JAMES HAWKINS APLC
James R. Hawkins (#192925)
Gregory Mauro (#222239)
Michael Calvo (#314986)
Lauren Falk (#316893)
Ava Issary (#342252)
9880 Research Drive, Suite 200
Irvine, CA 92618
Tel.: (949) 387-7200
Fax: (949) 387-6676
Email: James@jameshawkinsaplc.com
Email: Greg@jameshawkinsaplc.com
Email: Michael@jameshawkinsaplc.com
Email: Lauren@jameshawkinsaplc.com
Email: Ava@jameshawkinsaplc.com

Attorneys for Plaintiff PAUL F. MAISNIER, individually and on behalf of all others similarly situated.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SACRAMENTO

PAUL F. MAISNIER, individually and on behalf of all others similarly situated,

Plaintiff,

v.

NATIONAL VISION, INC. dba AMERICA'S BEST CONTACTS AND EYEGLASSES; and DOES 1-50, inclusive,

Defendant

Case No. 24CV018644
Judge: Hon. Jill H. Talley
Dept: 23

NOTICE OF MOTION AND MOTION FOR PRELIMINARY APPROVAL OF PAGA CLASS/COLLECTIVE ACTION SETTLEMENT; MEMORANDUM OF POINTS AND AUTHORITIES

[Declaration of James Hawkins In Support of Motion for Preliminary Approval of PAGA and Class Action Settlement; Declaration of Plaintiff Paul F. Maisnier; [Proposed] Order filed concurrently herewith]

Hearing: March 14, 2025
Time: 9:00 AM
Dept: 23

Reservation Number: #A-18644-001

TO THE HONORABLE COURT, ALL PARTIES, AND THEIR ATTORNEYS OF RECORD: PLEASE TAKE NOTICE that on March 14, 2025 at 9:00 AM., or as soon thereafter as counsel may be heard, in Department 23 of the above-captioned court, the Honorable Jill H. Talley presiding, Plaintiff PAUL F. MAISNIER will, and hereby does, move this Court to:

1. Preliminarily approve the settlement set forth in the Stipulation Of Class, Collective, And Representative Action Settlement, ("Settlement Agreement"), attached as Exhibit A to the Declaration of James Hawkins;
2. Conditionally certify the proposed Settlement Classes;
3. Appoint PAUL F. MAISNIER as the representative for the Settlement Classes;
4. Appoint James Hawkins, APLC as Class Counsel;
5. Approve distribution of the proposed Notice Of California Class, Representative, And Collective Action Settlement; attached as Exhibit B to the James Hawkins Declaration.
6. Appoint ILYM Group, Inc. as the Settlement Administrator; and
7. Set a hearing date for final approval of the settlement.

This Motion is based upon: (1) this Notice of Motion and Motion; (2) the Memorandum of Points and Authorities in support of Motion for Preliminary Approval of Class Action and PAGA claims Settlement; (3) the Declaration of James Hawkins; (4) the Declaration of Plaintiff PAUL F. MAISNIER; (5) the Settlement Agreement; (6) the [Proposed] Order Granting Preliminary Approval of Class Action Settlement; (7) the records, pleadings, and papers filed in this action; and (8) upon such other documentary and oral evidence or argument as may be presented to the Court at or prior to the hearing of this Motion. As this Motion is unopposed, the Parties respectfully request relief from the page limit requirement set by California Rules of Court, Rule 3.1113(5).

Dated: February 13, 2025

Respectfully submitted,
JAMES HAWKINS, APLC

By: ______________________________
James R. Hawkins
Gregory Mauro
Michael Calvo
Lauren Falk

TABLE OF CONTENTS

TABLE OF AUTHORITIES

State Cases

Federal Cases

STATES RULES AND STATUTES

Secondary Authorities

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

PAUL F. MAISNIER is the named plaintiff ("Plaintiff") in this action brought against Defendant NATIONAL VISION, INC. dba AMERICA'S BEST CONTACTS AND EYEGLASSES ("Defendant") (collectively with Plaintiff, the "Parties") for wage and hour violations. Following a thorough investigation and evaluation of their respective claims and defenses, the Parties participated in a mediation session with Brandon McKelvey, an experienced mediator of wage and hour actions. With Brandon McKelvey's guidance, the Parties were able to negotiate a gross settlement of the Action for $4,450,000.00 after a full day of mediation and mediator proposal.

Plaintiff accordingly seeks preliminary approval of the class/collective action and PAGA settlement, as memorialized in the Settlement Agreement (hereinafter "Settlement Agreement"). If approved, the Settlement would provide considerable monetary relief for approximately 3,962 class members. The principal terms of the Settlement provide for the following:

(1) Conditional certification of Settlement Classes. It is estimated there are approximately 3,962 total class members and approximately 3,784 Collective Members.

(2) A Gross Fund Value of $4,450,000.00. (Settlement Agreement ¶7(t)).

