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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.: CVRI2105284

CLASS and REPRESENTATIVE ACTION

**PLAINTIFF'S NOTICE OF MOTION AND
MOTION FOR FINAL APPROVAL OF
CLASS SETTLEMENT, CLASS
REPRESENTATIVE ENHANCEMENT
PAYMENT, and CLASS COUNSEL
AWARD;**

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

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

**DECLARATION OF MATTHEW H.
FISHER IN SUPPORT OF MOTION;**

**DECLARATION OF TED D.
MECHTENBERG IN SUPPORT OF
MOTION; and**

[PROPOSED] ORDER with COVER SHEET

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

Date: August 24, 2023

Time: 8:30 a.m.

Location: Dept. 10 (Hon. Harold W. Hopp)

Reservation ID# 413303880178

1 **TO THIS HONORABLE COURT, ALL INTERESTED PARTIES, and THEIR**
2 **ATTORNEYS OF RECORD PLEASE TAKE NOTICE** that on August 24, 2023 at 8:30 a.m.,
3 or as soon as the matter may be heard, in Department 10 (Hon. Harold W. Hopp) of the above
4 entitled Court 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 final approval of the proposed class action settlement on the terms and
8 conditions that this Court has previously approved (“The Motion”). The Motion is *unopposed*,
9 and is made pursuant to the California Code of Civil Procedure §382 and California Rules of
10 Court, rule 3.769, *et seq.*, and the Order Granting Preliminary Approval of Class Settlement
11 (“Preliminary Approval Order”). Specifically, Plaintiff moves the Court for an Order:

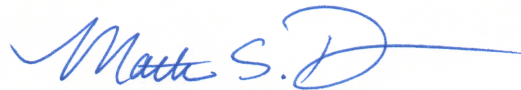
- 12 1. Approving the Class Settlement (**\$400,000** Gross Settlement Fund);
- 13 2. Certifying the Class for settlement purposes only;
- 14 3. Appointing Plaintiff as “Class Representative” for settlement purposes;
- 15 4. Appointing Plaintiff’s Counsel Da Vega Fisher Mechtenberg LLP as “Class
16 Counsel” for settlement purposes;
- 17 5. Approving a “Class Representative Enhancement Award” to the Class
18 Representative for their service to the Class and taking the risks of bringing
19 this Action as a class action, which has resulted in substantial benefits to the
20 Class, in an amount up to **\$10,000**;
- 21 6. Approving a “Class Counsel Award” of reasonable attorneys’ fees of
22 **\$132,000** to Class Counsel plus reimbursement of **\$18,150 for litigation**
23 **costs** incurred in pursuing the claims;
- 24 7. Approving the “PAGA Penalty Amount” payment for civil penalties under
25 the Private Attorneys General Act of 2004 (“PAGA”) of **\$5,000** (75% of this
26 amount [**\$3,750**] paid to the California Labor and Workforce Development
27 Agency [“LWDA Payment”] and 25% to this amount [**\$1,250**] paid back to
28 the PAGA group [“PAGA Group Amount”]).

8. Approving the “Settlement Administration Costs” of **\$8,500** paid to the CPT Group, Inc. (“CPT”) for settlement administration costs;
9. Directing the Parties to implement the terms of the Settlement; and
10. Entering a Judgment approving the Settlement and retaining jurisdiction over the parties to enforce the terms of the judgment.

This unopposed Motion will be based upon: this Notice; the attached Memorandum of Points and Authorities; the concurrently filed Declarations of Class Counsel, the Class Representative, and the Settlement Administrator Representative; and the records and files in this action, and any other further evidence or argument that the Court may properly receive at or before the hearing. Pursuant to Labor Code § 2699(1)(2), and the instructions provided by the Department of Industrial Relations on its web site, a PDF copy of this motion and the supporting papers will be sent/uploaded electronically to LWDA’s website at the time it is filed and served. A copy of the proof of that LWDA submission is attached to Declaration of Matthew S. Da Vega.

Dated: July 31, 2023

DAVEGA | FISHER | MECHTENBERG LLP



By: _____

Matthew S. Da Vega
Attorneys for Plaintiff

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION and SUMMARY OF SETTLEMENT TERMS**

3 On behalf of himself and similarly situated individuals, Plaintiff Wayne Douglas Gillette
4 (“Plaintiff” or “Class Representative”) respectfully moves for final settlement approval of the
5 **\$400,000** (Four Hundred Thousand dollars) maximum settlement payment for the class claims
6 asserted against Defendant Copan Diagnostics, Inc, (“Defendant” or “Copan”)(or together with
7 the Plaintiff, the “Parties”).

8 Plaintiff and Defendant vigorously disagree on the merits of the case. Class certification,
9 liability and damages are all sharply disputed. Nevertheless, after litigation, investigations,
10 numerous interviews, exchange of extensive information, data, and documents, and an all day
11 mediation the Parties reached an informed agreement to settle the class claims pursuant to the
12 Amended Joint Stipulation of Class Action Settlement and Release (“Settlement Agreement”).

13 Plaintiff filed their unopposed Motion for Preliminary Approval of Class Action
14 Settlement. A copy of the Settlement Agreement was submitted to the Court and attached to the
15 Declaration of Matthew S. Da Vega in support of that motion.

16 On April 18, 2023, the Court held a hearing on the motion for Preliminary Approval. The
17 Court preliminarily approved the settlement.

