

1 Galen T. Shimoda (Cal. State Bar No. 226752)
Justin P. Rodriguez (Cal. State Bar No. 278275)
2 Renald Konini (Cal. State Bar No. 312080)
Shimoda & Rodriguez Law, PC
3 9401 East Stockton Boulevard, Suite 120
Elk Grove, CA 95624
4 Telephone: (916) 525-0716
Facsimile: (916) 760-3733

5 Attorneys for Plaintiff ARNOLD SERRANO
6 individually and on behalf of similarly situated employees

7
8 **SUPERIOR COURT OF CALIFORNIA**
9
10 **FOR THE COUNTY OF SACRAMENTO**

11 ARNOLD SERRANO, individually and on
12 behalf of all other similarly situated
13 employees,

14 Plaintiff,

15 vs.

16 COOL TIME, LLC, a California Corporation;
17 and DOES 1 to 100, inclusive,

18 Defendants.
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Case No. 34-2021-00312356

*Assigned for All Purposes to Hon. Lauri A. Damrell,
Department 28*

CLASS ACTION

**MEMORANDUM OF POINTS &
AUTHORITIES IN SUPPORT OF
PLAINTIFF'S MOTION FOR FINAL
APPROVAL OF CLASS ACTION AND PAGA
SETTLEMENT**

Date: August 4, 2023

Time: 9:00 a.m.

Dept.: 28

Judge: Hon. Lauri A. Damrell

Filed: December 8, 2021

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Trial Date: None Set

TABLE OF CONTENTS

I. INTRODUCTION AND OPENING SUMMARY OF ARGUMENT	1
II. PROCEDURAL AND LITIGATION HISTORY	2
III. INVESTIGATION AND DISCOVERY CONDUCTED	2
IV. NEGOTIATION AND PROPOSED SETTLEMENT	3
a. Plaintiff and Defendant Engaged in Extensive Arm's Length Negotiations.....	3
b. The Terms of the Agreement.....	3
c. Allocation of Settlement Funds	6
V. PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT AND THE SUBSEQUENT CLASS ACTION ADMINISTRATION	6
VI. THE AGREEMENT WARRANTS PRELIMINARY APPROVAL AS IT IS FAIR, REASONABLE, AND ADEQUATE AS TO ALL CLASS MEMBERS BASED ON THE FACTS OF THIS CASE	8
a. The Terms of The Settlement Are Fair and Within the Range of Reasonableness	8
i. The Settlement is a Result of Extensive, Non-Collusive Arm's Length Negotiations Between the Parties.....	9
ii. The Extent of Investigation and Discovery Completed Provided Ample Information to Enter Into an Informed and Reasonable Settlement.....	9
iii. Plaintiff's Counsel are Experienced in Similar Litigation.....	9
iv. No Class Members Objected or Opted Out	10
v. The Settlement is Fair, Reasonable, and Adequate Based on the Strength of Plaintiff's Case and the Risks and Costs of Further Litigation.....	10
vi. The Proposed Settlement is a Reasonable Compromise of Claims	11
b. Certification of the Class is Appropriate.....	12
i. The Proposed Settlement Class is Ascertainable and Sufficiently Numerous.....	12
ii. The Commonality, Predominance, and Typicality Requirements are Met ..	13
iii. The Adequacy Requirement is Met.....	14
VII. ATTORNEY'S FEES AND COSTS, ENHANCEMENT PAYMENT TO THE CLASS REPRESENTATIVE, AND SETTLEMENT ADMINISTRATOR COSTS ARE REASONABLE AND SHOULD BE APPROVED.....	14
a. A Fee of Thirty-Five Percent of the Common Fund Is Reasonable Because It Is Within the Ranges Historically Approved by Courts in Class Settlements and a Lodestar Cross Check Validates the Proposed Fee	15
b. Class Counsel's Expenses and Costs Were Necessarily Incurred to Achieve the Benefit Obtained	17

c. Class Counsel’s Request for Class Representatives Enhancement Payments Is Justified In Light of The Results Achieved for the Class	18
d. The Court Should Approve the Payment of Settlement Administrator Costs.....	18
VIII. CONCLUSION	19

TABLE OF AUTHORITIES

CALIFORNIA CASES

<i>Cellphone Termination Fee Cases</i> , 180 Cal.App.4th 1110 (2009).....	8, 18
<i>Children’s Hosp. and Med. Ctr. v. Bonta</i> , 97 Cal.App.4th 740 (2002)	16
<i>City of San Jose v. Superior Court</i> , 12 Cal.3d 447 (1974).....	13
<i>Classen v. Weller</i> , 145 Cal.App.3d 27, 46-47 (1983).....	13
<i>Dunk v. Ford Motor Co.</i> , 48 Cal.App.4th 1794 (1996)	8, 9, 12
<i>Green v. Obledo</i> , 29 Cal.3d 126 (1981).....	8
<i>Hebbard v. Calgrove</i> , 28 Cal.App.3d 1017, 1030 (1972).....	13
<i>In re Microsoft I-V Cases</i> , 135 Cal.App.4th 706 (2006).....	5, 8
<i>Karton v. Ari Design & Constr., Inc.</i> , 61 Cal.App.5th 734 (2021).....	15, 16
<i>Ketchum v. Moses</i> , 24 Cal.4th 1122 (2001).....	15, 16, 17
<i>Kullar v. Foot Locker Retail, Inc.</i> , 168 Cal.App.4th 116 (2008)	8, 11
<i>Laffitte v. Robert Half Internat., Inc.</i> , 1 Cal.5th 480 (2016)	15, 16
<i>Lee v. Dynamex, Inc.</i> , 166 Cal.App.4th 1325 (2008).....	12
<i>McGhee v. Bank of America</i> , 60 Cal.App.3d 442 (1976).....	14
<i>Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles</i> , 186 Cal.App.4th 399 (2010)	11
<i>Neary v. Regents of Univ. of Cal.</i> , 3 Cal.4th 273 (1992)	8
<i>Noel v. Thrifty Payless, Inc.</i> , 7 Cal.5th 955 (2019).....	7, 12
<i>Nordstrom Com. Cases</i> , 186 Cal.App.4th 576 (2010).....	4, 8
<i>North County Contr. ’s Assn., Inc. v. Touchstone Ins. Svcs.</i> , 27 Cal.App.4th 1085 (1994)	8
<i>Rebney v. Wells Fargo Bank</i> , 220 Cal.App.3d 1117 (1990)	10
<i>Richmond v. Dart Ind., Inc.</i> , 29 Cal.3d 462, 473 (1981).....	13
<i>Rose v. City of Hayward</i> , 126 Cal.App.3d 926 (1981)	12
<i>Syers Props. III, Inc. v. Rankin</i> , 226 Cal.App.4th 691 (2014).....	16
<i>Wershba v. Apple Computer, Inc.</i> , 91 Cal.App.4th 224 (2001)	8, 10, 17

CALIFORNIA STATUTES AND OTHER AUTHORITIES

Cal. Labor Code section 2699	8
Cal. Labor Code section 2699.3.....	2
Cal. Rules of Court, Rule 3.769.....	8

