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**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN DIEGO**

EDUARDO PENA, individually, and on behalf
of all others similarly situated,

Plaintiff,

v.

STRATEGIC OPERATIONS, INC., a California
corporation, and DOES 1 through 10, inclusive,

Defendants.

Case No.: 37-2022-00014701

CLASS ACTION

*[Assigned for all purposes to: Hon. Carolyn
M. Caietti, Dept. C-70]*

**PLAINTIFF'S NOTICE OF MOTION
AND MOTION FOR FINAL APPROVAL
OF CLASS ACTION SETTLEMENT;
MEMORANDUM OF POINTS AND
AUTHORITIES**

*[Filed with Memorandum of Points and
Authorities the Declaration of Nicol E.
Hajjar, and Proposed Order]*

FINAL APPROVAL HEARING

Date: March 15, 2024

Time: 10:30 a.m.

Dept: C-70

Complaint filed: April 20, 2022

Trial date: None set

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

2 PLEASE TAKE NOTICE that on March 15, 2024 at 10:30 a.m., in Department C-70 of
3 San Diego County Superior Court, 330 West Broadway, San Diego, California 92101, pursuant
4 to Code of Civil Procedure § 382 and California Rules of Court 3.769 *et seq.*, Plaintiff
5 EDUARDO PENA (“Plaintiff”) will move the Court for an Order granting final approval of the
6 proposed class action settlement between Plaintiff and STRATEGIC OPERATIONS, INC.
7 (“Defendant”). Plaintiff further moves the Court for an Order:

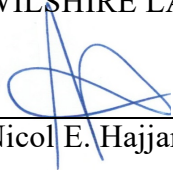
- 8 1. Certifying a Class for settlement purposes;
- 9 2. Approving the settlement as fair and reasonable and finding that class members were
10 given notice of the settlement, and advised of their right to participate in the
11 settlement, object to the settlement, or exclude themselves from the settlement, in a
12 reasonable manner;
- 13 3. Appointing Plaintiff Eduardo Pena as Class Representative for settlement purposes;
- 14 4. Appointing Plaintiff’s Counsel, Wilshire Law Firm, PLC, as Class Counsel for
15 settlement purposes;
- 16 5. Approving payment of administrative expenses to Phoenix Settlement Administrators
17 as the Settlement Administrator; and
- 18 6. Approving payment of \$120,733.42 in attorney’s fees, which is 33 1/3% of the
19 Maximum Settlement Amount, and costs of approximately \$12,933.92 for litigating
20 this action to Class Counsel;
- 21 7. Approving the payment to the California Labor Workforce Development Agency in
22 the amount of \$7,500.00;
- 23 8. Approving the payment of the PAGA settlement to the Class in the amount of \$2,500;
- 24 9. Directing that the clerk of the Court enter the Court’s order as a final judgment; and,
- 25 10. Without affecting the finality of the final judgment, reserving continuing jurisdiction
26 over the parties for the purposes of implementing, enforcing and/or administering the
27 Settlement or enforcing the terms of the judgment.

28 The motion will be based upon this notice, the attached memorandum of points and

1 authorities, the Declaration of Nicol E. Hajjar and the Declaration of Kevin Lee, filed
2 concurrently, the records and files in this action, and any other further evidence or argument that
3 the Court may properly receive at or before the hearing.

4
5 Dated: February 22, 2024

WILSHIRE LAW FIRM

6
7 By: 

Nicol E. Hajjar, Esq.

Attorney for Plaintiff

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I. INTRODUCTION

The proposed settlement satisfies all the criteria for settlement approval under California law. A presumption of fairness exists as the Settlement was reached through extensive, mediated arm’s-length negotiations, sufficient investigation and discovery allowed Class Counsel to act intelligently, and Class Counsel is experienced in similar wage-and-hour litigation. The settlement will provide substantial monetary payments to approximately 225 class members. Upon the Court’s approval of the settlement, participating class members will receive an estimated average gross payment of at least \$926.97, with the estimated highest gross payment being approximately \$3,588.76. (Declaration of Kevin Lee Regarding Notice and Settlement Administration [“Lee Decl.”], ¶ 13.) ***The deadline to opt-out or object to the settlement was December 28, 2023; as of February 20, 2024, there were three requests for exclusion and no objections to the settlement.*** (*Id.* at ¶¶ 7, 8.) Thus, the proposed Settlement is fair, reasonable, and adequate and is in the best interests of the Settlement Class Members.

