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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO

JONATHAN B. FERRINI, individually, and on behalf of all others similarly situated,

Plaintiff,

vs.

ALLIED SCHOOL, LLC, a limited liability company; AMERICAN SCHOOL OF REAL ESTATE EXPRESS, LLC, a limited liability company; and DOES 1 through 10, inclusive,

Defendants.

Case No.: 37-2022-00031845-CU-OE-CTL

[Assigned for all purposes to the Hon. Robert C. Longstreth, Dept. 65]

CLASS ACTION

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

Date: November 15, 2024
Time: 8:30 a.m.
Courtroom: Dept. C-65
Judge: Hon. Robert C. Longstreth

Action Filed: August 10, 2023
Trial Date: Not Set

TO THE COURT, ALL PARTIES, AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on November 15, 2024, at 8:30 a.m., in Department C-65 of the above-captioned Court, located at 330 West Broadway, San Diego, CA 92101, Plaintiff JONATHAN B. FERRINI ("Plaintiff") will and hereby does move this Court for an order:

1. Granting class certification of the Class, solely for settlement purposes pursuant to Code of Civil Procedure § 382;
2. Finally approving the CLASS ACTION AND PAGA SETTLEMENT AGREEMENT AND CLASS NOTICE ("Settlement" or "Agreement");
3. Appointing counsel for Plaintiff, Moon Law Group, PC, as Class Counsel;
4. Appointing Plaintiff as the Class Representative;
5. Ruling that Settlement Class Members who did not timely submit requests for exclusion from the settlement as set forth in the Agreement have released their claims against Defendants and the other releasees as set forth in the Agreement;
6. Ruling that Settlement class Members who did not timely object to the settlement pursuant to the terms set forth in the Agreement are barred from prosecuting or pursing any appeal of the Court's Order;
7. Awarding the sums requested in the Motion;
8. Entering a Final Judgment; and,
9. Without affecting the finality of the final judgment, reserving continuing jurisdiction over the parties for the purposes of implementing, enforcing and/or administering the settlement as set forth in the Agreement or enforcing the terms of the Final Judgment.

Good cause exists to grant this Motion because: (1) the Class meets all of the requirements for class certification for settlement purposes under Code of Civil Procedure § 382; (2) the Settlement Agreement is a fair, adequate, and reasonable compromise of the disputed wage and hour claims asserted by Plaintiff; (3) Plaintiff and Class Counsel are adequate to represent the Class; (4) the notice procedures and related forms comply with California Rules of Court 3.766(d) and (e) and this Court's Order granting preliminary approval of the Settlement, and adequately apprised Class Members of their rights and fully comport with due process.

TENTATIVE RULINGS: Tentative rulings are normally available after 4:00 p.m. on Thursday, one day prior to the hearing. Failure to appear may be deemed a waiver of oral argument. If neither party appears at the scheduled hearing, the tentative ruling may become the final order of the court on the date set for the hearing.

This Motion is based on this Notice of Motion and Motion, the attached Memorandum of Points and Authorities, the Declarations of H. Scott Leviant, Plaintiff, and the Settlement Administrator in support thereof, all papers and pleadings on file with the Court in this action, all matters judicially noticeable, and on such oral and documentary evidence as may be presented in connection with the hearing on the Motion.

Respectfully submitted,

Dated: October 23, 2024

MOON LAW GROUP, PC

By: H. S. Leviant

Kane Moon
H. Scott Leviant
Mariam Ghazaryan

Attorneys for Plaintiff JONATHAN B. FERRINI

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I. INTRODUCTION

Pursuant to California Rules of Court, Rules 3.769, Plaintiff requests that this Court finally approve the class action settlement set forth in the CLASS ACTION AND PAGA SETTLEMENT AGREEMENT AND CLASS NOTICE ("Settlement" or "Agreement") with Defendants Allied School, LLC and American School of Real Estate Express, LLC ("Defendants").

After informal and formal discovery, the exchange of documents and data, and an arm's-length mediation session with mediator Steve Serratore, Esq., Plaintiff and Defendants (collectively referred to herein as the "Parties") reached a proposed class action settlement with a gross settlement amount ("GSA") of **$195,000.00** in compromise of disputed claims asserted on behalf of the below-defined Class consisting of **32** members. Plaintiff believes this settlement is a fair, adequate, and reasonable compromise of disputed claims for alleged wage and hour violations and penalties asserted in this case.

Plaintiff now submits this Motion for Final Approval of Class Action Settlement, along with the Settlement (attached to the Declaration of H. Scott Leviant ["Leviant Decl."], Exhibit 1 thereto). For the Court's convenience, below is a summary of the key provisions of the Settlement.

II. THE NOTICE PROCESS WAS COMPLETED WITHOUT ISSUE

Plaintiff and Defendants have fulfilled the class notice procedures set forth in the Settlement. The Settlement Administrator, Phoenix Settlement Administrators ("Phoenix"), sent individual Notices to 32 Class Members on July 25, 2024. (Declaration of Mayra Gonzalez, ¶ 5.) There have been **zero** opt outs, **zero** objections, and **zero** workweek disputes received. (*Id*., at ¶¶ 6-9.)