FEDERAL CASES

<i>Abrams v. Lightolier, Inc.</i> , 50 F.3d 1204, 1225 (3d Cir. 1995).....	17
<i>Amchem Products v. Windsor</i> , 521 U.S. 591 (1997)	13
<i>Avila v. Cold Spring Granite Co.</i> , 2017 U.S. Dist. LEXIS 130878 (E.D. Cal. 2017)	11
<i>Bellinghausen v. Tractor Supply Co.</i> , 306 F.R.D. 245 (N.D. Cal 2015).....	11
<i>Birch v. Office Depot, Inc.</i> , USDC Southern District, Case No. 06cv1690 DMS (WMC).....	15
<i>Boeing Co. v. Van Gemert</i> , 444 U.S. 472 (1980)	15
<i>Boyd v. Bechtel Corp.</i> , 485 F.Supp. 610 (N.D. Cal. 1979)	9
<i>Bratcher v. Bray-Doyle Indep. Sch. Dist. No. 42</i> , 8 F.3d 722 (10th Cir. 1993)	17
<i>Bravo v. Gale Triangle, Inc.</i> , 2017 U.S. Dist. LEXIS 77714 (C.D. Cal. 2017)	11
<i>Briseno v. ConAgra Foods, Inc.</i> , 844 F.3d 1121 (9th Cir. 2017)	7
<i>Chem. Bank v. City of Seattle (In re Wash. Pub. Power Supply Sys. Sec. Litig.)</i> , 19 F.3d 1291 (9th Cir. 1994)	17
<i>Chu v. Wells Fargo Investments, LLC</i> , 2011 WL 672645 (N.D. Cal. 2011)	4
<i>City of Detroit v. Grinnell Corp.</i> , 495 F.2d 448 (2d Cir. 1974)	12
<i>Davis v. Cox Commc'ns California, LLC</i> , 2017 U.S. Dist. LEXIS 63514 (S.D. Cal. 2017).....	4
<i>Dent v. ITC Serv. Croup</i> , 2013 U.S. Dist. LEXIS 139359 (D. Nev. 2013).....	18
<i>Emmons v. Quest Diagnostics Clinical Lab'ys, Inc.</i> , 2017 WL 749018 (E.D. Cal. 2017)	15, 16
<i>Franco v. Ruiz Food Prod., Inc.</i> , 2012 WL 5941801 (E.D. Cal. 2012).....	4
<i>Garcia v. Gordon Trucking, Inc.</i> , 2012 U.S. Dist. LEXIS 160052 (E.D. Cal. 2012).....	4
<i>Garcia v. City of King City</i> , 2017 WL 363257 (N.D. Cal. 2017).....	12
<i>Gardner v. GC Servs., LP</i> , 2012 U.S. Dist. LEXIS 47043 (S.D. Cal. 2012)	11
<i>Gay v. Waiters' & Dairy Lunchmen's Union</i> , 489 F.Supp. 282 (N.D. Cal. 1980), <i>aff'd</i> 694 F.2d 531 (9th Cir. 1982)	13

1	<i>Hanlon v. Chrysler Corp.</i> , 150 F.3d 1011 (9th Cir. 1998)	13, 14
2	<i>Harris v. Marhoefer</i> , 24 F.3d 16 (9th Cir. 1994).....	17
3	<i>Hensley v. Eckerhart</i> , 461 U.S. 424 (1983).....	15, 16
4	<i>Hopson v. Hanesbrands Inc.</i> , 2009 U.S. Dist. LEXIS 33900 (N.D. Cal. 2009)	4
5	<i>Ingram v. The Coca Cola Co.</i> , 200 F.R.D. 685 (N.D. Ga. 2001).....	18
6	<i>In re Heritage Bond Litig.</i> , 2005 WL 1594403 (C.D. Cal. 2005).....	9, 10, 14
7	<i>In re Omnivision Technologies, Inc.</i> , 559 F.Supp.2d 1036 (2007)	11
8	<i>Jack v. Hartford Fire Ins. Co.</i> , 2011 U.S. Dist. LEXIS 118764 (S.D. Cal. 2011)	4
9	<i>Jennings v. Open Door Marketing, LLC</i> , 2018 WL 4773057 (N.D. Cal. 2018)	4
10	<i>Junkersfeld v. Med. Staffing Sols., Inc.</i> , 2022 WL 2318173 (E.D. Cal. 2022).....	4
11	<i>Linney v. Cellular Alaska P'ship</i> , 151 F.3d 1234 (9th Cir. 1998)	12
12	<i>Martin v. Ameripride Servs.</i> , 2011 U.S. Dist. LEXIS 61796 (S.D. Cal. 2011)	15
13	<i>Messineo v. Ocwen Loan Servicing, LLC</i> , 2017 WL 733219 (N.D. Cal. 2017).....	12
14	<i>Moore v. Fitness Int'l, LLC</i> , 2014 U.S. Dist. LEXIS 8358 (S.D. Cal. 2014).....	4
15	<i>Nat'l Rural Telecommunications Coop. v. DIRECTV, Inc.</i> , 221 F.R.D. 523 (C.D. Cal. 2004)	10
16	<i>Officers for Justice v. Civil Serv. Comm'n</i> , 688 F.2d 615 (9th Cir. 1982).....	10
17	<i>Paul, Johnson, Alston & Hunt v. Graulity</i> , 886 F.2d 268 (9th Cir. 1989)	15
18	<i>Rannis v. Recchia</i> , 380 F. App'x 646 (9th Cir. 2010).....	7
19	<i>Rippee v. Boston Mkt. Corp.</i> , USDC Southern District, Case No. 05cv1359 BTM (JMA).....	15
20	<i>Ruch v. AM Retail Grp., Inc.</i> , 2016 WL 5462451 (N.D. Cal. 2016)	4
21	<i>Schiller v. David's Bridal, Inc.</i> , 2012 U.S. Dist. LEXIS 80776 (E.D. Cal. 2012).....	11
22	<i>Silber v. Mabon</i> , 18 F.3d 1449 (9th Cir. 1994).....	7
23	<i>Singer v. Becton Dickinson & Co.</i> , 2010 U.S. Dist. LEXIS 53416 (S.D. Cal. 2010).....	4
24	<i>Syed v. M-I, L.L.C.</i> , 2017 U.S. Dist. LEXIS 24880 (E.D. Cal. 2017).....	4
25	<i>Van Vranken v. Atlantic Richfield Co.</i> , 901 F.Supp. 294 (N.D. Cal. 1995).....	18
26	<i>Vizcaino v. Microsoft Corp.</i> , 290 F.3d 1043 (9th Cir. 2002)	16
27	<i>Walsh v. CorePower Yoga LLC</i> , 2017 U.S. Dist. LEXIS 163991 (N.D. Cal. 2017).....	7
28	<i>West v. Circle K Stores, Inc.</i> , 2006 U.S. Dist. LEXIS 76558 (E.D. Cal. 2006)	18

1	<i>Wright v. Linkus Enters.</i> , 259 F.R.D. 468 (E.D. Cal. 2009).....	7
2	FEDERAL STATUTES AND OTHER AUTHORITIES	
3	Fed. R. Civ. Proc., Rule 23.....	8
4	<i>Richard Posner, Economic Analysis of Law</i> § 21.9, at 534-35 (3d ed. 1986).....	17

I. INTRODUCTION AND OPENING SUMMARY OF ARGUMENT

Plaintiff Arnold Serrano (“Plaintiff”) seeks final approval of a wage and hour class action and Private Attorneys General Act (“PAGA”) settlement in the gross amount of \$105,000. *See generally* Exhibit A (Joint Stipulation Regarding Class Action and PAGA Settlement and Release [“Agreement”]). Plaintiff brought this class action individually and on behalf of similarly situated employees who worked for Defendant Cool Time, LLC, (“Defendant”) (Plaintiff and Defendant sometimes collectively referred to as the “Parties”). *See generally* Exhibit B (Plaintiff's Operative Complaint). There are approximately 70 Class Members.