Accordingly, Plaintiff respectfully requests that the Court grant final approval of the Settlement.

II. SUMMARY OF THE LITIGATION AND SETTLEMENT

A. Plaintiff's Claims

This is a wage and hour class action and PAGA representative action. Plaintiff and putative class members worked in California as hourly-paid, non-exempt employees for Defendants during the class period. Defendant *inter alia* provides realistic training conditions for medical personnel to treat and care for wounded service members in battle, and maintains its headquarters in San Diego, California. (Declaration of Nicol E. Hajjar in Support of Plaintiff's Motion for Final Approval of Class Action Settlement ["Hajjar Decl."], ¶ 2.)

Plaintiff alleges that Defendant's payroll, timekeeping, and wage and hour practices resulted in Labor Code violations. Plaintiff alleges that Defendant failed to pay for all hours worked by not recording the actual start and end times of shifts for each workday, by automatically deducting meal periods, and by implementing a rounding policy that systematically underpaid Plaintiff and putative class members' wages. Plaintiff further alleges that Defendant failed to include all remuneration in the employees' overtime rate and meal and rest period premiums. Plaintiff further alleges that Defendant failed to provide employees with legally compliant meal and rest periods. Based on these allegations, Plaintiff asserts claims against Defendant for failure to pay minimum and straight time wages, failure to pay overtime wages, failure to provide meal periods, failure to authorize and permit rest periods, failure to timely pay all final wages at termination, failure to provide accurate itemized wage statements, unfair business practices, and civil penalties under PAGA. (*Id.* at ¶ 3.)

On April 20, 2022, Plaintiff filed a putative wage-and-hour class action complaint against Defendant for: (1) failure to pay minimum and straight time wages (Cal. Lab. Code §§ 204, 1194, 1194.2, and 1197); (2) failure to pay overtime wages (Cal. Lab. Code §§ 1194 and 1198); (3) failure to provide meal periods (Cal. Lab. Code §§ 226.7 and 512); (4) failure to authorize and permit rest periods (Cal. Lab. Code §§ 226.7); (5) failure to timely pay final wages at termination (Cal. Lab. Code §§ 201-203); (6) failure to provide accurate itemized wage statements (Cal. Lab. Code § 226); and (7) unfair business practices (Cal. Bus. & Prof. Code §§ 17200, *et seq.*). On December 21, 2022, Plaintiff filed a First Amended Class Action

1 Complaint adding a claim for civil penalties under PAGA. (Hajjar Decl., ¶ 4.)

2 **B. Discovery and Investigation**

3 Following the filing of the Complaint, the parties exchanged documents and
4 information before mediating this action. Defendant produced a sample of time and pay
5 records for class members. Defendant also provided documents of its wage and hour policies
6 and practices during the class period, and information regarding the total number of current
7 and former employees in its informal discovery responses. (*Id.* at ¶ 5.)

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

15 **C. Settlement Negotiations, Preliminary Approval, and Increased Class Size.**

16 On July 27, 2022, the parties participated in private mediation with experienced class
17 action mediator, Steve G. Pearl, Esq. (*Id.* at ¶ 7.) The mediation was conducted via Zoom.
18 After extensive negotiations and discussions regarding the strengths and weaknesses of
19 Plaintiff’s claims and Defendant’s defenses, the Parties were able to reach a resolution, the
20 material terms of which are encompassed within the Settlement. (*Id.*, Ex. 1 [Joint Stipulation
21 for Class Action Settlement].)

22 Class Counsel has conducted a thorough investigation into the facts of this case. Based
23 on the foregoing discovery and their own independent investigation and evaluation, Class
24 Counsel is of the opinion that the Settlement is fair, reasonable, and adequate and is in the best
25 interests of the Settlement Class Members in light of all known facts and circumstances, the
26 risk of significant delay, the defenses that could be asserted by Defendant both to certification
27 and on the merits, trial risk, and appellate risk. (*Id.* at ¶ 14.)

28 On October 13, 2023, the Court granted preliminary approval of a \$350,000.00 class

1 action settlement. (*Id.* at ¶ 9.)

2 Since then, the total number of Workweeks has increased from 11,528 to 13,123, the
3 Settlement Amount increased by 3.49%. (Lee Decl., ¶ 11.) Section 1(T) of the Settlement
4 Agreement provides for a proportional increase if there are more 11,528 Workweeks in the
5 Settlement Period:

6 . . . Subject to Section XI.C below, the Settlement Amount will be increased in the
7 event the final number of Workweeks in the Settlement Period is more than 10%
8 higher than the initially agreed upon estimate of 11,528 Workweeks.