III. MAJOR TERMS OF SETTLEMENT

The provisions of the proposed Settlement include the following:

- Defendants agree not to oppose certification for purposes of Settlement (Settlement, ¶ 12.1);
- <u>Class</u>: All persons who contracted with Defendants as Instructors in California during the Class Period (the "Class Period" is the period from August 10, 2018 through May 29, 2023). (Settlement, ¶¶ 1.5, 1.12.)
- <u>Settlement Amount</u>: Defendants will pay a maximum of **$195,000.00**, referred to as the Gross Settlement Amount (or GSA herein), resulting in an estimated average **gross** benefit per Class Member of approximately **$6,093.75** (Settlement, ¶ 1.21; 3.1; Leviant Decl., ¶

17.);

- Funding of Gross Settlement Amount: Defendants shall fully fund the Gross Settlement Amount, and also fund the amounts necessary to fully pay Defendants' share of payroll taxes by transmitting the funds to the Administrator no later than 14 days after the Effective Date. (Settlement, ¶ 4.3.)
- Class Size: **32** individuals who worked an approximately **15,489.4** Work Hours. (Settlement, ¶ 4.1.);
- PAGA Group Size: **32** individuals, who worked roughly **14,863.04** PAGA Work Hours (Settlement, ¶ 8);
- PAGA Period: August 9, 2021 through May 29, 2023. (Settlement, ¶ 1.30);
- Escalator Clause: This Settlement does not include an escalator clause. Instead, the Class Period is fixed with a specified end date. The class size and Work Hours counts will not change significantly.
- *Kullar/Munoz* Analysis: Plaintiff addresses the claims analysis herein, at Part V.B.3, and in the Declaration of Leviant, at Paragraph 18;
- No Reversion: The Settlement is a ***non-reversionary*** settlement (Settlement, ¶ 3.1);
- Certification: Plaintiff addresses certification requisites herein, at Part V.A., and in the Declaration of Leviant, at Paragraphs 34-40;
- No Claim Form: No claim form is required (Settlement., ¶ 3.1);
- Class Release: The Settlement will release wage-and-hour claims for Participating Class Members (those Class Members who do not opt out of the Settlement) all claims that were alleged, or reasonably could have been alleged, based on the facts stated in the Operative Complaint (Settlement, ¶ 5.2);
- PAGA Release: Plaintiff, Aggrieved Employees and the LWDA will release all claims for PAGA penalties that were alleged, or reasonably could have been alleged, based on the facts stated in the Operative Complaint and the PAGA Notice, regardless of whether they opt out of the class portion of the Settlement (Settlement, ¶ 5.3);

- Net Settlement Amount Available to the Class: After deducting Class Counsel's attorneys' fees and costs, service payment to Plaintiff, administration costs, and the PAGA penalty, the remainder will be available for distribution to Class Members who do not opt out, with each Class Member receiving a share based on the number of hours each Class Member worked for Defendants within the Class Period. The Net Settlement Amount is estimated to be at least **$81,862.06**, resulting in an average **net** payment per Class Member of at least **$2,558.19**, before any tax withholdings. (Settlement, ¶ 1.27.)
- Tax Allocation: The amounts distributed to Class Members will be characterized as 20% alleged unpaid wages, 80% to interest and penalties, and PAGA Settlement Payments will be allocated as 100% penalties. (Settlement, ¶¶ 3.2.4.1, 3.2.5.2.)
- Employer's Portion of Payroll Taxes Paid Separately: Defendants' portion of payroll taxes (e.g., FICA, FUTA, etc.) owed on any settlement payments to Class Members that constitute wages will be paid separate and apart from the GSA (Settlement, ¶ 3.1);
- Settlement Administrator: The notice portion of the Settlement has been administered by a third-party Administrator, Phoenix Settlement Administrators. Phoenix's estimate for settlement administration services in the amount of **$5,000.00** was selected as the lowest bid from a competitive bidding process, and is below the Parties' estimated cost of $12,000.00. (Settlement, ¶ 3.2.3; Gonzalez Decl., Exh. B.)
- Class Data for Administration: The Settlement Administrator received the Class Data within 14 calendar days of Preliminary Approval, used the National Change of Address ("NCOA") database to update the Class Data, and then used skip tracing on returned Notices (Settlement, ¶¶ 4.2; 1.10);
- Notice: The Notice was issued within 14 days of receipt of the Class List (Settlement, ¶ 7.4.2). The Notice describes how to dispute workweeks, submit an objection in writing, in person, or through an attorney, or request exclusion (Settlement, ¶¶ 7.5 – 7.7);
- Notice Language: Notice was issued in English (Settlement, ¶ 1.11; 7.4.2);
- Objections: Objections could have been submitted in person, through an attorney, or in writing to the Settlement Administrator, with no pre-requisite to being heard (Settlement, ¶¶

7.7.1 – 7.7.3);

- Exclusion Requests: The procedure for exclusion requests, mailing a request to the Settlement Administrator, is the same as the procedure for submitting a written objection (Settlement, ¶¶ 7.5.1 and 7.7.2);
- PAGA Allocation: From the GSA, **$20,000** will be allocated to settle claims brought pursuant to the California Private Attorneys General Act, Labor Code § 2699 *et seq*. ("PAGA"), and seventy-five percent (75%), or **$15,000**, will be paid to the California Labor & Workforce Development Agency. (Settlement, ¶ 1.33; 3.2.5);
- Notice to LWDA: Notice was provided prior to the filing of this Motion. Evidence is attached to the Leviant Declaration;
- Enhancement/Service Award to Plaintiff: Defendants will not oppose the application for Class Representative Service Payment of up to **$7,500.00** for Plaintiff, to be paid from the GSA (Settlement, ¶ 3.2.1);
- Fees and Costs: Defendants will not oppose Class Counsel's application for fees not to exceed 33.33% of the GSA **($65,000.00**), and actual costs of **$15,637.94**, which is below the not to exceed amount of $18,000.00, to be paid out of the GSA (Settlement, ¶ 3.2.2);
- Check Void Period: Settlement checks will be valid for 180 days (Settlement, ¶ 4.4.1);
- Uncashed Checks: Any settlement checks that are mailed to the Class Members and remain uncashed after 180 days of the date of issuance will be cancelled, and the moneys will be directed to the State Controller's Office, Unclaimed Property Division in the name of the Class Member (Settlement, ¶ 4.4.3);
- Judgment Notice: Judgment will be posted on the Settlement Administrator's website after entry (Settlement, ¶ 7.8.1);
- Confidentiality Provisions: The Settlement permits Class Counsel to discuss the Settlement with Class Members (Settlement ¶ 12.2).