(3) The Class Period is May 1, 2020 through June 17, 2024. The FLSA Period September 20, 2020, through the June 17, 2024.

An objective evaluation of the Settlement Agreement confirms that the relief negotiated on the Settlement Class's behalf is fair, reasonable, and valuable. The Settlement Agreement was negotiated by the Parties at arm's length with helpful guidance from an experienced mediator, Brandon McKelvey, and the Settlement confers substantial benefits to Class Members. The Net Settlement Fund is estimated to be approximately $2,582,000.00. (Settlement Agreement ¶7(y)). This relief—averages **approximately $651** per Class Member after fees and costs—and is particularly impressive when viewed against the difficulties encountered by plaintiffs pursuing wage and hour cases. Moreover, by settling now rather than proceeding to trial, Class Members will not have to wait (possibly years) for relief, nor will they have to bear the risk of class certification being denied or of Defendant prevailing at trial, or of Plaintiff prevailing at trial but losing on appeal. (James Hawkins Decl. "Hawkins Decl." ¶¶ 15-36).

As discussed below, the proposed Settlement satisfies all criteria for preliminary settlement approval under California law and falls within the range of reasonableness. Accordingly, Plaintiff respectfully requests that this Court grant preliminary approval of the Settlement Agreement.

II. FACTS AND PROCEDURE

A. Brief Overview of the Litigation

On September 20, 2022, Plaintiff filed a class action complaint, *Paul Maisnier v. National Vision, Inc. d/b/a America's Best Contacts and Eyeglasses*, in the Superior Court for the State of California, County of Alameda, Case No. 22CV018224, which Defendant removed to the United States District Court, Northern District of California, Case No. 3:22-cv-07859 ("Federal Court Action"). Plaintiff's class action complaint alleges causes of action for (i) failure to pay hourly and overtime wages; (ii) failure to provide meal periods or compensation in lieu thereof; (iii) failure to provide rest breaks or compensation in life lieu thereof; (iv) failure to timely pay wages; (v) failure to provide accurate itemized wage statements; (vi) failure to reimburse reasonable business expenses; (vii) unlawful wage deductions; and (viii) violation of California's Unfair Competition Law. (Hawkins Decl. ¶¶ 3-6).

On November 29, 2022, Plaintiff filed a complaint for civil penalties under the California Private Attorneys General Act of 2004, Labor Code §§ 2698 et seq., entitled *Paul Maisnier v. National Vision, Inc. d/b/a America's Best Contacts and Eyeglasses*, in the Superior Court for the State of California, County of Alameda, Case No. 22CV022738 ("PAGA Action"). Plaintiff's complaint in the PAGA Action seeks civil penalties based on alleged violations of the California Labor Code, including Labor Code §§ 201-203, 204, 210, 226, 226.3, 226.7, 510, 512, 558, 1174, 1174.5, 1175, 1182.12, 1194, 1194.2, 1197, 1198, 2802, and the California Wage Orders. The PAGA Action asserts the same alleged Labor Code violations Plaintiff alleged in his September 20, 2022, notice of intent to sue to the Labor and Workforce Development Agency. *Id.*

The Parties agreed, for purposes of settlement, to Plaintiff filing a consolidated Complaint in Sacramento County Superior Court, including the claims alleged in the Federal Court Action, the PAGA

Action, and a claim under the FLSA (the "Action"). Defendant denies all material allegations set forth in the Action, and has asserted numerous affirmative defenses. Notwithstanding, in the interest of avoiding further litigation, Defendant desires to fully and finally settle the Released Claims. (Settlement Agreement ¶3).

B. The Parties Settled After Mediation and Expert Analysis

On March 11, 2024, the Parties participated in mediation with Brandon McKelvey (the "Mediator"), a respected mediator of complex wage and hour actions, and with the assistance of the Mediator, reached the settlement that is memorialized herein. At all times, the settlement discussions were conducted at arm's-length. Based on the documents produced, as well as Class Counsel's own independent investigation and evaluation, Class Counsel believes that the settlement with Defendant for the consideration and on the terms set forth in this Agreement is fair, reasonable, and adequate and is in the best interest of the Class Members in light of all known facts and circumstances, including the risk of significant delay and uncertainty associated with litigation and various defenses asserted by Defendant. (Settlement Agreement ¶ 5).

In short, Defendant provided discovery sufficient to enable the Plaintiff and Class Counsel to rigorously evaluate the strengths and risks of the case and perform an analysis of the potential damages arising from the claims made in this case. As a result of settlement efforts, the Parties agreed to settle this matter for the Gross Fund Value of $4,450,000.00 for approximately 3,962 class members and the terms of which are fully memorialized in the Settlement Agreement (Hawkins Decl. ¶ 6, Ex. A.)