9 Pursuant to this provision, the gross settlement amount should increase to \$362,205.07
10 (\$350,000 + \$12,205.07). (Hajjar Decl., ¶ 11.)

11 If the Court applies Section XI(C) of the Stipulation of Settlement and increases the
12 gross settlement amount by 3.49% to \$362,205.07, there will be no prejudice to class members
13 even though the class notice disclosed a lower amount. (Hajjar Decl., ¶ 11.) Such an increase
14 will result in each class member receiving a larger settlement share. (*Id.*). Since there are no
15 objections and only three opt-outs to the settlement, participating class members are
16 presumably pleased with the lower estimated amount that was disclosed in the notice, and so
17 one can assume that they will be even more pleased to receive additional money. (*Id.*)

18 Applying the escalator clause, the \$362,205.07 Settlement represents 73% of **the realistic**
19 **maximum recovery of \$492,863.20.** (*Id.* at ¶ 25.) This is plainly an excellent result for the
20 Class. Indeed, because of the proposed Settlement, class members will receive timely,
21 guaranteed relief and will avoid the risk of an unfavorable judgment.

22 Class Counsel submitted the proposed settlement to the LWDA before filing this Motion
23 for Final Approval. (*Id.* at ¶ 16.)

24 **D. Key Terms of the Proposed Settlement**

25 Under the Settlement, Defendant will pay \$350,000.00 to resolve this litigation before
26 application of the escalator clause which brings the total amount to \$362,205.07. (Hajjar
27 Decl., ¶ 11.) This amount is all-inclusive. The Settlement's key terms include:

28 1. Settlement Class: For settlement purposes only, the Parties agree to the
certification of a class pursuant to California Code of Civil Procedure § 382 defined as: "All

persons who worked for Defendant in California as an hourly-paid or non-exempt employee during the Settlement Period (together, collectively referred to as the “Class Members”). (Settlement, § I (U).)

2. Settlement Period: The Settlement Period means the period from April 20, 2018 through July 27, 2022. (Settlement, § I (V).)

3. Total Settlement Amount: This amount is \$362,205.07 , which shall be paid by Defendant, and from which all Net Settlement Payments, Court-approved attorneys’ fees and Litigation costs pursuant to Section XIII, Administrative Costs pursuant to Section VIII, enhancement to Named Plaintiff pursuant to Section XIV, statutory penalties, interest, and PAGA Settlement pursuant to Section XVI shall be paid, except as provided herein. (Settlement, § I (T), § XI.)

4. No Reversion: This is a non-reversionary settlement. Settlement checks will be valid for 180 days. Pursuant to Code of Civil Procedure § 384(a), any unpaid cash residue or unclaimed or abandoned class member funds, plus any accrued interest will be sent to the Legal Aid at Work, 180 Montgomery Street, Suite 600, San Francisco, CA 94104 pursuant to Code of Civil Procedure Section 384(a). (Settlement, § XI (D).)

5. Release: The class release is limited to “all wage-related claims that were alleged in the Litigation or which could have been alleged in the Litigation based on the facts asserted” in the First Amended Complaint. (Settlement, § VII (A).)

6. PAGA Allocation: The settlement includes \$10,000 allocated to Plaintiff’s claims under PAGA, with 75% of which (\$7,500) will be paid to the LWDA and 25% (\$2,500) will be paid to Class Members. (Settlement, § XVI.) Class Counsel submitted the proposed settlement to the LWDA before filing the Motion for Preliminary Approval. (Hajjar Decl., ¶ 16.)

7. Net Settlement Fund: The Net Settlement Fund is the amount that remains and that shall be paid to Settlement Class Members after the following amounts are subtracted: (1) attorneys’ fees and litigation costs, (2) administrative costs, (3) enhancement to Named Plaintiff, and (4) amount paid to the LWDA. (Settlement, § I (N).)

1 8. Distribution Formula: Participating class members will receive a lump sum
2 payment as good and valuable consideration for the waiver and release of claims set forth in
3 Section VI(A), above, in an amount determined by the Settlement Administrator in accordance
4 with the provisions of this Agreement. The lump sum payment to each member of the Settlement
5 Class not excluding him/ herself will be determined in accordance with the procedure set forth in
6 Section X. (Settlement, § XI (A).) This formula is explained in the proposed Notice of
7 Settlement. (Settlement, Ex. A.)