(Leviant Decl., ¶¶ 11-12 and Exhibit 1 thereto.)

IV. FACTUAL AND PROCEDURAL BACKGROUND

A. Plaintiff's Claims

Plaintiff worked as an instructor for Defendants, which provide training for individuals seeking to pass the California real estate licensing exam. On August 10, 2022, Plaintiff commenced this Action by filing a Complaint alleging causes of action against Defendants for: Failure to Pay Minimum Wages, Failure to Pay Overtime Compensation, Failure to Provide Meal Periods, Failure to Authorize and Permit Rest Breaks, Failure to Indemnify Necessary Business Expenses, Failure to Timely Pay Final Wages at Termination, Failure to Provide Accurate Itemized Wage Statements, and Unfair Business Practices. (Leviant Decl., ¶ 4.)

Plaintiff sent a letter to the Labor and Workforce Development Agency ("LWDA"), pursuant to California Labor Code § 2699.3, providing notice of his intent to seek civil penalties under the Private Attorneys General Act, California Labor Code § 2698, *et seq*. ("PAGA Letter"). (*Id.* at ¶ 5.) The LWDA did not indicate that it intended to investigate the alleged violations referenced in the letter, and the 65-day time period permitted for the LWDA to provide such a notification expired. On November 1, 2022, Plaintiff filed a First Amended Complaint alleging an additional cause of action against Defendants for Civil Penalties Under PAGA. The First Amended Complaint is the operative complaint in the Action (the "Operative Complaint.") (*Id.* at ¶ 5.)

B. Pre-Mediation Data Production and Analysis

The Parties conducted informal and formal discovery and investigation of the facts and law. Such investigation included, inter alia, the exchange of extensive data and discoverable information in preparation for the mediation sessions. (Leviant Decl., ¶ 6.) The Parties have analyzed pay and other data pertaining to Plaintiff and the Class during the relevant Settlement Period, including but not limited to the numbers of former and current members of the Class, average workweeks, and average rate of hourly pay. (*Id.*) In addition, Defendants also provided documents reflecting wage and hour policies and practices during the Settlement Period and information regarding the total number of current and former employees in the Class. (*Id.*)

After reviewing documents regarding Defendants' wage and hour policies and practices and other information obtained during the exchange of discovery, Class Counsel were able to evaluate the probability of class certification, success on the merits, and the reasonably obtainable maximum monetary exposure for all claims. Class Counsel reviewed these records and prepared a damage analysis prior to mediation. Class Counsel also investigated the applicable law regarding the claims and defenses asserted in the litigation. (Leviant Decl., ¶ 7.)

C. Settlement

On March 30, 2023, the Parties participated in an all-day mediation presided over by Steve Serratore, Esq., which led to this Agreement to settle the Action. (Leviant Decl., ¶ 8.) The Parties discussed at length the burdens and risks of continuing with the litigation as well as the merits of claims and defenses. (*Id*.) After the mediation, the Parties then signed a long form settlement agreement (the Agreement). (*Id*.)

Plaintiff and Class Counsel are aware of the burdens of proof necessary to establish liability for the claims asserted in the Action, both generally and in response to Defendants' defenses thereto. (Leviant Decl., ¶ 9.) Plaintiff and Class Counsel have also taken into account Defendants' agreement to enter into a Settlement that confers substantial relief upon the Class. *(Id*.)

Based on the foregoing, Plaintiff and Class Counsel have determined that the Settlement set forth in this Agreement is a fair, adequate, and reasonable Settlement and is in the best interests of the Class. (Leviant Decl., ¶ 10.) Solely for the purpose of settling this case, the parties agree that the requirements for establishing class action certification with respect to this class have been met and are met. (*Id*.) If this Settlement is not approved by the Court for any reason, Defendants reserve the right to contest class certification. (*Id.*) This Settlement, if approved, will result in the termination of the litigation through the entry of the Judgment and the release of all Released Claims for all Class Members, including all within the class definition who have not elected to exclude themselves from the Class. (*Id.*)

V. CLASS DEFINITION

The Class is defined as follows:

> All persons who contracted with Defendants as Instructors in California during the Class Period (the "Class Period" is the period from August 10, 2018 through May 29, 2023) (Settlement, ¶ 1.5; 1.12) "Participating Class Member" means a Class Member who does not submit a valid and timely Request for Exclusion from the Class portion of the Settlement. (Settlement, ¶ 1.34.)

(Leviant Decl., ¶ 34 and Exhibit 1.)

VI. <u>DISCUSSION</u>

A. <u>Consistent with the Court's Findings at the Time of Preliminary Approval, the Court Should Certify the Class for Settlement Purposes</u>

Under Code of Civil Procedure § 382, class certification is warranted so long as there is a numerous and ascertainable class with a well-defined community of interest and that a "class action proceeding is superior to other means for a fair and efficient adjudication of the litigation." *See, e.g.*, *Sav-on Drug Stores, Inc. v. Superior Court*, 34 Cal.4th 319, 326, 332 (2004). For purposes of this Settlement *only*, Defendants stipulate to conditional certification. (Settlement ¶ 12.1.)