Plaintiff has alleged that Defendant 1) failed to pay overtime wages, 2) failed to pay minimum wages, 3) failed to provide meal periods, 4) failed to provide rest periods, 5) failed to provide accurate wage statements, 6) failed to timely pay all final wages, 7) failed to reimburse employees for incurred expenses, and 8) engaged in unfair competition. *See generally* Exhibit B; *see also* Declaration of Justin P. Rodriguez (“Decl. Rodriguez”), ¶ 2. Plaintiff has also alleged that Defendant is liable for civil penalties under the PAGA based on these violations. *See id.*; Exhibit C (Plaintiff's Ltr. to the Labor and Workforce Development Agency [“LWDA”] Regarding PAGA Claims). Defendant has denied all of Plaintiff's allegations in their entirety and any liability or wrongdoing of any kind. *See* Decl. Rodriguez, ¶ 5. Defendant has also denied that this case is appropriate for class certification other than for purposes of settlement. *See id.* However, subject to Court approval, the Parties have been able to compromise and settle all asserted claims as a result of extensive investigations, document and data exchanges, and extended negotiations. *See* Exhibit A. Plaintiff and Plaintiff's counsel believe the proposed Agreement is fair, reasonable, and adequate based on the investigations, discovery, employee data exchanges, negotiations, and a detailed knowledge of the issues in this case. *See* Decl. Rodriguez, ¶¶ 6-10.

The reaction of Class Members to the preliminary approved Agreement has been overwhelmingly positive and gives substantial support to the Agreement and all terms and allocations therein being fair, reasonable, and adequate. Zero Class Members opted out of the settlement and there have been zero objections to the Agreement. *See* Declaration of Karen Hernandez. (“Decl. Hernandez”), ¶¶ 11-12. It is well within the discretion of this Court to grant final approval of the

1 proposed settlement as it satisfied all applicable criteria for final settlement approval under California
2 law. Accordingly, Plaintiff requests that the Court: (1) certify the proposed settlement class; (2) grant
3 final approval of the Agreement (Exhibit A); (3) find that the procedures used to notify Class Members
4 complied with due process; (4) grant Plaintiff's request for attorney's fees and costs, the Enhancement
5 Payment to the Class Representative, and Claims Administrator Costs; and (5) approve and adopt the
6 proposed order granting final approval, which is filed concurrently herewith.

7 **II. PROCEDURAL AND LITIGATION HISTORY**

8 Plaintiff filed a class action complaint on approximately December 8, 2021, in the Sacramento
9 County Superior Court against Defendant. Plaintiff exhausted administrative remedies under the
10 PAGA by providing notice of the claims and violations to the LWDA. *See* Exhibit C; Cal. Lab. Code §
11 2699.3(a), (c); Decl. Rodriguez, ¶ 3. Then, Plaintiff filed a First Amended Class Action Complaint on
12 approximately February 10, 2022, to include a PAGA claim. *See id.*; Exhibit B. There is no date set
13 for a motion for certification or trial in this matter. *See* Decl. Rodriguez, ¶ 4.

14 **III. INVESTIGATION AND DISCOVERY CONDUCTED**

15 Plaintiff thoroughly investigated issues affecting certification, the merits of the class claims, and
16 potential damages for such claims. *See id.* at ¶¶ 3, 6-10; Declaration of Arnold Serrano ("Decl.
17 Serrano") ¶¶ 5-7. Plaintiff worked during the time all of Defendant's policies and practices at issue in
18 the Complaint were in effect and provided information regarding these policies and practices, enabling
19 pre-filing investigations to take place. *See* Decl. Serrano, ¶ 2. The Parties engaged in informal
20 discovery and exchange of documents, including a representative sampling of employee data and
21 relevant policies for the entirety of the statute of limitations applicable to the asserted claims. The
22 discovery covered all aspects of the asserted claims, including certification issues, merits issues,
23 damages, the scope and configuration of Class Members, the content and implementation of the wage
24 and hour policies at issue, issues relating to manageability concerns at trial, among other relevant areas.
25 *See* Decl. Rodriguez, ¶¶ 6-7. The information allowed Plaintiff to determine the extent and frequency
26 of any violations in accordance with Plaintiff's contentions and create an accurate damages model to
27 assess the reasonableness of any settlement. *See id.*

1 **IV. NEGOTIATION AND PROPOSED SETTLEMENT**

2 **a. Plaintiff and Defendant Engaged in Extensive Arm's Length Negotiations**

3 The final settlement occurred only after extended, arm's length negotiations. Over the course of
4 approximately seventeen (17) months, Plaintiff has been investigating the claims and discussing with
5 Defendant's counsel the merits of the claims and issues present in this case. *See id.* at ¶ 8. The Parties
6 exchanged substantial amounts of information and legal analysis in connection with these discussions.
7 *See id.* at ¶ 7. It was only after these extended discussions, that the Parties were able resolve all claims
8 and enter into the Agreement. *See id.* at ¶ 8.

9 **b. The Terms of the Agreement**

10 1. The following groups of individuals are covered by the Agreement: (a) Class Members,
11 which include all non-exempt employees who have or continue to work for Defendant in California
12 from December 8, 2017, up to March 17, 2023; and (b) Aggrieved Employees, which include all non-
13 exempt employees who have, or continue to work for Defendant in California, from November 11,
14 2020, up to March 17, 2023. *See* Exhibit A, ¶¶ 1.2, 1.5. There are approximately 70 Class Members
15 and 59 Aggrieved Employees. *See id*; Decl. Hernandez, ¶ 7.

16 2. Defendant will pay the Gross Settlement Amount of \$105,000, which is exclusive of the
17 employer's share of payroll taxes. *See id.* at ¶ 5.1. No portion of the Gross Settlement Amount will
18 revert to Defendant. *See id.* at ¶ 5.6. Aggrieved Employees will still be paid their share of the PAGA
19 Payment regardless of whether they opt out of being Class Members. *See id.* at ¶¶ 7.5.1, 7.8.3.

20 3. Up to \$10,000 will be paid to Plaintiff as an Enhancement Payment. This amount will
21 be in addition to any amount Plaintiff may be entitled to under the terms of the Agreement. *See id.* at ¶
22 5.4.

23 4. Subject to Court approval, the Parties have selected ILYM Group, Inc. to act as the
24 Settlement Administrator, whose final costs are \$6,377.40. *See* Decl. Hernandez, ¶ 16; Exhibit A, ¶
25 1.33; Decl. Rodriguez, ¶ 24.

26 5. The Parties agree that \$5,000 of the Gross Settlement Amount shall be allocated to
27 resolving claims under the PAGA. Seventy-Five percent (75%) of the PAGA Payment will be paid to
28 the LWDA and Twenty-Five percent (25%) will be paid to Aggrieved Employees. *See* Exhibit A, ¶