8 9. Tax Allocation: Any settlement money paid to Settlement Class Members will be
9 allocated as 50% as wages and 50% as penalties and interest. (Settlement, § XV.)

10 10. Service Award: Subject to Court approval, Plaintiff shall be paid an enhancement
11 award not to exceed \$5,000. (Settlement, § XIV.) This amount is for Plaintiff's time and effort
12 in bringing and presenting the action, and in exchange for a general release of all claims, known
13 or unknown, pursuant to Civil Code Section 1542. (Settlement, § VII (C).) If the Court approves
14 a lesser enhancement, then the unapproved portion or portions shall revert into the Net
15 Settlement Amount to be distributed between the participating Settlement Class Members on a
16 pro-rata basis. (Settlement, § XIV.)

17 11. Attorneys' Fees and Costs: The Settlement provides that Defendants will not
18 oppose a fee application of up to 33 1/3% (\$116,665.50) of the Settlement Amount, plus out-of-
19 pocket costs not to exceed \$13,955.40 (Settlement, § XIV.) However, the escalator was triggered
20 adding \$4,067.95, for a total fee of \$120,733.45. (Settlement, ¶ XI (C).) At this time, Class
21 Counsel's costs are approximately \$12,933.92. (Hajjar Decl., ¶ 15, Ex. 2.)

22 12. Notice of Proposed Settlement: The Notice sets forth in plain terms, a statement of
23 the case, the terms of the Settlement Agreement, the approximate amount of attorneys' fees,
24 costs, and service awards being sought, and an explanation of how the settlement allocations are
25 calculated. (Settlement, Ex. A.) The Notice also sets forth each class member's total
26 workweeks, as well as the approximate amount of money they would receive in the event all
27 class members participate in the settlement. The Notice also includes an opt-out form. (*Id.*)
28 Class Members will be notified by first class mail of the settlement. (Settlement, § IX (A).)

Phoenix Settlement Administrators, the proposed Settlement Administrator, will undertake its best efforts to ensure that the notice is provided to the current addresses of class members, including conducting a national change of address search and re-mailing the notice to updated addresses. (Settlement, § IX.)

13. Workweek Dispute Form: The Workweek Dispute Form will permit class members to dispute their number of workweeks or opt-out of the settlement. (Settlement, Ex. B.)

E. Preliminary Settlement Approval, Class Notice and Settlement Administration.

This Court granted preliminary approval on October 13, 2023. (Hajjar Decl., ¶ 9.) Notices explaining class member rights were mailed out to all 225 class members. (Lee Decl., ¶ 5.) To date, 0 notice packets remain undeliverable. (*Id.* at ¶ 8.) *There were three requests for exclusion and no objections to the settlement.* (*Id.* at ¶¶ 7, 8.)

III. THE SETTLEMENT MERITS FINAL APPROVAL

The law favors the settlement of lawsuits, particularly in class actions and other complex cases. (*See e.g., Neary v. Regents of Univ. of California* (1992) 3 Cal.4th 272, 277-81.) Factors to be considered in evaluating a class action settlement include “the strength of plaintiffs’ case, the risk, expense, complexity and likely duration of further litigation, the risk of maintaining class action status through proceedings, the experience and views of counsel, the presence of a government participant, and the reaction of the class members to the proposed settlement.” (*Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 128.) A presumption that a settlement is fair and reasonable exists where, as here, the following four factors are present: “(1) the settlement is reached through arm’s length bargaining; (2) investigation and discovery are sufficient to allow counsel and the court to act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of objectors is small.” (*Wershba v. Apple Computers, Inc.* (2001) 91 Cal.App.4th 224, 245.)

Whether a class action settlement should be approved is a question committed to the trial court’s broad discretion. (*Id.* at pp. 234-35.) In exercising its discretion, the Court should give “[d]ue regard ...to what is otherwise a private consensual agreement between the parties.” (*Dunk*

1 *v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1801.) “The inquiry ‘must be limited to the
2 extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or
3 overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a
4 whole, is fair, reasonable and adequate to all concerned.” (*Id.* [internal citations omitted].)

5 **A. The Settlement Reflects a Reasonable Compromise.**

6 A settlement is not judged against what the plaintiff might recover had she prevailed at
7 trial, nor does the settlement have to provide 100% of the damages sought to be fair and
8 reasonable. (*Wershba, supra*, 91 Cal.App.4th at pp. 246, 250 [“Compromise is inherent and
9 necessary in the settlement process...even if the relief afforded by the proposed settlement is
10 substantially narrower than it would be if the suits were to be successfully litigated, this is no bar
11 to a class settlement because the public interest may indeed be served by a voluntary settlement
12 in which each side gives ground in the interest of avoiding litigation.”].)