"The certification question is 'essentially a procedural one that does not ask whether an action is legally or factually meritorious.'" *Id.*, at 326, quoting *Linder v. Thrifty Oil Co.,* 23 Cal. 4th 429, 439-440 (2000). The certification question asks whether the theory of recovery advanced by the plaintiff is likely to prove amenable to class treatment. *See, e.g.*, *Jaimez v. Daiohs USA, Inc.*, 181 Cal. App. 4th 1286, 1298 (2010). As the court noted in *Dunk*, although certification requirements are intended "to protect the interests of the non-representative class members," that concern is "protected by the trial court's fairness review of the settlement." *Dunk v. Ford Motor Co.* 48 Cal. App. 4th 1794, 1807 n. 19 (1996). In view of these standards, ***as discussed more thoroughly as part of the preliminary approval motion***, the Settlement Class should be certified for settlement. Code Civ. Proc. § 382; Rules of Court, Rule 3.769(c).

B. <u>The Court Should Approve the Settlement Because It Is a Fair, Adequate, and Reasonable</u>

California courts favor settlement. *See, e.g.*, *Stambaugh v. Superior Court*, 62 Cal. App. 3d 231, 236 (1976). Unlike most settlements, class action settlements involve a court approval process that exists to prevent fraud, collusion, and unfairness to class members. *Malibu Outrigger Bd. of Governors v. Superior Court*, 103 Cal.App.3d 573, 578-579 (1980). This approval process consists of preliminary settlement approval, notice being given to class members, and a final fairness and approval hearing being held at which class members may be heard with respect to the settlement. *Id*. For the reasons discussed below, this Court should finally approve the Settlement and enter Judgment.

1. Class Action Settlements Are Subject to Review and Approval.

Any settlement of class litigation must be reviewed and approved by the presiding court. Rules of Court, Rule 3.769(a). Approval occurs in two steps: (1) an early (preliminary) review by the trial court and (2) a subsequent (final) review after notice has been distributed to the class members. The Preliminary Approval Hearing and Final Approval Hearing coincide with these two steps. The present motion seeks *final approval* and the entry of a Judgment.

To evaluate a settlement, a court must receive "basic information about the nature and magnitude of the claims in question and the basis for concluding that the consideration being paid for the release of those claims represents a reasonable compromise." *Kullar v. Foot Locker Retail, Inc.*, 168 Cal. App. 4th 116, 133 (2008). But the record need ***not*** contain an explicit statement of the maximum theoretical recovery. *Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles*, 186 Cal. App. 4th 399, 409 (2010).

2. The Parties Reached the Settlement Through Arms' Length Negotiations Between Experienced Counsel with the Assistance of a Highly-Qualified Mediator After Sufficient Data Was Exchanged to Evaluate Settlement.

A settlement is presumptively fair where it is reached through arms' length bargaining, based on sufficient discovery and investigation to allow counsel and the court to act intelligently, counsel is experienced in similar litigation, and the percentage of objectors is small. *Dunk*, 48 Cal.App.4th at 1802; *In re Microsoft I-V Cases*, 135 Cal. App. 4th 706, 723 (2006); *7-Eleven Owners for Fair Franchising v. Southland Corp.*, 85 Cal. App. 4th 1135, 1146 (2000). In exercising these powers, the overriding concern is to ensure that a proposed settlement is "fair, adequate, and reasonable." *Dunk*, at 1801, quoting *Officers for Justice v. Civil Serv. Comm'n of San Francisco*, 688 F.2d 615, 625 (9th Cir. 1982).

Relevant factors in making this determination, include, but are not limited to:

> [T]he complexity and likely duration of further litigation, the risk of maintaining class action status through trial, the amount offered in settlement, the extent of discovery completed and the state of the proceedings, the experience and views of counsel, the presence of a governmental participant, and the reaction of the class members to the proposed settlement.

Id. These factors require balancing, are non-exhaustive, and, trial courts should tailor the factors to each case and give due regard to "what is otherwise a private consensual agreement between the parties." *Id.*

Here, the Settlement resulted from thorough, arms' length negotiations between experienced counsel with the assistance of a highly-regarded mediator. (Leviant Decl., ¶¶ 8-10.) With respect to the claims at issue in this case, Plaintiff obtained data from Defendants (through informal discovery) and then carefully reviewed that information. Counsel for Plaintiff also examined relevant policies and interviewed witnesses in detail about their work experiences and Defendant's practices.

Based on that review, Plaintiff estimated potential exposure and then estimated risk factors to adjust the reasonable expected outcome. The investigation that Plaintiff's counsel conducted was sufficient to provide enough information to intelligently evaluate the estimated exposure for purposes of negotiating the Settlement in view of the risks discussed below and are also sufficient to allow this Court to do the same. *See, e.g.*, *Wershba v. Apple Computer*, *Inc.,* 91 Cal. App. 4th 224, 245 (2001).

3. The Settlement Represents a Fair, Adequate, and Reasonable Compromise of Class Members' Claims Based on Defendants' Estimated Liability Exposure Given the Risks Continued Litigation Would Entail.

The proposed Settlement of $195,000.00 offers substantial, timely, and guaranteed payments to Class Members. A settlement is not judged against what might have been recovered had a plaintiff prevailed at trial and does not have to provide 100% of damages sought to be fair and reasonable. "In the context of a settlement agreement, the test is not the maximum amount plaintiffs might have obtained at trial on the complaint, but rather whether the settlement is reasonable under all of the circumstances." *Wershba*, 91 Cal. App. 4th at 250. Accordingly, because settlements involve compromise, even one that provides for substantially narrower relief than would likely be obtained if the suit were successfully litigated can be reasonable given that "the public interest may indeed be served by a voluntary settlement in which each side gives ground in the interest of avoiding litigation." *Id*.

