be reasonable. See, *e.g. Hasty v. Elec. Arts, Inc.* (San Mateo Cty. Super. Ct., Sept. 22, 2006) No. CIV 444821 (approving an award of \$30,000 to the class representative in a wage and hour class action); *Meewes v. ICI Dulux Paints* (Los Angeles Cty. Super. Ct. Sept. 19, 2003) No. BC265880 (approving service awards of \$50,000, \$25,000 and \$10,000 to the named plaintiffs); *In re High-Tech Employee Antitrust Litig.* (N.D. Cal. Sept. 2, 2015) No. 11-CV-02509-LHK, 2015 WL 5158730, at *17 (awarding service awards of \$80,000 and \$120,000).

The requested Class Representative Enhancement Payment is also reasonable in proportion to the overall Settlement. The award represents only a small fraction of the total Settlement fund and thus barely impacts the recovery of the Class Members. See *Singer v. Becton Dickinson & Co.* (S.D. Cal. June 1, 2010) 2010 WL 2196104, at *9 (awarding \$25,000 to class representative from \$1 Million wage and hour case settlement (2.5% of fund)); *Thieriot v. Celtic Inc. Co, supra* 2011 WL 1522385 at *8 (awarding \$25,000 service award to class representative from class settlement of \$1.375 Million (1.8% of fund)).

In sum, the proposed Attorneys’ fees, costs and Class Representative Enhancement Payment are within the typical range of approval, and are justified given the facts of this case. Regardless, both the attorneys’ fees, costs and Enhancement Payment are subject to the Court’s approval and should be assessed at the final approval stage/Fairness Hearing after Class Counsel formally applies for fees, costs and Class Representative Enhancement Payment and the Class Members have an opportunity to respond.

G. CPT Group Should Be Appointed as the Settlement Administrator

Pursuant to the Settlement Agreement, the Parties seek to have CPT Group, Inc. appointed as the Settlement Administrator. Amongst other things, the Settlement Administrator will be responsible for: processing class data from Defendant; mailing Notices to Class Members (and request for Exclusion Form, Objection Form, and Workweek dispute form; handling returned Class Notices/Forms, using skip-tracing and last-known telephone numbers to obtain current addresses for Class Members; creating and overseeing a Qualified Settlement Fund (QSF); calculating the Class Settlement Payments (with the assistance and input of the Parties); distributing the Individual Settlement Amount and PAGA Group Payments to Class/PAGA Members; and tax reporting of Class Settlement Payments. CPT Group is a competent and experienced settlement administration company. Plaintiff will apply to the Court for payment for CPT's fees and costs, which it estimates at **\$7,500**. Based on the amount of work demanded of the Settlement Administration, this sum is reasonable. See, e.g. *McNeal v. RCM Techs. USA Inc.* (C.D. Cal. Mar. 16, 2017) 2017 WL 1807595, at *3 (preliminarily approving \$327,000 class settlement where the Claims Administrator would receive fees not exceeding \$20,000).

VIII. THE COURT SHOULD CONDITIONALLY CERTIFY A PROVISIONAL SETTLEMENT CLASS

When a negotiated class action settlement has been reached prior to certification—as here—the Parties may agree that a defined class be conditionally (or provisionally) certified for settlement purposes only. Cal. Rules of Court, Rule 3.769(d). In such circumstances, the decision to certify a class is purely a procedural one and should be based on the allegations in the Complaint and not on the perceived factual or legal merit of the class claims. *Linder v. Thrifty Oil Co.*, 23 Cal.4th 429, 439-41 (2000). Therefore in a class action settlement context the Parties are not required to stipulate to certification as contemplated by Cal. Rules of Court, Rule 3.764(e).

In support of conditional class certification, a party must show that (1) the class is “ascertainable and sufficiently numerous;” (2) there are “predominant common questions of law or fact;” (3) the class representatives have “claims or defenses typical of the class;” (4) the class representatives can “adequately represent the class;” and (5) the benefits of a class action make it

1 “superior to the alternatives.” *Brinker Rest. Corp. v. Superior Court* (2012) 53 Cal. 4th 1004,
2 1021.

3 *Ascertainability and Numerosity:* For settlement purposes the Class Members are
4 identifiable from Defendant's records, and they total approximately 25 individuals. For purposes
5 of administering this Settlement, the Class is ascertainable and sufficiently numerous as to make
6 joinder impracticable. *Citizens of Humanity, LLC v. Ramirez* (2021) 63 Cal.App.5th 117, 130–
7 131.