13 The settlement obviates the risk that this Court may deny certification of all or some of
14 Plaintiff’s claims. (Hajjar Decl., ¶ 19.) While Plaintiff is confident in the merits of their claims,
15 a legitimate controversy exists as to each cause of action. (*Id.* at ¶ 26.) Plaintiff also recognizes
16 that proving the amount of wages due to each class member would be an expensive, time-
17 consuming, and uncertain proposition. (*Id.*) Furthermore, even if Plaintiff obtained certification
18 of all or some of the claims, continued litigation would be expensive, involving a trial and
19 possible appeals, and would substantially delay and reduce any recovery by the class. (*Id.* at ¶¶
20 27.)

21 The proposed settlement of \$362,205.07 therefore represents a substantial recovery when
22 compared to Plaintiff’s reasonably forecasted recovery. (*Id.* at ¶¶ 18-29.) Because of the
23 proposed Settlement, class members will receive timely, guaranteed relief and will avoid the risk
24 of an unfavorable judgment. When considering the risks of litigation, the uncertainties involved
25 in achieving class certification, the burdens of proof necessary to establish liability, the
26 probability of appeal of a favorable judgment, it is clear that the settlement amount of
27 \$350,000.00 is within the “ballpark” of reasonableness, and final settlement approval is
28 appropriate. (*Id.*) To be sure, Defendant ultimately has to pay less under the settlement than

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

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

14 The Settlement was reached following extensive negotiations following a full-day
15 mediation session with experienced employment mediator Steve G. Pearl, Esq. (Hajjar Decl. ¶
16 7.) The settlement negotiations were at arm’s length and, although conducted in a professional
17 manner, were adversarial. (*Id.*) The parties went into the mediation willing to explore the
18 potential for a settlement of the dispute, but each side was also prepared to litigate their or its
19 position through trial and appeal if a settlement had not been reached. (*Id.*)

20 Before reaching this settlement, Class Counsel conducted informal discovery concerning
21 the claims set forth in the Litigation, such as a sample of class member timekeeping and payroll
22 records, Defendant’s policies and procedures concerning the payment of wages, the provision of
23 meal and rest breaks, issuance of wage statements, and providing all wages at separation, as well
24 as information regarding the number of putative class members and the mix of current versus
25 former employees, the wage rates in effect, and the amount of meal and rest period premium
26 wages paid to class members. (*Id.* at ¶¶ 5-6.) In conjunction with their extensive factual
27 investigation, Class Counsel investigated the applicable law regarding the claims and defenses
28 asserted in the litigation. (*Id.*) Thus, Plaintiff and his counsel were able to act intelligently and

effectively in negotiating the proposed Settlement. (*Id.*) There is no evidence to suggest that the Parties did not have sufficient information to make informed decisions about the value of this case or that the Settlement is a product of fraud, overreaching or collusion.

C. Plaintiff's Counsel Has Substantial Class Action Experience.

Class Counsel also has considerable experience and has demonstrated competence with litigating wage and hour class actions. (*Id.* at ¶¶ 40-47.) Class Counsel has substantial experience in all facets of litigation in state and federal court, including discovery, law and motion, trial, appeals, arbitration and mediation. Class Counsel has litigated numerous class actions on behalf of plaintiffs and have been lead counsel or otherwise exercised significant case handling responsibilities in numerous cases resulting in millions of dollars in class action settlements. (*Id.*)

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

D. The Overwhelmingly Positive Reaction from the Class Further Supports Settlement Approval.

No class member has objected to the Settlement, and only three class members have requested exclusion from the Settlement. (Lee Decl., ¶¶ 7, 8.) The overwhelmingly positive response of the class strongly supports final approval of the Settlement. (*See, e.g., In re Lifelock, Inc. Marketing and Sales Practices Litigation* (D. Ariz. 2010) 2010 WL 3715138, *6 [relatively few objections and requests for exclusion support approval].)