With respect to the claims asserted on behalf of the Class in this case, there are serious risks that support this compromise amount. These risks include, but are not limited to: (i) the risk that Plaintiff would be unable to establish liability for unpaid wages, *see Duran v. US Bank Nat'l Ass'n*, 59 Cal. 4th 1, 39 & n. 33 (2014) ("*Duran*"); (ii) the risk that Defendants' meal and rest period policies might not ultimately support class certification or a class-wide liability finding; (iii) the risk that uncertainties about the ultimate legality of Defendants' policies and practices could preclude class-wide awards of statutory penalties; (iv) the risk that individual differences between Class Members could be construed as pertaining to liability and not solely to damages; (v) the risk that any civil penalties award under PAGA could be reduced by the Court in its discretion; (vi) the risk that lengthy trial or appellate litigation could ensue; (vi) the risk that violation rate estimates could prove lower than expected; and, (vii) the risk that Defendants' classification of instructors would be deemed lawful. (Leviant Decl., ¶ 16.) These risks are non-exhaustive.

In light of the uncertainties of protracted litigation, the settlement amount reflects a fair and reasonable recovery for the Class Members. (Leviant Decl. ¶¶ 13-20.) The settlement amount is, of course, a compromise figure. (Leviant Decl. ¶ 17.) By necessity it took into account risks related to liability, damages, and the defenses asserted by Defendants. (*Id.*) Moreover, each Class Member will be given the opportunity to opt-out of the Settlement, allowing those who feel they have claims that are greater than the benefits they can receive under this Settlement to pursue their own claims. (*Id.*) For the approximately **32** members of the Class, the average ***gross*** benefit is **$6,093.75** per class member, and the estimated average ***net*** recovery for each Class Member is approximately **$2,558.19** (*Id.*) Given that Defendants could challenge certification and liability, this is a significant sum to have achieved in settlement. Moreover, <u>a Class Member who worked a greater number of hours will receive a larger Settlement share</u> than a Class Member who worked for a shorter time during the class period. (*Id.*)

After analyzing the claims in this matter, Plaintiff concluded that the value of this Settlement is fair, adequate, and reasonable. (Leviant Decl., ¶ 18.) The Class Settlement Amount of 195,000.00 is about 96% of the **$202,585.11** estimate of *risk-adjusted* recovery (excluding interest) at this stage in the litigation. (*Id.*) This assessment is based on a carefully constructed model of the current fair value of the case, using estimated risks, average wage rates, numbers of employees, and the amount of time covered by the class period. (*Id.*)

Plaintiff's counsel estimates that the calculated plausible exposure is **$627,899.50**, *including* PAGA penalties. (*Id.*)

- A reasonably estimated exposure for unpaid wages was calculated, with the assistance of an expert, to be approximately **$197,867.50**. However, with the risk factor discounts for certification and liability proof, the value of that claim is estimated by Plaintiff's counsel to be approximately **$83,104.35**, assuming certification probability of 70% and merits success at 60%.

- A reasonably estimated exposure for rest break violations over the class period was calculated at **$10,512.00**, but with chances of certification and proof of liability (20% and 40% respectively) for a risk-adjusted exposure of **$840.96**. Plaintiff assumes that 100% of the Class missed one rest break per work week due to the demands of work assignments, an aggressive assumption. But instructors had significant freedom to set their break times, so this claim was considered to be very risky.

- A reasonably calculated exposure for meal break violations over the class period was calculated at **$17,020.00**, with chances of certification and liability risks (30% and 30% respectively) resulting in a risk-adjusted exposure of **$1,531.80**. As with rest breaks, instructors had significant freedom to schedule their meal breaks, rendering this claim highly susceptible to failure at the liability phase.

- Risk-adjusted penalty recoveries for wage statement and Labor Code § 203 penalties were estimated to be approximately **$24,528.00** and **$45,360.00**, respectively, on maximum exposures of **$58,400.00** and **$108,000.00**, respectively (with certification and merits success chances of 70% and 60% respectively, based on unpaid wage claims).

- Performing risk-adjusted valuations for all claims yields a total value in the range of **$155,865.11**, excluding PAGA.[1]

- PAGA penalties were calculated as having a maximum realistic exposure of **$233,600.00**, but a risk adjusted value of **$46,720.00**, after factoring in risks of reduction in penalties pursuant to Court discretion and the high risk of the inability to prove violations for all aggrieved employees.

The concurrently-filed Declaration of H. Scott Leviant sets forth claim valuation in additional detail. (*See*, Leviant Decl., ¶ 18.)

The $195,000.00 settlement here is fully supportable. Many risks are eliminated through settlement. And, with respect to those risks, certification rates in California are lower than conventional wisdom holds. (Leviant Decl., ¶ 19.) The Judicial Council's Class Certification in California: SECOND INTERIM REPORT FROM THE STUDY OF CALIFORNIA CLASS ACTION LITIGATION - FEBRUARY 2010 ("Second Interim Report"), at page 5, states that "less than a quarter of disposed cases in the study sample were certified, either through a litigated motion for certification ***or*** as part of a classwide settlement agreement." *See*, Second Interim Report, at 5 (emphasis added).[2] That "***or***" is significant. The certification rates identified in the study of less that 25% includes **both** contested certifications and settlement certifications, which are the majority of certifications. In other words, one

[1] In a sense, it is nonsensical to assign specific percentages to future events, but it does provide a specific method for attempting to reduce the concept of "very high risk" or "high risk" to a quantifiable amount. Certification of a claim is typically a binary event. One does not obtain a 20% certification; a claim is either certified or it is not. But the current expected value is best quantified by applying a risk reduction, based on the total experience of counsel.