18 On April 25, 2023, the Court issued its Order Granting Preliminary Approval of Class
19 Settlement (“Preliminary Approval Order”). The Court’s Preliminary Approval Order states, in
20 part:

21 “The Court determines there is sufficient evidence to suggest that the Agreement
22 (including the Class Representative Enhancement Payment, Class Counsel's fees
23 and costs, the Settlement Administration Costs, and the allocation of payments to
24 Settlement Class Members) falls within the range of possible approval that could
ultimately be given final approval by this Court as fair, reasonable, and adequate
...”

25 “The Settlement Agreement and the Notice of Class Action Settlement are
26 preliminarily approved. The Court further preliminarily approves the formulas
provided in the Settlement for calculating Individual Settlement Payments to the
Class Members using a shift-based calculation methodology.”

27 “The Settlement Class is provisionally certified for settlement purposes only as a
28 class of: "All current and former Field Service Engineer employees who
physically performed work for Defendant in the State of California from

1 November 19, 2017, until the entry of judgment.” “Class Member(s)” refers to a
2 member(s) of Class” “The “Class Period” refers to the period of time from
3 November 19, 2017 through the date the Court grants preliminary approval of the
Settlement.”

4 In that Order the Court also set a date for the Final Approval/Fairness hearing for July 27,
5 2023, which was later continued, per a stipulation between the Parties, until August 24, 2023 at
6 8:30 a.m. in Dept. 10 (Hon. Harold W. Hopp). (Declaration of Matthew S. Da Vega in Support of
7 Plaintiff’s Unopposed Motion for Final Approval [“Da Vega Decl.”], **Exhibit 1 – April 25, 2023**
8 **Preliminary Approval of Class and Representative Action Settlement and Provisional Class**
9 **Certification Order (“Preliminary Approval Order”).**

10 On May 25, 2023, in accordance with the terms of the Settlement Agreement and
11 Preliminary Approval Order, the Class Settlement Administrator CPT mailed the Court-approved
12 Notice of Class Action and Proposed Settlement and various related forms including an objection,
13 dispute, and “opt-out” form (aka “Notice Packets”) via first class mail to all of the approximate 26
14 Class Members after receiving the class member data and running a change of address search.
15 Da Vega Decl., **Exhibit 2 – Declaration of Veronica Olivares (On Behalf of CPT Group, Inc.)**
16 **with Respect to Notification and Administration** [“CPT Decl.”], ¶¶ 1 - 17).

17 On July 10, 2023 the “Opt-Out”, dispute, and objection deadline passed. (Exhibit 2 – CPT
18 Decl., ¶ 10).

19 As of July 25, 2023 the Settlement Administrator CPT reported (“CPT Decl.”):

- 20 • 2 (two) Notice Packets remains undeliverable despite skip trace efforts;
- 21 • 0 (zero) Requests for Exclusion (“Opt-Outs”);
- 22 • 0 (zero) Disputes; and
- 23 • 0 (zero) Objections.

24 (Exhibit 2 – CPT Decl., ¶ 8 - 14).

25 Therefore, there are a total of 26 participating settlement Class Members out of 26
26 putative Class Members, representing a 100% participation rate. The average individual pre-tax
27 gross settlement payment, including PAGA payment, to each Settlement Class Members is
28 estimated at \$8,705.77. The highest individual settlement payment to a Settlement Class Member
is estimated at \$26,751.31 and the lowest is \$847.75 (Exhibit 2 – CPT Decl., ¶16).

1 As of the date of the filing of this motion, and pursuant to the terms of the Settlement
2 Agreement and Preliminary Approval Order, the Class will receive an **Estimated Net Settlement**
3 **Fund of \$226,350** (Two Hundred Twenty Six Thousand and Three Hundred and Fifty dollars) to
4 pay Settlement Class Members. That amount was determined by subtracting Class Counsel's
5 attorneys' fees [-\$132,000], Class Counsel's litigation costs [-\$18,150], the Class Representative
6 Enhancement Award [-\$10,000], the PAGA Penalties to the LWDA payment [-\$3,750], the
7 PAGA Group Employee payment [-\$1,250], and the Settlement Administrator costs [-\$8,500]
8 from the Gross Settlement Amount [\$353,500] to determine settlement fund payment to Class
9 Members. (Exhibit 2 – CPT Decl., ¶15.)

10 This an excellent result for Class Members, especially given the potential challenges
11 entailed in successfully litigating this case. Courts routinely approve wage and hour settlements
12 of comparable cases resulting in far less recovery to individual class members. In Class
13 Counsel's opinion, this is a good result in light of the disputed material factual and legal issues
14 involved, the intrinsic risks of further litigation without any assurance of a better outcome for
15 Class Members, and the substantial benefits available to Class Members under the Settlement.
16 The Settlement promotes judicial economy and eliminates the risk that Class Members could
17 receive nothing after protracted litigation.

18 The Settlement's key terms are summarized as follows:

19 1. The Settlement Class is defined as:

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

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

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

2. The Gross Settlement Amount:

The Settlement provides for Defendants to make a maximum payment of
\$400,000 in settlement of all class and PAGA claims in the case, including
the Class Counsel Award, all Settlement Administration Costs, the PAGA
Penalty Amounts, all settlement payments to Settlement Class Members,

and the Class Representative Enhancement Payment. (the “Gross Settlement Amount”) (Settlement Agreement §§1.16.; 2.1).

3. The Estimated Net Settlement Fund to Class Members:

After deducting the Class Counsel’s Award of attorney fees (-\$132,000) and litigation costs (-\$18,150), Settlement Administration costs (-\$8,500), PAGA penalties paid to the LWDA payment (-\$3,750), PAGA Group employee payment (-\$1,250) and a Class Representative Enhancement Award (-\$10,000) from the total of the Gross Settlement Amount (\$400,000), the Participating Settlement Class Members shall receive the approximate Net Settlement Fund/remainder of **\$226,350**) (“Estimated Net Settlement Fund”) based on a pro rata allocation formula. (Settlement Agreement §§ 1.13, 1.21, 7.1).