1 Factors to be considered in evaluating a class action settlement include “the reaction of
2 the class members to the proposed settlement.” (*Kullar, supra*, 168 Cal.App.4th at p. 128.) The
3 reaction here has been overwhelmingly positive. Courts have approved class action settlements
4 in lesser circumstances. (*See, e.g., Hughes v. Microsoft Corp.* (W.D.Wash. 2001) 2001 U.S.
5 Dist. LEXIS 5976, 2001 WL 34089697, *8 [court found that the “class members
6 overwhelmingly support[ed] the settlement” where there were over 37,000 notices sent out, 2,745
7 class members participated in the settlement, “only nine objections were submitted”, and there
8 were 86 timely opt-outs and over 20 additional defective or untimely opt-outs, “these indicia of
9 the approval of the class of the terms of the settlement support a finding of fairness under Rule
10 23”], *citing Hanlon v. Chrysler Corp.* (9th Cir.1998) 150 F.3d 1011, 1027 [despite vigorous
11 objections and appeal by objectors, “fact that the overwhelming majority of the class willingly
12 approved the offer and stayed in the class presents at least some objective positive commentary
13 as to its fairness”, court did not abuse its discretion in approving settlement].)

14 **IV. THE COURT SHOULD AWARD PLAINTIFFS THE REQUESTED AMOUNTS**
15 **OF FEES, COSTS AND AN ENHANCEMENT PAYMENT.**

16 Under the Settlement, subject to the Court’s approval, Defendant agreed to pay Class
17 Counsel reasonable attorneys’ fees in the amount of \$116,665.50, which is 33 1/3% of the
18 Maximum Settlement Amount, and costs up to \$13,995.40 for litigating this Action. However,
19 the Potential Increase in Funding clause of the Settlement Agreement was triggered. (Settlement,
20 ¶ I (T).) Since the total number of Workweeks was 13,123, the Settlement Amount increased by
21 3.49% (actual Workweeks of 13,123 *less* max Workweek count of 12,681 *equals* 442 Workweek
22 overage. 442 Workweeks *divided by* 12,681 Workweeks *equals* 3.49%). (Lee Decl., ¶ 11.) Since
23 the Settlement Amount was increased by 3.49%, the increased Settlement Amount is
24 \$362,205.07 (\$350,000 + \$12,205.07). (*Id.*) In addition, Defendant will not oppose an application
25 for the payment of Settlement Administration Costs and a Class Representative Enhancement
26 Award. Settlement Administration Costs are estimated at \$7,750.00, and Plaintiff will apply for
27 an Enhancement Award in the amount of \$5,000.00. The proposed attorneys’ fees and expenses
28

were disclosed to the Class Members in the proposed Notice of Proposed Class Action Settlement.

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

A. Counsel Requests an Award of Fees Based on the “Common Fund” Method.

California courts have long awarded attorneys’ fees as a percentage of the benefit created by counsel in pursuing claims on behalf of a class. The California Supreme Court held that “when a number of persons is entitled in common to a specific fund, and an action brought by a plaintiff or plaintiffs for the benefit of all results in the creation or preservation of that fund, such plaintiff or plaintiffs may be awarded attorneys’ fees out of the fund.” (*Serrano v. Priest* (1977) 20 Cal.3d 25, 34 [*quoting D’Amico v. Board of Medical Examiners* (1974) 11 Cal. 3d 1.]

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

The California Supreme Court affirmed in *Laffitte v. Robert Half Int’l Inc.* (2016) 1 Cal.5th 480 that, “when class action litigation establishes a monetary fund for the benefit of the

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

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

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

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

1 limit, with *thirty to forty percent commonly awarded in cases where the settlement is relatively*
2 *small*. (See *Id.*; see also, *Van Vranken v. Atlantic Richfield Company* (N.D. Cal. 1995) 901 F.
3 Supp. 294 [stating that most cases where 30-50 percent was awarded involved “smaller”
4 settlement funds of under \$10 million].)

5 The settled-for 33 1/3% fee award is consistent with the average fee award in class
6 actions. Indeed, the custom and practice in class actions is to award approximately one-third of a
7 fund as a fee award. (See *Chavez v. Netflix, Inc.* (2008) 162 Cal.App.4th 43, 66, n.11
8 [“Empirical studies show that, regardless whether the percentage method or the lodestar method
9 is used, fee awards in class actions average around one-third of the recovery.”].) Thus,
10 Plaintiff’s fee request is in line with the prevailing guidelines established in California case law
11 and academic literature, and is consistent with awards in California. Accordingly, Plaintiff
12 requests that the Court approve the attorneys’ fees requested herein.

13 2. This Matter Involves A “Fee-Shifting” Provision of the Labor Code.

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

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

18 (Cal. Lab. Code § 1194.)