5.5. Given the risk to proving the claims on the merits, the derivative nature of the penalties, the efforts by Defendant to maintain compliant policies and take corrective action, the presence of what may likely be deemed good faith disputes, and the Court's discretion to reduce any penalty award, Plaintiff believes the \$5,000 PAGA Payment allocation represents a meaningful settlement aimed at deterring non-compliance given the facts of this case. *See* Decl. Rodriguez, ¶¶ 5, 9-10; *see also Nordstrom Com. Cases*, 186 Cal.App.4th 576, 589 (2010) (approving \$0 allocation to the resolution of PAGA claims based on their being disputed and being part of a class settlement which was evaluated based on the terms of the agreement overall); *Junkersfeld v. Med. Staffing Sols., Inc.*, 2022 WL 2318173, at *8 n.2 (E.D. Cal. 2022) (collecting cases with PAGA settlement values ranging from .037%-1%); *Jennings v. Open Door Marketing, LLC*, 2018 WL 4773057, *9 (N.D. Cal. 2018) (approving settlement of PAGA claims at 0.6% of total estimated value due to risk of no recovery); *Ruch v. AM Retail Grp., Inc.*, 2016 WL 5462451, *7 (N.D. Cal. 2016) (approving \$10,00 PAGA settlement allocation where total PAGA penalty exposure was approximately \$5.2 million, or 0.2% of total estimated value); *Davis v. Cox Commc'ns California, LLC*, 2017 U.S. Dist. LEXIS 63514, *1 (S.D. Cal. 2017) (preliminarily approving \$4,000 PAGA allocation in \$275,000 settlement); *Moore v. Fitness Int'l, LLC*, 2014 U.S. Dist. LEXIS 8358, *5 (S.D. Cal. 2014) (approving \$2,500 PAGA allocation when attorneys' fees award alone amounted to \$200,000); *Jack v. Hartford Fire Ins. Co.*, 2011 U.S. Dist. LEXIS 118764, *6 (S.D. Cal. 2011) (approving \$3,000 PAGA allocation in \$1,200,000 settlement); *Singer v. Becton Dickinson & Co.*, 2010 U.S. Dist. LEXIS 53416, *2 (S.D. Cal. 2010) (approving \$3,000 PAGA allocation in \$1,000,000 settlement); *Hopson v. Hanesbrands Inc.*, 2009 U.S. Dist. LEXIS 33900, *9 (N.D. Cal. 2009) (approving \$1,500 PAGA allocation in \$1,026,000 settlement); *Syed v. M-I, L.L.C.*, 2017 U.S. Dist. LEXIS 24880, *34-35 (E.D. Cal. 2017) (approving \$100,000 PAGA allocation in a \$3,950,000 settlement even though PAGA exposure was calculated at \$53,600,000, or 0.2% of total estimated value); *Garcia v. Gordon Trucking, Inc.*, 2012 U.S. Dist. LEXIS 160052, at *7 (E.D. Cal. 2012) (approving \$10,000 PAGA allocation in a \$3,700,000 settlement); *Franco v. Ruiz Food Prod., Inc.*, 2012 WL 5941801, at *14 (E.D. Cal. 2012) (\$10,000 in PAGA payment from \$2,500,000 settlement fund); *Chu v. Wells Fargo Investments, LLC*, 2011 WL 672645, at *1 (N.D. Cal. 2011) (approving PAGA settlement payment of \$7,500 to the LWDA out of \$6.9 million common-fund settlement).

1 6. The Parties agree that up to thirty-five (35%) of the Gross Settlement Amount (\$36,750)
2 will be paid for Plaintiff's attorneys' fees incurred in the litigation of this case. Defendant will not
3 oppose any application for attorneys' fees so long as it is within this threshold. *See id.* at ¶ 5.2.
4 Additionally, the Parties agree that Plaintiff will be entitled to the actual litigation costs in the amount
5 of \$3,239.95. *See* Exhibit D (Plaintiff's Counsel's Itemized Costs). The difference between the actual
6 costs and the originally allocated \$4,000 will be redistributed to Class Members on a pro rata basis. *See*
7 Exhibit A, ¶ 5.2.

8 7. Any allocated amounts under the Agreement for Settlement Administrator Costs, Class
9 Representative Enhancement Payment, and attorney's fees and costs that are not ultimately awarded by
10 the Court will remain part of the Net Settlement Amount and be paid out to Participating Class
11 Members on a pro rata basis as set forth in the Agreement. *See* Exhibit A, ¶¶ 5.1-5.5, 5.8. These
12 amounts will be paid out from the Gross Settlement Amount, not in addition to the Gross Settlement
13 Amount. *See* Exhibit A, ¶¶ 5.1-5.5.

14 8. Class Members who fail to timely opt-out of this settlement will waive all Released
15 Class Claims as set forth in the Agreement. *See* Exhibit A, ¶¶ 1.14, 1.26, 1.30, 1.32, 6.1. Aggrieved
16 Employees will waive all Released PAGA Claims as set forth in the Agreement regardless of whether
17 they opt out of being a Class Member. *See id.* at ¶¶ 1.2, 1.14, 1.31-1.32, 6.2, 7.5.1.

18 9. For any portion of the Net Settlement Amount or PAGA Payment allocated to
19 Participating Class Members and/or Aggrieved Employees that is not claimed by them by cashing their
20 respective settlement checks within 180 calendar days of issuance, that remaining amount shall be
21 donated equally, *i.e.*, 50/50 to Capital Pro Bono, Inc., and the Center for Workers' Rights under the
22 doctrine of *cy pres*. *See* Exhibit A, at ¶ 5.6. Because the Agreement provides for all funds such that
23 there is no residue, the provisions of California Civil Procedure Code section 384 are inapplicable. *See*
24 *In re Microsoft I-V Cases*, 135 Cal.App.4th 706, 718, 720 (2006). The designated beneficiaries clearly
25 promote the law consistent with the objectives and purposes underlying the lawsuit as they are non-
26 profits aimed at assisting employees with wage and hour claims who cannot afford legal representation,
27 including providing representation for employees in wage claims before the California Labor
28 Commissioner. *See id.* at 722-724; *see also* Decl. Rodriguez, ¶¶ 26-35.

1 **c. Allocation of Settlement Funds**

2 Payment to Participating Class Members and Aggrieved Employees will not require the
3 submission of a claim form. A Net Settlement Amount will be determined by subtracting from the
4 Gross Settlement Amount any attorneys' fees and costs, Enhancement Payment to the Class
5 Representative, Settlement Administrator Costs, PAGA Payment that are approved and/or awarded by
6 the Court. Each Class Member's share will be determined by dividing their total weeks worked within
7 the Class Period by the total weeks worked by all Class Members within the Class Period. That
8 fraction will then be multiplied by the Net Settlement Amount to arrive at the Class Member's
9 individual share of the Net Settlement Amount. Each Aggrieved Employee's share of the 25% portion
10 of the PAGA Payment will be determined by dividing their total weeks worked within the PAGA
11 Claim Period by the total weeks worked by all Aggrieved Employees within the PAGA Claim Period.
12 That fraction will then be multiplied by the 25% portion of the PAGA Payment to arrive at the
13 Aggrieved Employee's individual share. *See* Exhibit A, at ¶¶ 1.17, 5.5, 5.8.

14 **V. PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT AND THE**
15 **SUBSEQUENT CLASS ACTION ADMINISTRATION**

16 Plaintiff's motion for preliminary approval of the class action settlement was approved by the
17 Court on March 17, 2023. To comply with Class Members' due process rights, the parties enlisted an
18 exhaustive method to ensure the best practical means possible was used to provide notice to the class.
19 The parties provided the Settlement Administrator the names, last known address, and social security
20 numbers for the class. The Settlement Administrator then updated this information by doing an address
21 trace for each individual using this information prior to mailing. *See* Decl. Hernandez, ¶¶ 5-6. If the
22 notices were returned as undeliverable, further investigation was performed and they were re-mailed
23 using updated information. *See id.* at ¶¶ 8-9. Of the 70 Notice Packets mailed, zero were undeliverable
24 after use of these methods. *See id.* at ¶ 10. The Notice included information regarding the requested
25 attorneys' fees, costs, payment to the LWDA, administration costs, and tax allocations. *See* Exh. A to
26 Decl. Hernandez. The average distribution to participating class members is approximately \$622.45,
27 the maximum distribution is approximately \$2,447.99. *See id.* at ¶ 15. No objections to the
28 preliminarily approved settlement have been made and no Class Members opted out. *See* Decl.