4. Individual Settlement Amount Calculations:

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

5. Notice Period and Response/Opt-Out Deadline:

Class Members had **45 calendar days** following Class Notice (mailed on May 25, 2023) on and until July 10, 2023, to mail in a written request to be excluded (“Opt-Out Request”) or object to the proposed settlement. (Settlement Agreement §§1.33, 1.34, 4.6)

6. Release of Claims For Settling Class Members:

The Settlement Agreement provides for a release of claims for Class Members who did not timely submit an “Opt-Out” Request. The released claims include:

“Released Claims” with respect to the “Released Parties” (defined below) are, “all known and unknown claims losses, damages, liquidated damages, penalties, interest, liabilities, causes of action, civil complaints, arbitration demands or suits which arise from the facts asserted in the Action, including, without limited to the foregoing, all claims under the Fair Labor Standards Act (FLSA) for all worked performed inside and/or outside of California by any Class Members, the California Labor Code as alleged in the Action, including violations for meal periods, rest breaks, unpaid overtime and minimum wages, timely payment of wages, wage statements, waiting time penalties, unreimbursed necessary business expenses, penalties under the Private Attorneys General Act sections 2698, et seq., and violations of California Unfair Competition Law (Cal.

Bus. & Prof. Code §§ 17200, et seq.), the laws of the principal places of work (“Home States”) of the Class Members, or other remuneration whether sought under statute, tort, contract or as an unfair business practice, released by Plaintiff and each of the Settlement Class Members, on behalf of themselves and each of their heirs, representatives, successors, assigns and attorneys, which shall be fully, finally and forever released, relinquished and discharged. (“Released Claims.”) (Settlement Agreement §1.30)

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

The Settlement Agreement also provides Defendants with a general release from named Plaintiff, including a Civil Code § 1542 waiver. (Settlement Agreement §2.6)

7. PAGA Payments

\$5,000 of the Gross Settlement Fund is allocated to be paid for the resolution of potential PAGA claims (the “PAGA Penalty Amount”). (Settlement Agreement §1.27). Pursuant to PAGA, 75% of that amount, **\$3,750**, is to be paid to the California Labor and Workforce Development Agency (the “LWDA Payment”) and 25% of that amount, **\$1,250**, to the PAGA Group (the “PAGA Group Amount”). (Settlement Agreement §§1.19, 1.20, 1.25, 1.26, 2.5)

8. Settlement Administrator Payment

As part of the Final Approval/Fairness Hearing, Class Counsel has applied to the Court for payment from the Gross Settlement Fund to compensate the Settlement Administrator – CPT Group, Inc. - for fees and costs associated with the administration of the settlement for **\$8,500** (the “Settlement Administration Costs”). (Settlement Agreement §§ 1.3, CPT Decl.)

9. Class Representative Enhancement Award

Pursuant to the terms of the Settlement, Class Counsel will seek an Enhancement Payment of **\$10,000** for the Class Representative. (Settlement Agreement §§1.8, 2.3)

10. Class Counsel Award (Attorney Fees and Costs)

Plaintiff may apply to the Court for an award of up to **\$132,000 in attorney fees plus** reimbursement of up to \$20,000 (**actual costs are \$18,150**) in litigation costs (Settlement Agreement §§ 1.5, 2.2)

The final approval of the Settlement is appropriate as all requirements for a class action have been satisfied and the terms of the Settlement are fair and reasonable.

1 **II. FACTUAL BACKGROUND**

2 Plaintiff and Class Members are current and former Field Service Engineers (“FSEs”) in
3 the Field Service Department of Defendant Copan Diagnostics which is headquartered in
4 Murrieta, CA (Riverside County). Plaintiff alleges that he and other FSEs were misclassified as
5 exempt from overtime/salaried employees by Defendant and not paid overtime wages for
6 overtime hours worked while performing work both in and outside California. Plaintiff alleges
7 Class Members worked for Defendant Copan by traveling to/from various client’s facilities,
8 including in/at physical locations in California, to repair Defendant’s diagnostic equipment.
9 Despite being given the misleading job title of “Field Service Engineer” the Class Members
10 are/were not engineers and their job duties/work is/was largely manual labor (working with their
11 hands and tools) related to the inspections and repairs of Copan’s diagnostic equipment
12 (automated microbiology equipment). Plaintiff further alleges that Defendant failed to pay
13 minimum wage, failed to keep and provide accurate and timely records of wages earned and
14 other legally mandated records, and failed to pay Plaintiff and Class Members whose
15 employment has terminated (voluntarily resigned and/or were terminated) a final payment of his
16 or her wages in a prompt and timely manner in conformity with California Labor Codes.

17 **III. PROCEDURAL HISTORY**

18 **November 19, 2021 (Original Complaint Filed and PAGA Notice Sent):** Plaintiff filed
19 his original complaint and provided written PAGA notice (California Labor Code §§ 2699 *et*
20 *seq.*) via online submission and certified mail to the Labor and Workforce Development Agency
21 ("LWDA") and to Defendant (LWDA Case No.: LWDA-CM-852456-21). It included the
22 specific provisions of the Labor Code alleged to have been violated, and the facts and theories to
23 support the alleged violations, pursuant to Labor Code §2699.3.

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

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

28 **March 9, 2022 (Parties Agree to Class-wide Mediation):** The Parties agreed to mediate

1 the matter on class basis. Defendant agreed to produce data related to the putative class for the
2 purposes of mediation.