[2] The report is available at https://www.courts.ca.gov/documents/classaction-certification.pdf (last viewed March 12, 2024).

must assume in any wage and hour class action prior to certification that a contested certification motion will have a success rate of well under 25%, and probably closer to 10% as a starting point for risk evaluation. (Leviant Decl., ¶ 19.) The facts of each case have significant bearing on these percentages. But it cannot be disputed that certification is an exceptionally difficult procedural hurdle to successfully overcome. Thus, it is not unreasonable to start from the proposition that a pre-certification settlement that is 10% to 15% of the maximum plausible exposure is a valid starting point for valuation. (Leviant Decl., ¶ 19.) If roughly 10% of class actions are certified on a contested basis, then, on average, 90% of the time a class will not be certified and the result for the class is zero dollars. (*Id.*) The recovery is **31%** of the maximum plausible recovery (estimated to be approximately **$627,899.50**, including 233,600.00 in PAGA penalties), which falls within the expected outcome under the likelihood of success metric and which compares favorably to other cases in which courts have granted approval of class wage and hour settlements representing a smaller fraction of the maximum theoretical damages.[3] (*Id.*) It would also be appropriate to evaluate the result by examining only the premium wages at issue (approximately $255,399.50, with no risk reduction), excluding penalties and interest; the settlement is about 87% of the premium wages (unpaid wages, meal period premiums, and rest break premiums) at maximum realistic exposure value.[4] Because the total Settlement amount and the proportion of the Settlement allocated to PAGA penalties fall within a reasonable range, the Settlement should be approved.

4. The Proposed Method for Allocating Settlement Funds Is Fair.

The proposed method of allocating the Settlement Fund to Class Members also is fair and

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[3] *See, e.g.*, *Ferrell v. Buckingham Property Mgmt*. (E.D. Cal. Jan. 21, 2020) Case No. 1:19-cv-00332-LJO-SAB, 2020 WL 291042, *17-20 (granting preliminary approval of settlement that represented 5.2% of the original valuation of the claims); *Thomas v. Cognizant Tech. Sols. U.S. Corp*. (C.D. Cal. June 24, 2013) No. SACV111123JSTANX, 2013 WL 12371622, at *6 (granting final approval of settlement that encompassed between 4.4% and 5% of the maximum estimated liability).

[4] The exclusion of interest and penalties from the fairness evaluation is proper because, first, PAGA penalties are discretionary (*see* Lab. Code § 2699(e)(2) (the court in its discretion "may award a lesser amount than the maximum civil penalty amount specified by this part…")), and, second, courts evaluate the strength of a proposed settlement without taking potential penalties or interest into consideration. *See Rodriguez v. West Publishing Corp.,* 563 F.3d 948, 955 (9th Cir. 2000); *see also Miller v. CEVA Logistics U.S.A., Inc.*, 2015 WL 729638, at *7 (E.D. Cal. Feb. 19, 2015) (court utilized calculation of a defendant's exposure exclusive of interest and penalties to determine whether the settlement fell within the range of possible approval).

reasonable. As noted, the parties agreed to allocate the Settlement Fund between all Class Members based on time worked by the Class Member during the Class Period, in relation to the total amount of time worked by all participating Class Members collectively during the class period. This proposed method is fair and reasonable because each Class Member's actual potential damages vary based on the number of workweeks he or she worked (e.g., Lab. Code § 226.7 provides for an extra hour of pay at the employee's regular rate of pay for each violation, resulting in a higher potential damage when a higher number of incidents occur). A Class Member who worked a greater number of hours for Defendants will receive a larger payment under the Settlement than a Class Member who worked for a shorter amount of time during the relevant period. (Leviant Decl., ¶¶ 13, 17.)

5. The Proposed Enhancement Award to Plaintiff Warrants Approval.

The proposed enhancement of $7,500 to Plaintiff is intended to recognize substantial initiative and significant efforts on behalf of the Class. Courts routinely approve incentive awards to compensate named plaintiffs for the services they provide and the risks they incur during class action litigation, often in much higher amounts than that sought here. Factors considered when awarding an incentive include the actions the plaintiff has taken to protect the class, the degree to which the class has benefitted, the amount of time and effort the plaintiff expended in the litigation, the risk to the class representative in commencing suit (financial and otherwise), the notoriety and personal difficulties encountered, the duration of the litigation, and the personal benefit (or lack thereof) enjoyed by the plaintiff as a result of the litigation. *Clark v. Am. Residential Servs. LLC*, 175 Cal. App. 4th 785, 804 (2009). Here, Plaintiff contributed time to the prosecution of this matter, including assistance prior to the mediation with information and substantial time conferring with counsel over the course of this litigation and before it was filed. (Ferrini Decl,. ¶¶ 5-20; Leviant Decl., ¶ 33.) The enhancement also recognizes risks Plaintiff took to be personally liable for costs regardless of the success of the litigation, as well as the personal risk of facing intrusive discovery and potential disclosure to future employers that Plaintiff sued an employer, making future employment less certain. Plaintiff's Declaration supports the requested enhancement.

6. The Proposed Award of Attorneys' Fees and Costs Is Also Fair, Adequate, and Reasonable and Merits Preliminary Approval.

a) *Plaintiff's Counsel Should be Awarded Fees Based on a Percentage of the Fund Recovered, Consistent with the Common Fund Method*

The request for fees as a percentage of a settlement is supported by the "common fund theory," where "one 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." *Serrano v. Priest*, 20 Cal. 3d 25, 35 (1977). 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." *City and County of San Francisco v. Sweet*, 12 Cal. 4th 105, 110 (1995). The lodestar may be cross-checked against the percentage. *See In re Consumer Privacy Cases*, 175 Cal. App. 4th 545, 556-58 (2009).