1 Hernandez, ¶¶ 11-12.

2 It is not required that Class Members be given actual notice of a class settlement; instead, the
3 best practicable notice under the circumstances is all that is required. *See Silber v. Mabon*, 18 F.3d
4 1449, 1453 (9th Cir. 1994); *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1129 (9th Cir. 2017);
5 *Walsh v. CorePower Yoga LLC*, 2017 U.S. Dist. LEXIS 163991, at *12-14 (N.D. Cal. 2017); *Wright v.*
6 *Linkus Enters.*, 259 F.R.D. 468, 474-75 (E.D. Cal. 2009). In *Silber v. Mabon*, 18 F.3d 1449 (9th Cir.
7 1994), the Court rejected a class member's argument that he had not received due process because he
8 did not receive notice until after the opt out period, finding that, so long as the notice process utilized is
9 the best practicable under the circumstances, due process is satisfied even if there is no actual receipt of
10 the notice. *See Silber*, 18 F.3d at 1453-1454. A similar finding was made in *Briseno v. Conagra*
11 *Foods, Inc.*, 844 F.3d 1121 (9th Cir. 2017). With regard to any potential for undeliverable notice
12 mailings, the Court in *Rannis v. Recchia*, 380 F. App'x 646 (9th Cir. 2010) found that class members
13 who did not receive actual notice due to their mailings being deemed undeliverable were still properly
14 held to be part of the class settlement because they received the best notice practicable under the
15 circumstances. *See Rannis v. Recchia*, 380 F. App'x at 650-651. In *Noel v. Thrifty Payless, Inc.*, 7
16 Cal.5th 955, 980-984 (2019), the California Supreme Court noted that California has adopted a similar
17 approach regarding providing notice to class members.

18 The notice method in *Rannis* is similar to that used in the present case. For example, the Notice
19 contains all information necessary for a Class Member to assess the litigation, the settlement, and
20 whether they wanted to participate, object, or opt-out. *See* Exh. A to Decl. Hernandez. The Settlement
21 Administrator utilized a national change of address database, forwarding notices, and skip tracing in an
22 effort to ensure that all reasonable means were exhausted in attempting to provide Class Members
23 notice of this settlement. *See* Decl. Hernandez, ¶¶ 5-8. The content of the notice provided and the
24 manner in which it was provided to Class Members was the best practicable notice to satisfy due
25 process.
26
27
28

1 **VI. THE AGREEMENT WARRANTS PRELIMINARY APPROVAL AS IT IS FAIR,**
2 **REASONABLE, AND ADEQUATE AS TO ALL CLASS MEMBERS BASED ON THE**
3 **FACTS OF THIS CASE**

4 A class action may not be dismissed, compromised, or settled without Court approval and the
5 decision to approve or reject a settlement is committed to the Court's sound discretion. See Cal. Rules
6 of Court, Rule 3.769; Fed. R. Civ. Proc., Rule 23(e)¹; *Wershba v. Apple Computer, Inc.*, 91 Cal.App.4th
7 224, 234-35 (2001); see also Cal. Lab. Code §§ 2699(1)(2). However, "[d]ue regard should be given to
8 what is otherwise a private consensual agreement between the parties. The inquiry 'must be limited to
9 the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or
10 overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole,
11 is fair, reasonable and adequate to all concerned.'" See *Dunk v. Ford Motor Co.*, 48 Cal.App.4th 1794,
12 1801 (1996); see also *Cellphone Termination Fee Cases*, 180 Cal.App.4th 1110, 1118 (2009); *In re*
13 *Microsoft I-V Cases*, 135 Cal.App.4th at 723; *Nordstrom Com. Cases*, 186 Cal.App.4th at 581. The law
14 favors settlement of lawsuits, particularly class actions and other complex cases where substantial
15 resources can be conserved by avoiding the time, expense, and rigors of formal litigation. See
16 *Cellphone Termination Fee Cases*, 180 Cal.App.4th at 1117-1118; *In re Microsoft I-V Cases*, 135
17 Cal.App.4th at 723 n.14; *Nordstrom Com. Cases*, 186 Cal.App.4th at 581; see also *Neary v. Regents of*
18 *Univ. of Cal.*, 3 Cal.4th 273, 277-81 (1992).

19 **a. The Terms of The Settlement Are Fair and Within the Range of Reasonableness**

20 The purpose of the Court's final evaluation of a proposed class action settlement is to determine
21 only whether it is within the range of reasonableness. See *Wershba*, 91 Cal.App.4th at 234-35. If the
22 Court finds a proposed settlement falls within "the range of reasonableness," it should grant final
23 approval of the class action settlement. See, e.g., *North County Contr. 's Assn., Inc. v. Touchstone Ins.*
24 *Svcs.*, 27 Cal.App.4th 1085, 1089-90 (1994); *Kullar v. Foot Locker Retail, Inc.*, 168 Cal.App.4th 116,
25 133 (2008). Factors to consider in determining whether the settlement is fair, reasonable, and adequate
26 include the strength of the Plaintiff's case, the risk, expense, complexity and likely duration of further
27 litigation, the risk of maintaining class action status through trial, the amount offered in settlement, the

28

¹The California Supreme Court has authorized California's trial courts to rely on these federal resources to decide class certification issues. See *Green v. Obledo*, 29 Cal.3d 126, 145-46 (1981).

1 extent of discovery completed and the stage of the proceedings, the experience and views of counsel,
2 the presence of a governmental participant, and the reaction of the class members to the proposed
3 settlement. *See Dunk v. Ford Motor Co.*, 48 Cal.App.4th at 1801. However, this Court should begin its
4 analysis with a presumption that the proposed settlement is fair. “A presumption of fairness exists
5 where: (1) the settlement is reached through arm’s length bargaining; (2) investigation and discovery
6 are sufficient to allow counsel and the court to act intelligently; (3) counsel is experienced in similar
7 litigation; and (4) the percentage of objectors is small.” *Id.* at 1802; *see also In re Heritage Bond Litig.*,
8 2005 WL 1594403, at *10 (C.D. Cal. June 10, 2005) (“It is established that the absence of a large
9 number of objectors to a proposed class action settlement raises a strong presumption that the terms of
10 a proposed class settlement action are favorable to the class members”).

11 **i. The Settlement is a Result of Extensive, Non-Collusive Arm’s Length**
12 **Negotiations Between the Parties**

13 Settlement of this case was reached only after substantial litigation and extensive arm’s length
14 negotiations lasting nearly seventeen (17) months. *See Decl. Rodriguez*, ¶¶ 3, 6-10. At all times, the
15 negotiations were adversarial, although still professional in nature. *See id.*

16 **ii. The Extent of Investigation and Discovery Completed Provided Ample**
17 **Information to Enter Into an Informed and Reasonable Settlement**

18 The Parties were in possession of all necessary information during the negotiations. The Parties
19 engaged in substantial informal discovery, which included all necessary components for evaluating the
20 class claims and creating an accurate damages model. *See id.* at ¶¶ 6-10. Plaintiff was in possession of
21 this information prior to calculating any damages in this case. *See id.* As a result, Plaintiff was able to
22 make a reasonable estimation of Defendant's potential liability. *See id.* For these reasons, the
23 settlement now before the Court was reached at a stage where “the parties certainly have a clear view of
24 the strengths and weaknesses of their cases” sufficient to support the settlement. *See Boyd v. Bechtel*
25 *Corp.*, 485 F.Supp. 610, 617 (N.D. Cal. 1979).