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

5 **April 12, 2022 (The Parties Agreed to Mediate the Matter using JAMS Mediator**
6 **Michael Loeb):** The parties discussed potential mediators. The parties eventually agreed upon
7 using JAMS mediator Michael Loeb and the date for mediation as August 2, 2022.

8 **August 2, 2022 (Date of Mediation Proceedings):** The Parties participated in an all-day
9 mediation with JAMS Mediator Michael Loeb. The Plaintiff traveled from the East Coast to
10 California to participate in person with his counsel. At the mediation the Parties reached a
11 tentative settlement of the class and PAGA claims pending this Court's approval. The Parties
12 executed a confidential Memorandum of Understanding (MOU) regarding settlement. The
13 Parties then later executed the long form settlement in the form of a Joint Stipulation of Class
14 Action Settlement and Release ("Settlement Agreement").

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

17 **April 18, 2023 (Hearing on Motion for Preliminary Approval):** The Plaintiff filed his
18 unopposed Motion for Preliminary Approval of Class and PAGA Settlement. A copy of the
19 Settlement Agreement was attached. The Court, after requesting minor changes to terms of
20 settlement, held the hearing on the motion for Preliminary Approval on April 18, 2023. The
21 Court granted the motion.

22 **April 25, 2023 (Court Issues Order Preliminary Approving Class Settlement):** The
23 Court issued its Order Granting Preliminary Approval of Class Settlement ("Preliminary
24 Approval Order"). In the Preliminary Approval Order the Court set the hearing for Final
25 Approval Hearing for July 27, 2023. That date was later continued by stipulation between the
26 Parties until August 24, 2023 at 8:30 a.m.

27 **May 25, 2023 (Notice of Class Action and PAGA Settlement Mailed):** Notice Packets
28 to Class Members were mailed by the Settlement Administrator CPT.

1 **July 10, 2023 (Class Action Notice Period/Response Deadline Ended):** The Class
2 Notice/Response Deadline ended.

3 **August 24, 2023 @ 8:30 a.m. (Hearing on Final Approval/Fairness of Class**
4 **Settlement):** The hearing on Final Approval/Fairness of the Class Action and PAGA settlement
5 is to be held.

6 **IV. THE SETTLEMENT SHOULD RECEIVE FINAL APPROVAL**

7 Pursuant to the Settlement, the Settlement Administrator CPT has engaged in a
8 comprehensive notification process which started on May 25, 2023 with mailing of notice to 26
9 Class Members via First Class mail. The notice period in which to submit a dispute, objection, or
10 “opt out” of the settlement concluded on July 10, 2023. The terms of the Settlement have been
11 well received by the Class Member as 0 (zero) Class Members have submitted an “opt-out” (100
12 % participation rate), 0 (zero) Class Members have objected, and 0 (zero) Class Members have
13 submitted a dispute. (Exhibit 2 – CPT Decl., ¶¶ 10-14)

14 “The trial court’s discretion is broad” regarding approval of a class action settlement, and
15 “is to be exercised though the application of several well-recognized factors.” *Munoz v. BCI*
16 *Coca-Cola Bottling Co. of Los Angeles* (2010) 186 Cal.App.4th 399, 407. These factors include,
17 but are not limited to, the strength of Plaintiff’s case; the risk, expense, complexity and likely
18 duration of further litigation; the risk of maintaining class action status through trial; the amount
19 offered in settlement; the extent of discovery completed and the stage of the proceedings; the
20 experience and views of counsel; and the reaction of the class members to the proposed
21 settlement. *Id.* (omitting quotations and citations). “The most important factor is the strength of
22 the case for plaintiffs on the merits, balanced against the amount offered in settlement.” *Id.* at
23 407-408 (quoting *Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 130). An
24 analysis of the pertinent factors to the Parties’ Settlement demonstrates that final approval is
25 appropriate.

26 **A. The Parties Disputed the Merits of Plaintiff’s Case and Likelihood of Class**
27 **Certification**

28 The Settlement is the result of the exchange of significant data and information and
vigorously investigated and debated claims. Plaintiff’s Counsel began their investigation into the

1 claims well before the case was filed. Plaintiff's Counsel interviewed and obtained informal
2 discovery from the Plaintiff and various current and former Class Members regarding their
3 experiences working for Defendant. Likewise, Defendant's counsel conducted their own
4 investigation of Plaintiff's allegations after the litigation was initiated. These investigations were
5 crucial to the Parties' dispute over both the merits of the case, as well as with respect to the
6 appropriate scope of the Class.

7 After the Action was initiated, Plaintiff's counsel and Defendant's counsel engaged in
8 litigation, discovery, discussions and negotiations before reaching this Settlement. Early on they
9 began having regular discussions regarding the claims, discovery, production of data, the scope of
10 the Class, and the possibility of mediation and settlement. The Parties each feel strongly
11 regarding their respective positions as to the claims asserted, both at the certification stage and on
12 the merits. In this case, Plaintiff alleges that class certification is appropriate because Defendant's
13 employees were misclassified as exempt employees and subjected to consistent wage and hour
14 policies regarding the lack of payment of overtime wages, meal/rest periods, and wage statements.
15 Plaintiff alleges Defendant misclassified all Class Members as exempt employees and Class
16 Members worked overtime hours but were not paid for said overtime and/or at the appropriate
17 overtime rates throughout the Class Period. Defendant asserts that class certification would not be
18 appropriate because Plaintiff's proposed Class Members were not misclassified.