The California Supreme Court removed any lingering doubt about the use of the percentage of the fund method to award attorney's fees in California Courts. *Laffitte v. Robert Half Intern. Inc.*, 1 Cal. 5th 480, 503 (2016).[5] Thus, this Court may and, as strongly encouraged by the California Supreme Court, *should* award fees to Plaintiff's counsel based upon the percentage of the fund methodology.

"Empirical studies show that, regardless whether the percentage method or the lodestar method is used, fee awards in class actions average around one-third of the recovery." *Chavez v. Netflix, Inc.*, 162 Cal. App. 4th 43, 47 n. 11 (2008). This is consistent with counsels' experience in class cases. Here, Plaintiff's attorneys intend to request attorneys' fees of up to **$65,000.00** (33 and 1/3% of the GSA), and costs of **$15,639.94** (which includes payment for mediation, filing fees, service of process fees, and other standard expenses). (Leviant Decl., ¶ 31.) Given the efforts and risks involved in this case, as well as the results achieved, these amounts are within the range of reasonableness and warrant *final approval*.

[5] The Supreme Court also corrected the misconception that *Dunk* should be viewed as expressing doubt about the use of the percentage method: "The *Dunk* court, while finding the percentage method inapplicable to the settlement before it due to the lack of a readily valued common fund, did not purport to bar its usage generally in common fund cases." *Laffitte*, 1 Cal. 5th at 501.

b) A Lodestar Cross Check Confirms that Class Counsel's Requested Attorneys' Fees Are Reasonable

Plaintiff's fee application is also reasonable based on lodestar. Under the lodestar method, the court considers a compilation of the time spent and a reasonable hourly compensation of each attorney to evaluate the reasonableness of the fee. *Ramos v. Countrywide Home Loans, Inc*., 82 Cal. App. 4th 615, 622 (2000). The moving party meets its burden by submitting "declarations evidencing the reasonable hourly rate for their services and establishing the number of hours spent working on the case" as "California case law permits fee awards in the absence of detailed time sheets." *Wershba*, 91 Cal. App. 4th at 254-55; *Dunk*, 48 Cal. App. 4th at 1810; *Nightengale v. Hyundai Motors America*, 31 Cal. App. 4th 99, 103 (1994). The hours spent and the reasonable hourly compensation are used to arrive at a "lodestar" figure which may then be augmented or diminished taking into account various "multiplier" factors. *See Ramos*, 82 Cal. App. 4th at 622 (*citing Serrano*, 20 Cal. 3d at 48-49).

Here, Class Counsel's *total* lodestar is **$70,747.50** (including about 10 hours of past and future time not billed by Mr. Leviant). (Leviant Decl., ¶ 32.) The billed lodestar to date is **$60,997.50**. (Leviant Decl., ¶ 32.) The request for **<u>$65,000.00</u>** in attorneys' fees, which is **0.92** times the estimated total lodestar, is reasonable under the lodestar method.

(1) Class Counsel's Hours Are Reasonable

In determining whether the number of hours was reasonable, the court must determine that "the time spent was reasonably necessary and that [] counsel made 'a good faith effort to exclude from the fee request hours that are excessive, redundant, or otherwise unnecessary." *Jordan v. Multnomah County*, 815 F.2d 1258, 1263 n.8 (9th Cir. 1987). The court should defer to the lawyer's judgment as to how much time he was required to spend on the case. *Moreno v. City of Sacramento*, 534 F.3d 1106, 1112 (9th Cir. 2008) ("[l]awyers are not likely to spend unnecessary time on contingency fee cases in the hope of inflating their fees. The payoff is too uncertain, as to both the result and the amount of the fee."). Here, Counsel expended a prudent amount of time to achieve the excellent result. (Leviant Decl., ¶ 32.)

(2) Class Counsel's Hourly Rates Are Reasonable

The reasonable hourly rate is that prevailing in the community for similar work. *PLCM Group, Inc. v. Drexler*, 22 Cal. 4th 1084, 1095 (2000). "[I]n assessing a reasonable hourly rate, the trial court is allowed to consider the attorneys' skill as reflected in the quality of work, as well as the attorneys' reputation and status." *MBNA American Bank, N.A. v. Gorman*, 147 Cal. App. 4th 1, 3 (2006). The trial court may also "find hourly rates reasonable based on evidence of other courts approving similar rates." *Parkinson v. Hyundai Motor America*, 796 F.Supp.2d 1160, 1172 (C.D. Cal. 2010).

Class Counsel are experienced litigators who specialize in employment law, with a substantial wage and hour practice. (Leviant Decl., ¶¶ 21-27.) A number of courts, including this Court, have approved Class Counsel's hourly rates. (Leviant Decl., ¶ 21.) Given the skill and experience of Class Counsel, and the excellent result achieved, Class Counsel's hourly rates are reasonable.

c) Class Counsel's Costs Are Reasonable

The Settlement Agreement provides for reimbursement of costs not to exceed $18,000.00. Moon Law Group, PC seeks costs in the amount of $15,637.94. (Leviant Decl., ¶ 32, Exh. 2.) These costs were reasonably incurred in prosecuting the Action on behalf of the Class Members and should be approved by the Court. Accordingly, Class Counsel respectfully requests the Court approve total costs in the amount of **<u>$15,637.94</u>**. (*Ibid.*)

7. The Proposed Payment to the Administrator Is Fair and Reasonable

Phoenix Settlement Administrators, which has been selected due to its competitive bid, requests a cost of **$5,000.00**. (Gonzalez Decl.). In counsel's experience, based on similar wage-and-hour actions, a cost of **$5,000.00** is a fair and reasonable amount for administration fees and should be approved, and it is well below the Parties' estimated cost of $12,000 to administer the Settlement. (Leviant Decl., ¶ 34.)