26 **iii. Plaintiff’s Counsel are Experienced in Similar Litigation**

27 Plaintiff’s counsel have considerable experience in complex litigation such as class and PAGA
28 actions. *See Decl. Rodriguez*, ¶¶ 12-19. Thus, Plaintiff’s counsel are qualified to evaluate the class

claims, the value of settlement versus moving forward with litigation, and viability of possible affirmative defenses. Plaintiff's counsel believe that the Agreement is fair, reasonable, and adequate in light of the risks associated with the claims, the uncertainties of complex litigation, and the secured benefit to Class Members. *See id.*

iv. No Class Members Objected or Opted Out

The reaction by Class Members to the Agreement and all the terms and allocations stated therein is overwhelmingly positive. **Zero Class Members have objected to any aspect of the Agreement and zero have opted out.** *See* Decl. Hernandez ¶¶ 11-12; *see also* Decl. Rodriguez, ¶ 36. This provides strong evidence that the settlement is fair, reasonable, and adequate. *In re Heritage Bond Litig.*, 2005 WL 1594403, at *10 (“It is established that the absence of a large number of objectors to a proposed class action settlement raises a strong presumption that the terms of a proposed class settlement action are favorable to the class members”); *Nat’l Rural Telecommunications Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 529 (C.D. Cal. 2004) (“That unanimous, positive reaction to the Proposed Settlement is compelling evidence that the Proposed Settlement is fair, just, reasonable, and adequate”).

v. The Settlement is Fair, Reasonable, and Adequate Based on the Strength of Plaintiff’s Case and the Risks and Costs of Further Litigation

Plaintiff’s claims and the ability to obtain and maintain certification all the way through trial were heavily disputed by Defendant. *See* Decl. Rodriguez, ¶¶ 5-9. Based on the records and facts of this case, Plaintiff has secured a gross recovery of approximately 7.21% of the maximum value of the claims in this matter and between 23.4% to 53.5% of the more realistic range of recovery. *See* Decl. Rodriguez, ¶¶ 9-10. The net recovery represents approximately 3% of the maximum value of the claims in this matter and between 10% and 22% of the more realistic range of recovery. The average net award is approximately \$622.45, and the highest recovery is approximately \$2,447.99. *See* Decl. Hernandez, ¶ 15. This settlement is a reasonable compromise of the class and PAGA claims, and is within the percentile ranges of the total available damages that have been approved in other class settlements. *See Wershba*, 91 Cal.App.4th at 246, 250; *Rebney v. Wells Fargo Bank*, 220 Cal.App.3d 1117, 1139 (1990); *Officers for Justice v. Civil Serv. Comm’n*, 688 F.2d 615, 628 (9th Cir. 1982); *see*

1 also *In re Omnivision Technologies, Inc.*, 559 F.Supp.2d 1036, 1042 (2007) (noting that certainty of
2 recovery in settlement of 6% of maximum potential recovery after reduction for attorney’s fees was
3 higher than median percentage for recoveries in shareholder class action settlements, averaging 2.2%-
4 3% from 2000 through 2002); *Bravo v. Gale Triangle, Inc.*, 2017 U.S. Dist. LEXIS 77714 (C.D. Cal.
5 2017) (approving a settlement where the net recovery to class members was approximately 7.5% of the
6 projected maximum recovery amount); *Avila v. Cold Spring Granite Co.*, 2017 U.S. Dist. LEXIS
7 130878 (E.D. Cal. 2017) (approving a settlement with a gross recovery of 11% of the projected
8 maximum damages available and a net recovery of approximately 6.7% of the projected maximum
9 recovery); *Bellinghausen v. Tractor Supply Co.*, 306 F.R.D. 245 (N.D. Cal. 2015) (approving a
10 settlement where the gross recovery was approximately 8.5% of the projected maximum recovery);
11 *Schiller v. David’s Bridal, Inc.*, 2012 U.S. Dist. LEXIS 80776 at *48 (E.D. Cal. 2012) (“Class
12 Members will receive an average of approximately \$198.70, with the highest payment to a Class
13 Member being \$695.78 . . . Overall, the Court finds that the results achieved are good, which is
14 highlighted by the fact that there was no objection to the settlement amount or the attorneys’ fees
15 requested.”); *Gardner v. GC Servs., LP*, 2012 U.S. Dist. LEXIS 47043, 18 (S.D. Cal. 2012) (“the
16 results achieved in this case were very favorable. Class members are provided with immediate
17 monetary relief, with an average award of around several hundred dollars and a minimum award of
18 \$50”).

19 **vi. The Proposed Settlement is a Reasonable Compromise of Claims**

20 In *Kullar v. Foot Locker Retail, Inc.*, 168 Cal.App.4th 116 (2008), the Court required additional
21 information be presented in class action settlements “to ensure that the recovery represents a reasonable
22 compromise, given the magnitude and apparent merit of the claims being released, discounted by the
23 risks and expenses of attempting to establish and collect on those claims by pursuing the
24 litigation” *Id.* at 129. *Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles*, 186 Cal.App.4th 399
25 (2010), clarified that *Kullar* does not require an illusory prediction of the outer reaches of exposure
26 without taking into account the actual risks of litigation such as dispositive motions and trial. *Kullar*
27 also does not require an explicit statement of the maximum amount to be recovered if a plaintiff
28 prevailed on all the claims, provided there is a record that allows “an understanding of the amount that

1 is in controversy and the realistic range of outcomes of the litigation.” *Id.* at 409.

2 Plaintiff has thoroughly set forth the realistic range of outcomes in this litigation as well as the
3 data points relied upon in reaching these ranges. *See* Decl. Rodriguez ¶¶ 9-10. The record
4 demonstrates that the compromises made by Plaintiff was reasonable and have resulted in a settlement
5 with recovery percentage well within the range of what has been found to be sufficient in several other
6 cases. *See, supra*, Section VI.a.iv; *see also* *Linney v. Cellular Alaska P'ship*, 151 F.3d 1234, 1242 (9th
7 Cir. 1998) (“The fact that a proposed settlement may only amount to a fraction of the potential recovery
8 does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be
9 disapproved”); *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 455 (2d Cir. 1974) (“In fact there is no
10 reason, at least in theory, why a satisfactory settlement could not amount to a hundredth or even a
11 thousandth part of a single percent of the potential recovery”).

12 **b. Certification of the Class is Appropriate**

13 Class certification is appropriate when (1) the class is ascertainable and (2) there is “a well-
14 defined community of interest in the questions of law and fact involved affecting the parties to be
15 represented.” *Dunk*, 48 Cal.App.4th at 1806. The “community of interest” element “embodies three
16 factors: (1) common questions of law or fact predominate; (2) class representatives with claims or
17 defenses typical of the class; and (3) class representatives who can adequately represent the class.” *Id.*
18 Here, the Court conditionally certified the settlement class on March 17, 2023, and nothing has
19 happened in the interim that would warrant changing that decision. *See Garcia v. City of King City*,
20 2017 WL 363257, *4 (N.D. Cal. 2017); *Messineo v. Ocwen Loan Servicing, LLC*, 2017 WL 733219, *4
21 (N.D. Cal. 2017). Further, the parties agree that, for the purposes of settlement, these prerequisites are
22 met. *See* Exhibit A. .

23 **i. The Proposed Settlement Class is Ascertainable and Sufficiently Numerous**

24 The proposed settlement class is ascertainable because all putative Class Members can be
25 readily identified through employee personnel and payroll files. *See Noel v. Thrifty Payless, Inc.*, 7
26 Cal.5th at 980; *Rose v. City of Hayward*, 126 Cal.App.3d 926, 932 (1981); *Lee v. Dynamex, Inc.*, 166
27 Cal.App.4th 1325, 1334 (2008). The numerosity requirement is met because there are 70 individuals
28 who fall within the definition of Class Member, which makes joinder of all members impracticable.

1 *See Gay v. Waiters' & Dairy Lunchmen's Union*, 489 F.Supp. 282 (N.D. Cal. 1980), *aff'd* 694 F.2d 531
2 (9th Cir. 1982); *Hebbard v. Calgrove*, 28 Cal.App.3d 1017, 1030 (1972) (noting no set minimum to
3 meet the numerosity prerequisite, but a class as few as twenty-eight (28) members is acceptable). Thus,
4 these requirements are satisfied.

5 **ii. The Commonality, Predominance, and Typicality Requirements are Met**

6 The commonality requirement is met when there are questions of law or fact regarding the class
7 as a whole. *See Hanlon*, 150 F.3d 1011, 1019 (9th Cir. 1998). Commonality requires only that some
8 common legal or factual questions exist; Plaintiff need not show that all issues in the litigation are
9 identical. *See Richmond v. Dart Ind., Inc.*, 29 Cal.3d 462, 473 (1981); *City of San Jose v. Superior*
10 *Court*, 12 Cal.3d 447, 460 (1974). Common questions of law or fact must also predominate over
11 individual questions and class-wide treatment of a dispute must be superior to individual litigation.²
12 *See Richmond*, 29 Cal.3d at 469. Predominance requires a putative class be sufficiently cohesive to
13 warrant adjudication by representation. *See Hanlon*, 150 F.3d at 1022. The typicality requirement is
14 met when claims of the named representative are typical of those of the class, though "they need not be
15 substantially identical." *Id.* at 1020; *Classen v. Weller*, 145 Cal.App.3d 27, 46-47 (1983).