8 *Common Legal and Factual Questions Predominate:* For settlement purposes, the
9 common questions include, without limitation: (i) whether Class Members were misclassified as
10 exempt employees; (ii) whether Class Members were paid for all hours worked and wages to
11 which they were entitled; (iii) whether Class Members were paid for all overtime hours worked
12 and wages to which they were entitled at the appropriate rate; (iv) whether Class Members were
13 denied duty-free meal/rest periods; (v) whether Class Members are entitled to recover waiting
14 time penalties under California law; (vi) whether Class Members received reimbursement for
15 necessary business expenses; and (vii) whether Class Members received compliant wage
16 statements. *See, e.g. Williams v. Superior Court* (2013) 221 Cal.App.4th 1353, 1369-1371
17 (overturning decertification of off-the-clock class and ruling the plaintiffs had adequately shown
18 that defendants had a company-wide practice of having class members work off-the-clock).

19 *Typicality of Claims:* “The test of typicality is whether other members have the same or
20 similar injury, whether the action is based on conduct which is not unique to the named plaintiffs,
21 and whether other class members have been injured by the same course of conduct.” *Johnson v.*
22 *GlaxoSmithKline, Inc.* (2008) 166 Cal.App.4th 1497, 1509. Like all Class Members, Plaintiff
23 was engaged as a FSE employee and alleges that he and all other non-exempt employees were
24 subject to the same or similar policies and practices of Defendant whereby they were allegedly
25 misclassified as exempt employees, not paid minimum wage for all hours worked, not paid for
26 overtime hours worked, not provided compliant wage statements, and not paid all wages due
27 upon separation. *See Wershba v. Apple Computer, Inc.*, *supra*, 91 Cal.App.4th at p. 239 (class
28

1 representative typical as “all of the class members [including the class representative] here
2 suffered a common alleged wrong.”)

3 *Adequate Representation:* Plaintiff will adequately represent the Class. He has the same
4 interest in maintaining this action as any Class Member would have. Further, he has hired counsel
5 experienced in class actions and wage and hour law. *See McGhee v. Bank of America* (1976) 60
6 Cal.App.3d 442, 450 (“Adequacy of representation depends on whether the plaintiff’s attorney is
7 qualified to conduct the proposed litigation and the plaintiff’s interests are not antagonistic to the
8 interests of the class.”)

9 *Superiority of Class Action:* Further, the maintenance of the Class results in “substantial
10 benefits” to the Parties, including the Class Members, and the Court. *Linder v. Thrifty Oil Co.*
11 (2000) 23 Cal. 4th 429, 435. It would be inefficient and a waste of the Court’s and Parties’
12 resources to require numerous Class Members to separately litigate the same issues in different
13 lawsuits. *Capitol People First v. Dep’t of Developmental Servs.* (2007) 155 Cal.App.4th 676, 702
14 (“without class treatment there could be multiple actions that would burden the litigants and the
15 courts with cumulative and excessive expenses, discovery efforts and evidence.”) The class action
16 procedure is an ideal method for resolving the relatively modest individual claims of the current
17 and former FSE employees, many of whom would be deterred from bringing individual claims
18 due to the costs of litigation and concerns that bringing a lawsuit could adversely affect current or
19 future employment. *See Bibo v. Fed. Exp., Inc.* (N.D. Cal. Apr. 21, 2009) 2009 WL 1068880, at
20 *9 (“Class treatment will increase class members’ access to redress because it unifies what may be
21 a series of small claims . . . Additionally, class treatment may relax any concerns that current
22 employees may have about retaliation if they were to bring a suit against FedEx, as unity of the
23 employee class would prevent retaliation.”)

24 Accordingly, the Class should be conditionally certified as a provisional settlement class.

25 **IX. THE COURT SHOULD APPROVE THE PROPOSED CLASS NOTICE**

26 A court is afforded broad discretion in determining appropriate notice to class members.
27 *Cartt v. Superior Court* (1975) 50 Cal.App.3d 960, 973-74. The Class Notice should be provided
28 in a manner that “has a reasonable chance of reaching a substantial percentage of the class

1 members.” *Wershba v. Apple Computer, Inc., supra*, 91 Cal.App.4th at p. 251 (internal quotation
2 omitted). “In regard to the contents of the notice, the notice given to the class must fairly apprise
3 the class members of the terms of the proposed compromise and of the options open to dissenting
4 class members.” *Id.* (internal quotation omitted).