8. The PAGA Allocation is Reasonable

The ultimate decision as to the amount of penalties is always up to the discretion of the Court. Labor Code § 2699(e)(2) states: "In any action by an aggrieved employee seeking recovery of a civil penalty available under subdivision (a) or (f), a court may award a lesser amount than the maximum civil penalty amount specified by this part if, based on the facts and circumstances of the particular case, to do otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory."

Prior to the issuance of *Moniz v. Adecco USA, Inc.*, 72 Cal. App. 5th 56 (2021), the only sources of persuasive guidance as to how to assess the reasonableness of a PAGA allocation were found in federal court decisions. In their view, a PAGA allocation, even if a small portion of the total settlement, could be reasonable if the settlement of the wage and hour claims is robust and serves the deterrent purpose of PAGA. *O'Connor v. Uber Technologies, Inc*., 201 F.Supp.3d 1110, 1135 (N.D. Cal. 2016) ("By providing fair compensation to the class members as employees and substantial monetary relief, a settlement not only vindicates the rights of class members as employees, but may have a deterrent effect upon the defendant employer and other employers, an objective of PAGA."). *Moniz* provided explicit confirmation that this was an appropriate yardstick by which to measure reasonableness of a PAGA settlement. *Moniz*, 72 Cal. App. 5th at 77. *Moniz*, in agreeing with federal courts that have considered how to evaluate a PAGA settlement, concluded that the class action factors are appropriately considered, along with a consideration of whether the settlement furthers "PAGA's purposes to remediate present labor law violations, deter future ones, and to maximize enforcement of state labor laws."

As to the first set of elements (the class-type analysis), it is embodied in Plaintiff's discussion of the adequacy of the settlement generally. Here, the expense, complexity and likely duration of future litigation was to some extent an unknown. However, what is certain is that to adequately establish the violations that would support a substantial penalty, tremendous time and expense would be invested.

The second element (the PAGA purposes element) is also satisfied here. As held by *Moniz*, PAGA's purposes include (1) remediation of present labor law violations, (2) deterrence of future violations, and (3) maximization of enforcement of state labor laws. Here the allocation of a major portion of settlement funds to class members still advances the goal of labor law violation remediation. The allocation of a major portion of settlement funds to class members also deters future violations. This is a $195,000.00 settlement, not a trivial sum for just 33 individuals. Deterrence is fulfilled. Finally, allocation of a major portion of settlement funds to class members still advances the goal of enforcement of state labor law. This settlement is, by definition, a response to alleged violations of labor laws, balanced against risks.

In addition, there is no evidence that a court or a commissioner had informed Defendants that their conduct violated the Labor Code. *Amaral v. Cintas Corp*., 163 Cal. App. 4th 1157, 1209 (2008); *Willis v. Xerox Bus. Servs., LLC,* 2013 WL 6053831, *7-8 (E.D. Cal. 2013). And in *Cotter*, the court found a significant reduction of the PAGA claim would be appropriate because "[t]his does not appear to be a case where a company has deliberately sought to evade the law." *Cotter*, 176 F. Supp. 3d at 941.

Finally, the PAGA allocation is fair. The LWDA is receiving $15,000. The Class is receiving, net, an estimated $81,862.06 for the releases of eight other claims (excluding the $5,000 as the aggrieved employees' share of the PAGA Allocation). While the proportion is tipped in favor of the employees, the allocation is not unfair because it satisfies California's wage and hour policies.

VII. CONCLUSION

For all the foregoing reasons, because the Class meets the requirements for certification, because the Settlement bears all requisite indicia of fairness, reasonableness, and adequacy, and because the proposed notice procedure and forms comport with Rule 3.766 and due process, this Court should grant this Motion for Final Approval.

Respectfully submitted,

Dated: October 23, 2024

MOON LAW GROUP, PC

By: ______________________

Kane Moon
H. Scott Leviant
Mariam Ghazaryan

Attorneys for Plaintiff

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the State of California, County of Los Angeles. I am over the age of 18 and not a party to the within suit; my business address is 725 South Figueroa Street, 31st Floor, Los Angeles, CA 90017.

On the date indicated below, I served the document described as: **PLAINTIFF'S NOTICE OF MOTION AND MOTION FOR FINAL APPROVAL OF CLASS AND REPRESENTATIVE ACTION SETTLEMENT; MEMORANDUM OF POINTS AND AUTHORITIES** on the interested parties in this action by sending [ ] the original [or] [✓] a true copy thereof [✓] to interested parties as follows [or] [ ] as stated on the attached service list:

Joshua D. Carlon
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F: 626-583-8610

Counsel for Defendant

[ ] **BY MAIL (ENCLOSED IN A SEALED ENVELOPE):** I deposited the envelope(s) for mailing in the ordinary course of business at Los Angeles, California. I am "readily familiar" with this firm's practice of collection and processing correspondence for mailing. Under that practice, sealed envelopes are deposited with the U.S. Postal Service that same day in the ordinary course of business with postage thereon fully prepaid at Los Angeles, California.

[✓] **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 e-mail address or e-mail of record in this action.

[ ] **BY PERSONAL SERVICE:** I delivered the document, enclosed in a sealed envelope, by hand to the offices of the addressee(s) named herein.

[ ] **BY OVERNIGHT DELIVERY:** I am "readily familiar" with this firm's practice of collection and processing correspondence for overnight delivery. Under that practice, overnight packages are enclosed in a sealed envelope with a packing slip attached thereto fully prepaid. The packages are picked up by the carrier at our offices or delivered by our office to a designated collection site.

I declare under penalty of perjury under the laws of the State of California and the United States that the foregoing is true and correct. Executed this **October 23, 2024** at Los Angeles, California.

H. Scott Leviant
Type or Print Name

H. S. Leviant
Signature