16 The common questions of law and fact in this case stem from Plaintiff's contention that
17 Defendant violated California law by 1) failing to pay minimum wages for off-the-clock work, 2)
18 failing to pay overtime wages for off-the-clock-work, 3) failing to properly record and pay for all hours
19 worked, 4) by failing to pay for being on-call, 5) failing to authorize and permit timely and
20 uninterrupted meal periods, 6) failing to authorize and permit timely and uninterrupted rest periods, and
21 failing to pay for reimbursement for mileage, cell phone use, and other work related incurred expenses.
22 *See Exhibit B.* The waiting time penalties, unfair competition, and PAGA claims are derivative of
23 these violations. *See id.* Plaintiff and the Class Members seek the same remedies under state law.
24 Under these specific circumstances, the commonality and predominance requirements are satisfied.
25 Regarding the typicality requirement, Plaintiff contends he suffered from the same unlawful policies,
26 treatment, and circumstances as Class Members did, will request the same remedies, and will rely on
27

28 ²When assessing predominance and superiority, a court may consider that the class will be certified for settlement purposes only and that manageability of trial is therefore irrelevant. *See Amchem Products v. Windsor*, 521 U.S. 591 (1997).

the same methods of proof to establish liability and damages. *See id.* Thus, the typicality requirement is also satisfied for settlement purposes.

iii. The Adequacy Requirement is Met

The adequacy of representation requirement is met if the named representative and counsel have no interests adverse to those of the putative class members and are committed to vigorously prosecuting the case on behalf of the class. *See Hanlon*, 150 F.3d at 1020; *McGhee v. Bank of America*, 60 Cal.App.3d 442, 450-51 (1976). Those standards are met here. Under the proposed Agreement, Plaintiff and the putative Class Members will receive a pro rata share of the settlement based on the number of workweeks they worked for Defendant. *See* Exhibit A. Finally, any settlement class member who wished to opt-out of the settlement was able to do so, and he or she was also able to dispute the number of workweeks stated in the Notice of Settlement.

There is no conflict of interest between Plaintiff and Class Members. Plaintiff and Plaintiff's counsel have pursued the claims made in the operative Complaint vigorously on behalf of the class. Plaintiff's counsel, with Plaintiff's assistance, thoroughly investigated the claims made in this case by speaking with Plaintiff and reviewing substantial amounts of documents. Plaintiff's counsel thereafter engaged Defendant's counsel in settlement discussions over the course of approximately seventeen (17) months. Moreover, Plaintiff's counsel has experience defending and bringing wage and hour claims. Because Plaintiff's counsel has vigorously pursued Plaintiff's and the Class Members' claims, the adequacy requirement is met. *See generally* Decl. Rodriguez.

VII. ATTORNEY'S FEES AND COSTS, ENHANCEMENT PAYMENT TO THE CLASS REPRESENTATIVE, AND SETTLEMENT ADMINISTRATOR COSTS ARE REASONABLE AND SHOULD BE APPROVED

The Notice of Settlement sent to Class Members specifically identified the allocations for attorney's fees and costs, the Class Representative Enhancement Payments, and Settlement Administrator Costs. *See* Exh. A to Decl. Hernandez. The reaction of Class Members to these requested amounts provides useful evidence of whether they are reasonable. *See In re Heritage Bond Litig.*, 2005 WL 1594403, *21 ("The absence of objections or disapproval by class members to Class Counsel's fee request further supports finding the fee request reasonable"). As noted above, there were no objections raised to the Agreement or any term or allocation therein whatsoever. *See* Decl.

Hernandez, ¶ 12. In addition to Class Members’ reactions supporting the requested amount, the facts and applicable case law also support awarding these amounts in full.

An award of attorney’s fees should include compensation for all hours reasonably spent. *See Ketchum v. Moses*, 24 Cal.4th 1122, 1133 (2001); *see also Hensley v. Eckerhart*, 461 U.S. 424, 431 (1983) (finding hours are reasonably spent if they are the kind normally billed to a fee-paying client). California has not adopted any “benchmark” percentage utilized by several federal courts. *See Emmons v. Quest Diagnostics Clinical Lab ’ys, Inc.*, 2017 WL 749018, at *7 (E.D. Cal. 2017) (“Notably, while the California Supreme Court recognized the Ninth Circuit’s 25 percent benchmark for percentage awards in common fund cases, it did not adopt such a benchmark for California cases”). Instead, “[t]he benchmark in determining attorney fees is reasonableness.” *Karton v. Ari Design & Constr., Inc.*, 61 Cal.App.5th 734, 744 (2021).

a. A Fee of Thirty-Five Percent of the Common Fund Is Reasonable Because It Is Within the Ranges Historically Approved by Courts in Class Settlements and a Lodestar Cross Check Validates the Proposed Fee

An award of attorney’s fees under the common fund doctrine is appropriate in this case as there is sufficiently identifiable class of beneficiaries (*e.g.* the settlement class), the benefits received can be accurately traced to the settlement Plaintiff and Class Counsel were able to negotiate on behalf of Class Members, and the fee can be shifted with exactitude to those benefiting as the fee request is a specific, lump-sum percentage of the fund. *See Laffitte v. Robert Half Internat., Inc.*, 1 Cal.5th 480, 506 (2016); *Paul, Johnson, Alston & Hunt v. Gaulty*, 886 F.2d 268, 271 (9th Cir. 1989); *Boeing Co. v. Van Gemert*, 444 U.S. 472, 477-478 (1980) (“A lawyer who recovers a common fund for the benefit of persons other than . . . her client is entitled to a reasonable attorney’s fee from the fund as a whole.”). The requested fee, 35% of the common fund, is within ranges awarded in other cases. *See Martin v. Ameripride Servs.*, 2011 U.S. Dist. LEXIS 61796, *22-23 (S.D. Cal. 2011) (collecting cases); *Birch v. Office Depot, Inc.*, USDC Southern District, Case No. 06cv1690 DMS (WMC) (awarding 40% fee on a \$16 million wage and hour class action settlement); *Rippee v. Boston Mkt. Corp.*, USDC Southern District, Case No. 05cv1359 BTM (JMA) (awarding a 40% fee on a \$3.75 million wage and hour class action settlement); Decl. Rodriguez, ¶ 20.

1 To the extent there may be some Courts that have granted fees at a percentage less than 35%,
2 that does not justify an arbitrary cap on Class Counsel’s fees in this case. First, in many instances, the
3 treatises or cases discussing these percentages are relying on federal decisions guided by a
4 “benchmark” percentage of 25% that has not been adopted by the California Supreme Court. *See*
5 *Emmons*, 2017 WL 749018, at *7. This artificially lowers the average percentage of fees awarded.
6 Second, many of the same decisions and treatises refer to cases that have a substantial gross settlement
7 fund to begin with, which will generally correspond to a lower percentage of fees being deemed
8 reasonable. *See Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1052 (9th Cir. 2002) (compiling an
9 appendix of class settlements with gross settlement funds of \$53 million to \$193 million and a range of
10 2.8% to 40% in awarded attorney’s fees, averaging approximately 22%). Rather than acting as a cap on
11 any fee, the percentages applied in cases are a tool to cross check the reasonableness of the fee just as
12 the lodestar method is a tool to cross check the reasonableness of the requested percentage. *See Karton*,
13 61 Cal.App.5th at 744; *Vizcaino*, 290 F.3d at 1048 (“courts cannot rationally apply any particular
14 percentage—whether 13.6 percent, 25 percent or any other number—in the abstract, without reference
15 to all the circumstances of the case”).