19 As this litigation culminated in a settlement that provided for a recovery of unpaid wages,
20 including unpaid minimum wages and overtime compensation, Plaintiff is entitled to recover
21 reasonable attorneys’ fees and costs under the California Labor Code.

22 Class Counsel is also entitled to a fee award under California’s private attorney general
23 statute, Code of Civil Procedure § 1021.5. “The award of attorneys’ fees is proper under Section
24 1021.5 if ‘(1) plaintiffs’ action ‘has resulted in the enforcement of an important right affecting
25 the public interest,’ (2) ‘a significant benefit, whether pecuniary or nonpecuniary, has been
26 conferred on the general public or a large class of persons’ and (3) ‘the necessity and financial
27 burden of private enforcement are such as to make the award appropriate.’” (*Press v. Lucky*
28 *Stores* (1983) 34 Cal.3d 311, 317-318.) The fundamental objective of the statute is “to

1 encourage suits enforcing public policies by providing substantial attorneys' fees to successful
2 litigants in such cases." (*Graham v. DaimlerChrysler Corp.* (2004) 34 Cal.4th 553, 565.)

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

9 This action also conferred a significant benefit on a large class of persons. Notice was
10 sent to 225 Settlement Class Members, and only three Settlement Class Members requested
11 exclusion. The Settlement provides a significant monetary benefit, in that it permits all persons
12 who worked for Defendant during the applicable class period to obtain compensation for unpaid
13 wages and missed meal and rest periods.

14 Finally, the necessity and financial burden of private enforcement render an award
15 appropriate. Without the incentive of an attorneys' fee award, Plaintiff could not have afforded
16 to hire counsel to pursue this case, as the cost of litigating this matter far outweighed Plaintiff's
17 potential recovery. (*See Ryan v. California Interscholastic Federation* (2001) 94 Cal.App.4th
18 1033, 1044 ["As to the necessity and financial burden of private enforcement, an award is
19 appropriate where the cost of the legal victory transcends the claimants' personal interest; in
20 other words, where the burden of pursuing the litigation is out of proportion to the plaintiff's
21 individual stake in the matter."].)

22 3. The Experience, Reputation and Ability of Class Counsel Support the 23 Fee Award.

24 As demonstrated by their past experience in pursuing class actions on behalf of
25 consumers and employees, Class Counsel possesses considerable expertise in litigating class
26 action matters. Class Counsel has been involved as lead counsel or co-counsel in dozens of class
27 actions resulting in a multitude of beneficial results to class members in California. Because it is
28 reasonable to compensate class counsel commensurate with their skill, reputation and experience,

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

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

10 **B. While the Lodestar Method is Not Necessary in Common Fund Cases, Courts**
11 **May Perform a Cross-Check to Award Fees.**

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

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

26 To be sure, trial courts have substantial discretion in adjusting the lodestar to account for
27 various factors. (*See Lealao v. Beneficial California, Inc.* (2000) 82 Cal.App.4th 19, 26, 39-45;
28 *see also Serrano, supra*, 20 Cal.3d at p. 49.) In addition, it has been held that "[m]ultipliers can

range from 2 to 4 or even higher.” (*See Wershba*, 91 Cal.App.4th at p. 255; *see also Van Vranken*, *supra*, 901 F. Supp. At p. 298 “[m]ultipliers in the 3-4 range are common in lodestar awards for lengthy and complex class action litigation”].)

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

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

2. The Lawsuit Provided a Public Benefit.

Class Counsel’s choice to litigate this matter provided a public benefit to 225 California employees. Moreover, the California Supreme Court stated that “Labor Code section 1194 confirms “a clear public policy ... that is specifically directed at the enforcement of California's minimum wage and overtime laws for the benefit of workers.” [citation omitted].” (*Sav-on Drug Stores, Inc. v. Super. Ct.* (2004) 34 Cal.4th 319, 340.) Given the financial risks and numerous attorney hours attendant to the litigation of Plaintiff’s claims, this factor supports Class Counsel’s fee request and encourages the private enforcement of legal rights for the general good.

C. Costs Are Reasonable.

Class Counsel requests reimbursement of up to \$12,933.92 in expenses. (Hajjar Decl., ¶ 15.) As of the date of filing this Motion, Class Counsel has incurred around \$12,433.92 in costs, and they anticipate incurring at least \$500.00 in additional costs up to the time the Court enters a judgment in this action and schedules a hearing on distribution. (*Id.*) Accordingly, Class Counsel respectfully requests reimbursement of \$12,933.92 in costs. (*Id.*) Notably, Defendants have agreed that it will not oppose any cost award request up to \$13,955.40. The categories of costs are set forth in the accompanying Declaration of Nicol Hajjar, and these costs are easily seen to be both reasonable and necessary.