19 Throughout the litigation, the Parties also have vigorously disputed the merits of Plaintiff's
20 claims. Plaintiff alleges that all Class Members throughout the Class Period were subject to the
21 same misclassification and wage policy and practices promulgated by Defendant. Plaintiff alleges
22 Defendant misclassified Class Members as exempt employees when they were in fact not exempt
23 employees and worked overtime hours that were not paid for at the appropriate overtime rates, etc.
24 Defendants have generally denied Plaintiff's allegations, and further asserts that it has no liability
25 for any of Plaintiff's or the Class Members' alleged claims on the basis that it properly classified
26 Class Members as exempt employees and/or overtime. Defendant further contends that, if this
27 matter were to be further litigated, it would have strong defenses on the merits.

28 As the Parties clearly disagree regarding the strength of Plaintiff's claims and likelihood

1 of class certification, the Settlement represents a fair compromise assuring significant recovery to
2 the Class Members that they would not otherwise be guaranteed.

3 **B. The Risk, Expense, And Complexity Of Continuing To Litigate The Action**

4 As demonstrated above, the Parties are sharply divided on the factual and legal issues
5 pertaining to the underlying claims, as well as whether class certification can be obtained in this
6 case. Defendant is represented by well-staffed counsel who are experienced in wage and hour
7 law and class actions, as are Plaintiff's counsel. The Parties contend that continued litigation
8 would be protracted and expensive, with no assurance of a better outcome for the Class.

9 Significantly, while extensive informal discovery has occurred to ensure the Settlement is
10 fair and reasonable to the Class, should the Settlement not be finally approved, the Parties will
11 need to start from scratch in terms of engaging in formal discovery on the certification issues, as
12 well as the merits in this matter. The Settlement reached by the Parties through extensive arms-
13 length negotiations eliminates the risk that the Class Members will receive nothing, eliminates the
14 need for protracted and expensive litigation that financially jeopardizes any recovery, and
15 eliminates the risk of lengthy and uncertain appeals. The elimination of those many uncertainties
16 is reflected in the Settlement which provides prompt and substantial relief to the Class Members.
17 These factors weigh heavily in favor of approving the Settlement.

18 **C. The Settlement Amount Offered To Class Members Is Fair And Reasonable**

19 The Settlement provides for Defendant to make a payment of **\$400,000** in settlement of all
20 Class claims in the case, including attorney's fees and costs, settlement administration fees,
21 PAGA penalties, and a class representative enhancement award. Class Members will share in a
22 Estimated Net Settlement Fund of approximately **\$226,350** after subtracting attorney fees
23 [-\$132,000] and costs [-\$18,150], the class representative enhancement award [- \$10,000],
24 PAGA LWDA Payment [-\$3,750], PAGA Group employee payment [-\$1,250] and settlement
25 administration costs [-\$8,500]. (Exhibit 2 – CPT Decl., ¶15.) This is an excellent recovery for the
26 class, which at the time of filing includes 26 (out of 26) Settlement Class Members. The average
27 Class Member will receive a pre-tax award of approximately \$8,705.77. (Exhibit 2 – CPT Decl.,
28 ¶ 16). The amount of the Settlement is reasonable given the difficulty of the claims, the degree of
risk and uncertainty involved in further litigation, the amount of time that would pass before

1 Plaintiff and the Class Members would see the fruits of any class verdict in their favor, and the
2 lack of ability of Defendant to pay.

3 The Individual Settlement Amount Calculations are based on the approximate number of
4 Workweeks each Settlement Class Member worked during the Class Period. The Settlement
5 Administrator will determine the total number of Workweeks worked by all Class Members
6 during the Class Period and then divide the Net Settlement Fund by the number of Total
7 Workweeks to derive the “Workweek Value”. Then for each Settlement Class Member the
8 Settlement Administrator shall multiply the number of their Workweeks worked during the Class
9 Period by the Workweek Value to determine each Settlement Class Members Individual
10 Settlement Amount. The Settlement Class Members Individual Settlement Amounts shall be
11 reported as follows: 33% as wages, 33% as interest, and 34% as penalties. (Settlement Agreement
12 § 7.1). As stated in the Class Notices, the Settlement Class Members need not take any further
13 action to receive a Settlement payment other than cash the settlement checks they receive in the
14 mail. (Settlement Agreement §7.5). Since any and all uncashed settlement checks will be
15 distributed to the California State Controller's Unclaimed Property Division, this Settlement and
16 the associated Final Approval Order and Judgment will not create an unpaid residue, and
17 therefore no distribution of such shall be required.

18 **D. The Settlement Agreement Is Fair And Reasonable**

19 The law favors settlements, especially of class actions. *See Potter v. Pacific Coast Lumber*
20 *Co.* (1951) 37 Cal. 2d 592, 602; *Van Bronkhorst v. Safeco Corp.* (9th Cir. 1976) 529 F.2d 943,
21 950. To ensure there is no “fraud, collusion or unfairness to the class,” class claims can only be
22 settled through Court review and approval. *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794,
23 1801. The trial court is required to determine whether the “settlement is fair, adequate and
24 reasonable,” and has “broad discretion” in making this assessment. *Id.*

25 Following notice to the Class, the Court can now make a final determination regarding the
26 fairness of the Settlement. In making this evaluation, courts consider and balance a number of
27 factors, as described above, including: [T]he strength of plaintiffs’ case, the risk, expense,
28 complexity and likely duration of further litigation, the risk of maintaining class action status
through trial, the amount offered in settlement, the extent of discovery completed and the stage of

1 the proceedings, the experience and views of counsel, the presence of a governmental participant,
2 and the reaction of the class members to the proposed settlement. *Wershba v. Apple Computer,*
3 *Inc.* (2001) 91 Cal.App.4th 224, 244–45 (quoting *Dunk v. Ford Motor Co.*, *supra*, 48 Cal.App.4th
4 at 1801).