5 The proposed Class Notices is attached to the Settlement Agreement as **Exhibit C: Notice**
6 **of Class Action Settlement**. The Settlement Agreement is attached as Exhibit 1 to the Da Vega
7 Decl., which is filed in support of this motion.

8 The Class Notice and attached Forms (Request for Exclusion Form, Objection Form,
9 Workweek Dispute Form) will be sent to Class Members. **The “Notice Period” and “Response**
10 **Deadline” will be 45 calendar days**. The Class Notice clearly and accurately describes (a) the
11 case information and the nature of the action; (b) the terms of Settlement Agreement; (c) the
12 definition of the class; (d) the formula for calculating the Net Settlement Fund (including the
13 amounts sought for the Class Counsel Award (Attorney Fees and Costs), Class Representative
14 Enhancement Payment, Settlement Administration Costs and the LWDA Payment) and Individual
15 Settlement Amounts; (e) the individual Class Member’s estimated number of Workweeks worked
16 during the Class Period and Gross Allocated Amount; (f) the dates which comprise the Class
17 Period, (g) instructions on how to submit a Workweek Dispute Form, Request for Exclusion Form,
18 or Objection Form, and (h) the deadlines by which Workweek Disputes, Requests for Exclusion,
19 or Objections to the Agreement must be submitted to the Settlement Administrator. It also
20 describes that Class Members who do not opt-out/request to exclude themselves, will be bound by
21 the Settlement Agreement, including the release of claims and PAGA, if the Settlement
22 Agreement is approved by the Court; the process to appear at the Final Approval
23 Hearing/Fairness Hearing to state objections; and that a Class Member may retain separate
24 counsel to appear on the Class Member’s behalf. *See* Cal. Rules of Court, rule 3.766(d) &
25 3.769(f).

26 The proposed plan for distributing the Class Notice is also reasonable and satisfies the
27 notice requirements of California Rules of Court, Rules 3.766 & 3.769(f) and all other legal and
28 due process requirements. Individual notice will be mailed to Class Members, which is a

1 reasonable and practicable way of reaching all of the Class Members. 4 NEWBERG ON CLASS
2 ACTIONS § 8:15 (5th ed. 2014). The Class Notice will have contact information for Class
3 Counsel and Settlement Administrator. Defendant will provide the Settlement Administrator with
4 a Class List containing each Class Members: (1) full name; (2) last known mailing address; (3)
5 last known telephone number; (4) Social Security number; and (5) estimated number of
6 Workweeks worked during the Class Period to the extent any or all such information in reasonably
7 available to Defendant. (Settlement Agreement §1.6)

8 Prior to the mailing of the Class Notice, the Settlement Administrator will run the list of all
9 Class Members through the United States Postal Service's National Change of Address database
10 ("NCOA"). (Settlement Agreement §4.3) However, if Class Notices are returned because the
11 address of the recipient is no longer valid, the Settlement Administrator will perform skip traces to
12 locate Class Members. (Settlement Agreement §4.4) Further, as necessary, the Settlement
13 Administrator will use Class Members' last-known telephone numbers (and telephone numbers
14 updated through public and proprietary databases) to obtain Class Members' current addresses.
15 The proposed mailing and distribution of the Class Notice constitutes the best notice practicable.

16 **X. A FINAL APPROVAL / FAIRNESS HEARING SHOULD BE SCHEDULED**

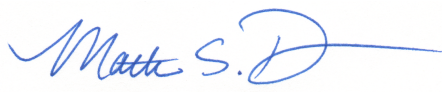
17 The last step in the settlement approval process is a final approval hearing, at which the
18 Court may hear all evidence and argument necessary to evaluate the proposed Settlement. *See*
19 California Rules of Court, Rules 3.769(g). Plaintiff respectfully requests that the Court schedule
20 the Fairness Hearing and set deadlines for the submission of motion and supporting papers.

21 **XI. CONCLUSION**

22 For the reasons set forth above and in the accompanying papers, Plaintiff respectfully
23 requests that the Court grant Plaintiff's Motion for Preliminary Approval of the Class Settlement.

24 **DATED:** February 28, 2023

DA VEGA | FISHER | MECHTENBERG LLP

25
26 By: 

27 Matthew S. Da Vega
28 Attorneys for Plaintiff and Class