1 **D. The Enhancement Payment to the Plaintiff Is Reasonable.**

2 Named plaintiffs in class action lawsuits “are eligible for reasonable incentive payments to
3 compensate them for the expense or risk they have incurred in conferring a benefit on other
4 members of the class.” (*Munoz, supra*, 86 Cal.App.4th at p. 412.) Courts routinely grant approval
5 of class action settlement agreements containing enhancements for the class representatives, which
6 are necessary to provide incentive to represent the class, and are appropriate given the benefit the
7 class representatives help to bring about for the class. (*See Rodriguez v. W. Publ'g Corp.* (9th Cir.
8 2009) 563 F.3d 948, 958-59.) The California Supreme Court has also noted that “retaliation against
9 employees for asserting statutory rights under the Labor Code is widespread,” despite anti-
10 retaliation statutes designed to protect employees. (*Gentry v. Super. Ct.* (2007) 42 Cal.4th 443,
11 460-61.) Plaintiffs should therefore be rewarded for assuming the risk of retaliation for the sake
12 of class members. (*See Frank v. Eastman Kodak Co.* (W.D.N.Y. 2005) 228 F.R.D. 174, 187.)

13 Under the settlement agreement, subject to the Court’s approval, Defendant agreed to pay
14 a Service Award in the amount of \$5,000.00 to Plaintiff. (Settlement, § XIIV.) This amount is
15 also in exchange for Plaintiff’s general release of all claims against Defendants. Plaintiff has
16 submitted a declaration demonstrating that he devoted approximately 12 hours of time and work
17 assisting counsel in the case, communicated with counsel very frequently for litigation and to
18 prepare for mediation. (*See Declaration of Plaintiff Eduardo Pena*, ¶¶ 7-13.)

19 When compared with the amounts awarded in typical class action cases, the amount
20 requested here is particularly reasonable. Indeed, a **2006** study examining the average incentive
21 award given to class action plaintiffs from **1993 to 2002** found that the “average award per class
22 representative was \$15,992 and the median award per class representative was \$4,357.” (Theodore
23 Eisenberg & Jeffrey P. Miller, “Incentive Awards to Class Action Plaintiffs: An Empirical Study”,
24 53 UCLA L. Rev. 1303, 1308 (2006).)

25 **E. Administration Expenses Should be Approved.**

26 Phoenix Settlement Administrators, the Settlement Administrator, estimates that it will
27 incur a total of \$7,750.00 in costs associated with the administration of this Settlement. (Lee
28

Decl., ¶ 16.) These expenses are reasonable, based upon the size of the class, claim and exclusion tracking, and Class Member payment processing.

V. CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court grant final approval of the proposed settlement.

Dated: February 22, 2024

Respectfully submitted,

WILSHIRE LAW FIRM, PLC

By: 

Nicol E. Hajjar, Esq.
Tina Petrosian, Esq.

Attorneys for Plaintiff and the Class

PROOF OF SERVICE

Eduardo Pena v. Strategic Operations, Inc., et al.
37-2022-00014701

STATE OF CALIFORNIA)
) ss
COUNTY OF LOS ANGELES)

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

On **February 22, 2024**, I served the foregoing **PLAINTIFF'S NOTICE OF MOTION AND MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT; MEMORANDUM OF POINTS AND AUTHORITIES**, on the interested parties by placing a true copy thereof, enclosed in a sealed envelope by following one of the methods of service as follows:

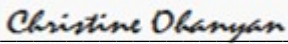
Harvey C. Berger
Berger & Williams, LLP
401 B Street, Suite 2000
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Email: berger@bergerwilliams.com
waller@bergerwilliams.com
beshear@bergerwilliams.com

*Attorneys for Defendant,
Strategic Operations, Inc. et al.*

- (X) **BY UPLOAD:** I hereby certify that the documents were uploaded by my office to the State of California Labor and Workforce Development Agency Online Filing Site
- (X) **BY E-MAIL:** I hereby certify that this document was served from Los Angeles, California, by e-mail delivery on the parties listed herein at their most recent known email address or e-mail of record in this action.

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

Executed on **February 22, 2024**, at Los Angeles, California.



Christine Ohanyan