5 A presumption of fairness exists when: (1) the parties reached a settlement through arm’s-
6 length bargaining; (2) the parties conducted sufficient investigation and discovery to allow
7 counsel and the Court to act intelligently; (3) counsel are experienced in similar litigation; and,
8 (4) the percentage of objectors is small. *Dunk*, *supra*, 48 Cal.App.4th at 1802. In this case, both
9 Plaintiff and Defendant recognized that it was in their mutual interest to explore early resolution.
10 Defendant agrees, through an informal discovery process, to produce a significant amount of data
11 to enable Plaintiff to fully and fairly evaluate both liability and damages. Indeed, prior to and
12 during the mediation, Defendant produced voluminous data, which Plaintiff analyzed through
13 dynamic spreadsheet calculations via Plaintiff’s experts. Those calculations were provided in
14 Plaintiff’s motion for preliminary approval and declarations in support thereof.

15 The Parties therefore had more than enough information to allow for a sufficient analysis
16 of the likelihood of certification (and decertification), liability, and damages. Prior to attending
17 mediation, the Parties were aware of the strengths and weaknesses of their respective positions,
18 and they addressed their respective positions at the lengthy mediation session. It was only after
19 the exchange of information and multiple rounds of arm’s-length demands and offers facilitated
20 by the mediator that the parties finally reached their proposed Settlement. The amount is, of
21 course, a compromise figure, and considers risks related to liability, possible damage scenarios,
22 and all defenses asserted by Defendants.

23 Should a Class Member not desire to participate in the Settlement, for whatever reason,
24 the Parties provided for an “opt-out” procedure. This procedure allowed any Class Members who
25 believed they had claims worth more than what the Settlement provides with an opportunity to
26 pursue their individual claims. Moreover, in the event that a Class Member disagreed with the
27 Settlement for any reason whatsoever, the Parties provided for an objection procedure. However,
28 to date 0 (zero) Class Members have “opted out”, 0 (zero) Class Members have disputed their
Workweeks/individual payment amounts, and 0 (zero) Class Members have objected to final

1 settlement approval. At all times during this litigation, the Parties were represented by competent
2 and experienced counsel with decades of class action experience, who vigorously prosecuted their
3 respective positions while seeking a cost-effective resolution to this Action. Counsel is confident
4 that the Settlement is in the best interest of the Plaintiff, and the Class, as it is fair, reasonable,
5 and provides substantial relief which the Class would not be guaranteed, for numerous reasons,
6 should litigation proceed.

7 **V. THE CLASS REPRESENTATIVE ENHANCEMENT PAYMENT IS**
8 **REASONABLE**

9 Pursuant to the terms of the Settlement, Class Counsel now seeks an Enhancement
10 Payment of **\$10,000 for the Class Representative.** (Settlement Agreement §§1.8, 2.3). Courts
11 have routinely granted such enhancements. *Staton v. Boeing Co.*, 327 F.3d 938, 977 (9th Cir.
12 2003) (“[N]amed Plaintiffs . . . are eligible for reasonable incentive payments.”).

13 When considering whether to make an incentive award, courts consider the following
14 factors: (1) the risk to the class representative in commencing suit, both financial and otherwise;
15 (2) the notoriety and personal difficulties encountered by the class representative; (3) the amount
16 of time and effort spent by the class representative; (4) the duration of the litigation; and (5) the
17 personal benefit, or lack thereof, received by the class representative as a result of the litigation.
18 *Van Vranken v. Atl. Richfield Co.*, 901 F. Supp. 294, 299 (N.D. Cal. 1995) (quotations and
19 citation omitted).

20 The typical enhancement award ranges from approximately \$5,000.00 to \$40,000.00,
21 although some awards are higher, and commonly more than one class representative receives
22 awards in the above range. *Mirkarimi v. Nev. Property I, LLC*, No. 12cv2160 BTM (DHB), 2016
23 WL 795878, at *6 (S.D. Cal. Feb. 29, 2016) (finding a \$30,000.00 enhancement award is proper);
24 *Chu v. Wells Fargo Inv., LLC*, Nos. C 05-4526 MHP, C 06-7924 MHP, 2011 WL 672645, at *5
25 (N.D. Cal. Feb. 16, 2011) (awarding \$10,000.00 to two named plaintiffs, and \$4,000.00 to three
26 named plaintiffs, and indicating that enhancement awards have ranged from \$5,000.00 to
27 \$50,000.00); *see also Williams v. Centerplate, Inc.*, No 11-CV-2159 H-KSC, 12-cv-0008-H-KSC,
28 2013 WL 4525428, at * (S.D. Cal. Aug. 26, 2013) (finding \$5,000.00 incentive awards to three
named plaintiffs, representing 2.3% of the common fund, reasonable).

1 Here, the requested Class Representative Enhancement Payment of \$10,000 is reasonable
2 and justified based on the significant risk, difficulties, time and effort the Class Representative
3 incurred in bringing this case on behalf of the Class, as well as the substantial benefits the resulting
4 Settlement provides the Class. The requested award is at the bottom of the reasonable range, and
5 is justified because of the Class Representative's involvement. The Class Representative has made
6 exceptional efforts to provide information, witnesses, and evidence to Plaintiff's Counsel to
7 achieve the excellent result described herein. The proposed Class Representative Enhancement
8 Payment of \$10,000 represents only 0.025 % of the \$400,000 gross settlement payment (\$10,000
9 divided by \$400,000) and will not significantly reduce the awards of the Class Members.