16 To the extent the Court wishes to exercise its discretion to conduct a lodestar cross check, the
17 cross check only validates the fee request. *See Laffitte*, 1 Cal.5th at 503-506. Again, an award of
18 attorney’s fees should include compensation for all hours reasonably spent. *See Ketchum*, 24 Cal.4th at
19 1133; *see also Hensley*, 461 U.S. at 431 (finding hours are reasonably spent if they are the kind
20 normally billed to a fee-paying client). To date, Class Counsel has spent approximately 174.7 hours
21 performing tasks that would normally be billed to any fee playing client in complex litigation and
22 estimate that this number will increase to approximately 184.7 after monitoring the disbursement of all
23 funds and compliance hearing(s). *See Decl. Rodriguez*, ¶ 21; Exhibit F; *Syers Props. III, Inc. v. Rankin*,
24 226 Cal.App.4th 691, 699 (2014) (“Because time records are not required under California law ... ,
25 there is no required level of detail that counsel must achieve.”) (internal quotations omitted).
26 At the prevailing market rates for Class Counsel’s level of experience and this type of complex
27 litigation, this equates to a lodestar of approximately \$111,467.50. *See Decl. Rodriguez*, ¶¶ 20-22;
28 *Children’s Hosp. and Med. Ctr. v. Bonta*, 97 Cal.App.4th 740, 746 (2002) (noting rates were reasonable

1 where they were “within the range of reasonable rates charged by and judicially awarded comparable
2 attorneys for comparable work”).

3 The reasonableness of Class Counsel’s fee request is also demonstrated by the fact that the
4 amount requested would actually result in a negative multiplier to their lodestar. Multipliers are
5 typically awarded in contingent fee litigation to compensate counsel for the risk of non-payment:

6 It is an established practice in the private legal market to reward attorneys
7 for taking the risk of non-payment by paying them a premium over their
8 normal hourly rates for winning contingency cases. *See Richard Posner,*
9 *Economic Analysis of Law* § 21.9, at 534-35 (3d ed. 1986). Contingent
10 fees that may far exceed the market value of the services if rendered on a
non-contingent basis are accepted in the legal profession as a legitimate
way of assuring competent representation for Plaintiff who could not
afford to pay on an hourly basis regardless whether they win or lose.

11 *Chem. Bank v. City of Seattle (In re Wash. Pub. Power Supply Sys. Sec. Litig.)*, 19 F.3d 1291, 1299 (9th
12 Cir. 1994). Moreover, “in the common fund context, attorneys whose compensation depends on their
13 winning the case, must make up in compensation in the cases they win for the lack of compensation in
14 the cases they lose.” *Id.* at 1300-01; *see also Ketchum*, 24 Cal.4th at 1138 (“The adjustment to the
15 lodestar figure, *e.g.*, to provide a fee enhancement reflecting the risk that the attorney will not receive
16 payment if the suit does not succeed, constitutes earned compensation; unlike a windfall, it is neither
17 unexpected nor fortuitous”); *Wershba*, 91 Cal.App.4th at 255 (“Multipliers can range from 2 to 4 or
18 even higher”). Because awarding attorney’s fees at the requested 35% would still result in a negative
19 multiplier, a lodestar cross check validates the common fund percentage requested and the Court should
20 grant Class Counsel’s fee request. *See Decl. Rodriguez*, ¶¶ 20-22.

21 **b. Class Counsel’s Expenses and Costs Were Necessarily Incurred to Achieve the Benefit**
22 **Obtained**

23 The appropriate analysis in determining whether particular costs are compensable is whether
24 they are of the type typically billed by attorneys to paying clients in the marketplace. *See Harris v.*
25 *Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994) (“Harris may recover as part of the award of attorney’s fees
26 those out-of pocket expenses that ‘would normally be charged to a fee paying client’”); *Abrams v.*
27 *Lightolier, Inc.*, 50 F.3d 1204, 1225 (3d Cir. 1995); *Bratcher v. Bray-Doyle Indep. Sch. Dist. No. 42*, 8
28 F.3d 722, 725-26 (10th Cir. 1993). The categories of expenses for which Class Counsel seek

reimbursement here are categories normally charged to hourly clients and, therefore, should be reimbursed out of the common fund. See Decl. Rodriguez, ¶ 23; Exhibit D.

c. Class Counsel's Request for Class Representatives Enhancement Payments Is Justified In Light of The Results Achieved for the Class

A service payment to a named plaintiff is intended to recognize their time and effort on behalf of the class. Indeed, courts routinely approve incentive awards to compensate named plaintiffs for the services they provide and the risks they incurred during the course of the class action litigation. See *Ingram v. The Coca Cola Co.*, 200 F.R.D. 685, 694 (N.D. Ga. 2001) (approving incentive awards of \$300,000.00 to each named plaintiff); *Van Vranken v. Atlantic Richfield Co.*, 901 F.Supp. 294 (N.D. Cal. 1995) (approving a \$50,000.00 participation award); *Cellphone Termination Fee Cases*, 186 Cal.App.4th 1380, 1393 (2010) (approving \$10,000 awards to each of the four (4) named plaintiffs).

In this case Plaintiff provided substantial support in helping to secure payment to Class Members. Plaintiffs have spent tremendous amounts of time and effort to help secure payment for Class Members. See Decl. Rodriguez, ¶ 7; Decl. Serrano, ¶¶ 2-3, 5-8. Payment of \$10,000.00 to Plaintiff is appropriate given the risk, assistance, time required, and burden experienced in bringing and resolving this case, especially since this amount was identified in the Notice of Settlement and no objections to it have been received. See *West v. Circle K Stores, Inc.*, 2006 U.S. Dist. LEXIS 76558, at *7-*8, *12, *27 (E.D. Cal. 2006) (awarding a \$15,000 representative enhancement where 10,000 class members were to receive a gross award of approximately \$500 each from the \$5,000,000 settlement); *Dent v. ITC Serv. Group*, 2013 U.S. Dist. LEXIS 139359, at *9-*10, *15-*16 (D. Nev. 2013) (awarding a \$15,000 representative enhancement out of a \$150,000 settlement for approximately 530 class members).

d. The Court Should Approve the Payment of Settlement Administrator Costs

Since being preliminarily approved as the Settlement Administrator, ILYM Group, Inc., has carried out its duties as set forth in the Court's order and the Agreement. See generally See Decl. Hernandez. Under the Agreement, a maximum of \$10,000 was set aside for potential Settlement Administrator Costs. ILYM Group, Inc.'s final costs are \$6,377.40, well under the potential maximum Class Members were given notice of. Plaintiff requests that the Court approve payment to the

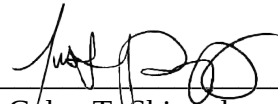
1 Settlement Administrator in the amount of \$6,377.40 to compensate it for the costs of administration as
2 part of the final order approving the Settlement.

3 **VIII. CONCLUSION**

4 For all of the foregoing reasons, Plaintiff respectfully requests that this Court certify the class
5 for settlement purposes; grant final approval of the proposed settlement, including the Enhancement
6 Payment, the payment to the LWDA under PAGA, Class Counsel's application for reasonable
7 attorneys' fees and costs, and the Settlement Administration Costs; find that the Notice of Settlement,
8 and administration process satisfied Class Members' due process rights; and adopt the proposed order
9 submitted concurrently herewith.

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12 **Shimoda & Rodriguez Law, PC**

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14 Dated: July 11, 2023

15 By: 
16 Galen T. Shimoda
17 Justin P. Rodriguez
18 Renald Konini
19 Attorneys for Plaintiff
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