10 Plaintiff is a single African American male working in the Field Service Department
11 industry. He was the driving force behind this case. He initiated the respective claims, arranged for
12 Plaintiff's Counsel to obtain evidence through production of his own employment files,
13 interviewed former co-workers, reviewed the pleadings/briefs, had numerous calls and meetings
14 with counsel, attended a full day mediation in person, and took personal and financial risk in
15 coming forward (*see, e.g., Earley v. Sup. Ct.*, 79 Cal. App. 4th 1420, 1433 (2000) (representative
16 risk an adverse award of costs). Plaintiff knows little about the legal system but provided and
17 obtained additional information in support of his legal claims. Plaintiff and witnesses expressed
18 fear that by participating in a class action lawsuit they might risk their current jobs and/or future
19 opportunities. Plaintiff however stepped up and worked diligently in support of the case. Plaintiff
20 had numerous meetings and telephone conversations with Class Counsel to aid in the initial
21 investigation, factual development, mediation, and resolution of this case. He also reached out to
22 and communicated with other former/current Class Members about their work, and encouraged by
23 Plaintiff, these other Class Members to contact Class Counsel to provide information about their
24 time at Defendants. In sum, the Settlement could never have been achieved without his service to
25 the greater good on behalf of the Class has resulted in recovery for these workers. (See Da Vega
26 Decl., **Exhibit 3 - Declaration of Wayne Douglas Gillette ISO Motion for Final Approval of**
27 **Class Settlement**). The Class Representative also risked potential judgments against himself if
28 these matters were unsuccessful as a losing party is liable for the prevailing party's costs. *Earley v.*

1 *Sup. Ct.* (2000) 79 Cal.App.4th 1420, 1431-33. Additionally, Plaintiff has protected the interests
2 of Class Members during the pending of this matter, and will continue to do so.

3 **VI. THE PROPOSED ATTORNEYS' FEES AND COSTS ARE REASONABLE**

4 Under the terms of the Settlement Agreement, Class Counsel now moves for a Class
5 Counsel Award of reasonable attorney's **fees in the amount of \$132,000** (33% of the Gross
6 Settlement Amount of \$400,000) approved per Court's Preliminary Approval Order and
7 Settlement Agreement. (Settlement Agreement §§1.5, 2.2; and Preliminary Approval Order).
8 Class Counsel also seeks reimbursement of reasonable **costs incurred in the amount of \$18,150**.
9 (Da Vega Decl., ¶14; Settlement Agreement §§1.5, 2.2). These amount falls well within the
10 historical range of attorneys' fee awards, especially as Class Counsel's fees constitute one-third
11 (1/3) of the total settlement value. The requested fee represents fair compensation for undertaking
12 complex, risky, expensive, and time-consuming litigation on a contingent fee basis, especially in
13 light of the substantial benefits achieved by Class Counsel for the Class Members. Plaintiff's
14 Counsel diligently litigated and investigated this case. Class Counsel has attached a detailed
15 declaration justifying the award of fees and costs. (see Da Vega Decl., ¶¶ 1- 22).

16 It has long been recognized that "a litigant or a lawyer who recovers a common fund for
17 the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee
18 from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). The purpose of
19 this doctrine is to avoid unjust enrichment and to spread litigation costs proportionately among all
20 the beneficiaries. *Id.* This common fund doctrine is firmly rooted in American case law. *See, e.g.,*
21 *Trustees v. Greenough*, 105 U.S. 527 (1882); *Central R. & Banking Co. v. Pettus*, 113 U.S. 116
(1885); *Blum v. Stenson*, 465 U.S. 886, 900 n.16 (1984).

22 California courts have recognized that an appropriate method for awarding attorney's fees
23 in class action cases like this is to award a percentage of the "common fund" created as a result of
24 the settlement. *City & Cnty. of San Francisco v. Sweet* ("Sweet"), 12 Cal.4th 105, 110-11 (1995);
25 *Quinn v. State*, 15 Cal.3d 162, 168 (1975). The basis of the common fund is fairness to the
26 successful litigant who might otherwise receive no benefit because his recovery might be
27 consumed by the expenses; correlative prevention of an unfair advantage to others who are
28 entitled to share in the fund and who should bear their share of the burden of its recovery; and

1 encouragement of the attorney, who will be more willing to undertake and diligently prosecute
2 proper litigation for the protection or recovery of the fund if he is assured that he will be properly
3 and directly compensated should his efforts be successful. *Sweet*, 12 Cal.4th 105, 111 (1995). In
4 *Quinn v. State*, the California Supreme Court expressly recognized that “one who expends
5 attorneys’ fees in winning a suit which creates a fund from which others derive benefits may
6 require those passive beneficiaries to bear a fair share of the litigation costs.” 15 Cal.3d 162, 167
7 (1975). Similarly, in *Sweet*, the Court recognized that the common fund doctrine has been
8 applied “consistently in California when an action brought by one party creates a fund in which
9 other persons are entitled to share.” 12 Cal.4th at 110.

10 Several courts have expressed frustration with the alternative “lodestar” approach for
11 deciding fee awards, which usually involves wading through voluminous and often
12 indecipherable time records. *Lealao v. Beneficial Cal., Inc.*, 82 Cal. App. 4th 19, 31 n.5 (citing *In*
13 *re Activision Sec. Litig.*, 723 F. Supp. 1373, 1375 (N.D. Cal 1989)). The percentage approach is
14 preferable to the lodestar because it: (1) aligns the interests of class counsel and absent class
15 members; (2) encourages efficient resolution of the litigation by providing an incentive for early,
16 yet reasonable, settlement; and (3) reduces the demands on judicial resources. *In re Activision*,
17 723 F. Supp. at 1378-79. The Ninth Circuit now routinely uses the percentage of the common
18 fund approach to determine the award of attorney’s fees. *Lealao*, 82 Cal. App. 4th at 30-31; *see*
19 *e.g., In re Pacific Enters. Sec. Litig.*, 47 F.3d 373, 378-79 (9th Cir. 1995) (approving attorney’s
20 fee of 33%).

21 Class Counsel’s request for fees of one-third of the Gross Settlement Amount is well
22 within the range of reasonableness. Historically, courts have awarded percentage fees between
23 20% and 50%, depending on the circumstances of the case. *See In re Activision*, 723 F.Supp. at
24 1378. Awarding 33% of a common fund is neither unreasonable nor uncommon. California
25 courts have frequently awarded attorneys’ fees in common fund cases equal to one-third of the
26 gross recovery. *See, e.g., Lafitte v. Robert Half International Inc.* (2016) 1 Cal.5th 480 (approving
27 one-third percent attorneys’ fee); *Chavez v. Netflix, Inc.*, 162 Cal.App.4th 43, 66 n.11 (1st Dist.
28 2008) (noting that fee of one-third gross settlement value is customary); *see also, e.g., In re*
M.D.C. Holdings Sec. Litig., 1990 WL 454747, at *7 (S.D. Cal. Aug. 30, 1990) (“In private

1 contingent litigation, fee contracts have traditionally ranged between 30% and 40% of the total
2 recovery.”).

3 Further, California courts recognize that a percentage fee “may be calculated on the basis
4 of the total fund made available rather than the actual payment made to the class.” *Lealao*, 82
5 Cal.App.4th at 51 (citing *Boeing Co. v. Van Gemert*, 444 U.S. 472 (1980); *Waters v. Intern.*
6 *Precious Metals Corp.*, 190 F.3d 1291 (11th Cir. 1999); *Williams v. MGM-Pathe Commun’s. Co.*,
7 129 F.3d 1026 (9th Cir. 1997)); see also, e.g., *Bergman v. Thelen LLP*, 2016 U.S. Dist. LEXIS
8 170861, *21-22 (N.D. Cal. Dec. 9, 2016) (“...Ninth Circuit precedent requires courts to award
9 class counsel fees based on the total benefits being made available to class members rather than
10 the actual amount that is ultimately claimed.”) (citing *Williams*).

11 Class Counsel has borne, and continues to bear, the entire risk and cost of litigation
12 associated with this class action on a pure contingency basis. The factual and legal issues posed
13 in this case are highly disputed, and there also were risks whether a class would be certified,
14 leaving a large number of putative class members unlikely to receive any recovery. While
15 California courts recognize that the percentage method is superior to the lodestar method, they
16 also recognize that the lodestar provides a useful “cross-check” in determining reasonableness of
17 percentage fees sought. Here, the requested fee award of \$132,000 represents a negative
18 multiplier of the lodestar to date (\$135,325) which is well within the range warranted under
19 California law. (see Da Vega Decl., ¶ 13, 19-21; **Exhibit 4 - NALFA 2020 Litigation Hourly**
20 **Rate Range Growth; Exhibit 5 - Laffey Matrix; Exhibit 6 - National Law Journal Billing**
21 **Survey 2017**; See also Declaration of Matthew H. Fisher ISO Final Approval, ¶¶ 8-13;
22 Declaration of Ted Mechtenberg ISO Final Approval ¶¶ 8-13). ““Multipliers of 1 to 4 are
23 commonly found to be appropriate in complex class action cases.”” *Destefano v. Zynga, Inc.*,
24 2016 WL 537946, at *21 (N.D. Cal. Feb. 11, 2016) (quoting *Hopkins v. Stryker Sales Corp.*, 2013
25 WL 496358, at *4 (N.D. Cal. Feb. 6, 2013)); see *Vizcaino v. Microsoft Corp.*, 290 F.3d United
26 States District Court Northern District 1043, 1051 n.6 (9th Cir. 2002)(citing survey finding most
27 multipliers range from 1.0 to 4.0). As a result, this Court should have no trouble concluding that
28 an award is supported by the lodestar cross-check is fair and reasonable and is justified under
California law. “[T]he lodestar method better accounts for the amount of work done, while the

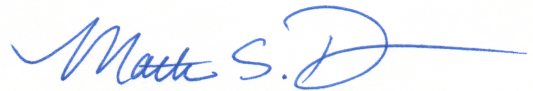
percentage of the fund method more accurately reflects the results achieved.” *Rawlings v. Prudential-Bache Properties, Inc.* (6th Cir. 1993) 9 F.3d 513, 516. The Court should approve the requested attorneys’ fees and costs, which are justified by the results achieved, the complexity of the issues, the difficulty of the case, and the risk undertaken by Class Counsel. The requested attorneys’ fees and costs will not be opposed by Defendant and are well within established guidelines.

VII. CONCLUSION

For the reasons set forth above and in the accompanying papers, Plaintiff respectfully requests that the Court grant Plaintiff’s unopposed Motion for Final Approval of the Class Settlement and sign the proposed Order and Judgment thereon. The Settlement is fair, adequate, and reasonable. It will result in substantial payments to Class Members; it is non-collusive; and it was achieved as the result of informed, extensive, and arm’s length negotiations conducted by counsel for respective Parties who are experienced in wage and hour class action litigation.

DATED: July 31, 2023

DA VEGA | FISHER | MECHTENBERG LLP



By: _____
Matthew S. Da Vega
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