III. SUMMARY OF SETTLEMENT TERMS

A. The Proposed Settlement Fully Resolves Plaintiff's Claims

1. <u>Composition of the Settlement Classes</u>

"Class Member(s)" means all non-exempt employees who have been employed by Defendant in California at any time during the Class Period (the time period from May 1, 2020 through June 17, 2024). Defendant represents there are approximately 3,962 Class Members and 3,784 Collective Members. (Settlement Agreement ¶7(f) and (g)). Collective Members means all non-exempt employees who have been employed by Defendant anywhere in California during the FLSA Period. "FLSA Settlement Fund" means the amount of the Settlement allocated for payment to Settlement Class Members for settlement and release of claims under the FLSA. The FLSA Settlement Fund shall not exceed Fifty Thousand Dollars ($50,000). The FLSA Settlement Fund shall be paid out of the Gross Fund Value. (Settlement Agreement ¶7 (s)).[1] "PAGA Group Members" or "PAGA Group" means all non-exempt California employees of Defendant at any time during the PAGA Period (September 25, 2021, June 17, 2024). Defendant represents there are approximately 3,115 PAGA Group Members. (Settlement Agreement ¶7(cc-dd)). During the Class Period, Class Members worked approximately 226,937 workweeks.

2. Settlement Consideration

Plaintiff and Defendant have agreed to settle the underlying claims in exchange for the Gross Fund Value of $4,450,000.00, exclusive of employer-side taxes. The Gross Fund Value includes: (1) attorneys' fees in the amount of $1,483,000.00 ("Attorneys' Fees and Costs") and reimbursement of reasonable litigation costs and expenses in the amount of up to $30,000.00 to Class Counsel; (2) Class Representative's incentive award to Plaintiff in the amount of up to $25,000.00 ("Enhancement Payment"); (3) fees and expenses of administration of the Settlement to the Settlement Administrator in an amount not to exceed $30,000.00 ("Settlement Administration Costs"); (4) $250,000.00 ("PAGA Fund, LWDA Payment, and/or PAGA Settlement Fund") with twenty-five percent (25%) share of the PAGA Penalties to be a part of the Net Settlement Sum that will be distributed to Class Members in the PAGA Group in the amount of $62,500.00; (5) the seventy-five percent (75%) share of PAGA Penalties in the amount of $187,500.00 to the California Labor and Workforce Development Agency ("LWDA"); (6) The FLSA Settlement Fund shall not exceed Fifty Thousand Dollars ($50,000) ("FLSA Settlement Fund") and the remainder to of the Net Settlement Fund to the Class Members. (Settlement Agreement ¶7(y)). The Class Settlement Fund and PAGA Fund are non-reversionary, and any unclaimed Class Settlement and PAGA Fund settlement checks shall escheat to the State of California's Controller, to be held in the name of each expired check payee, pursuant to applicable unclaimed property laws. (Settlement Agreement, ¶ 21.) A portion of the FLSA Settlement Fund—which amounts to roughly one percent of the Gross Fund Value ($50,000 / $4,450,000)—may revert to Defendant, if FLSA Collective Members do not

[1] "FLSA Period" means the time period from September 20, 2020, through the June 17, 2024. Settlement Agreement ¶7(r).

opt in to the FLSA portion of the Settlement by cashing their FLSA settlement check.[2]

3. Formula for Calculating Payments from the Net Settlement Amount

The "Net Settlement Amount" means the net amount available for payment of claims to Class Members after deducting Attorneys' Fees and Costs, Settlement Administration Costs, Enhancement Payment, 75% of the $250,000.00 PAGA Penalty Payment that is payable to the LWDA. (Settlement Agreement ¶3.21). The Net Settlement Fund estimated at $2,582,000.00. (Hawkins Decl. ¶ 15.)

Given that there are approximately 3,962 **Class Members**, each can expect to receive on average approximately $**651**. **FLSA Collective Members** can expect to receive on average **$13.21**. **PAGA Members** will receive approximately **$20.06** per PAGA Member. (Hawkins Decl. ¶ 27.)

This average net recovery is in line with many other wage and hour class action settlements approved by California state and federal courts. *See*, *e.g.*, *Sandoval v. Nissho of Cal., Inc.*, Case No. 37-2009-00091861 (San Diego County Super. Ct.) (average net recovery of approximately $145); *Fukuchi v. Pizza Hut*, Case No. BC302589 (L.A. County Super. Ct.) (average net recovery of approximately $120); *Contreras v. United Food Group, LLC*, Case No. BC389253 (L.A. County Super. Ct.) (average net recovery of approximately $120); *Ressler v. Federated Department Stores, Inc.*, Case No. BC335018 (L.A. County Super. Ct.) (average net recovery of approximately $90); *Doty v. Costco Wholesale Corp.*, Case No. CV05-3241 FMC-JWJx (C.D. Cal.) (average net recovery of approximately $65); *Sorenson v. PetSmart, Inc.*, Case No. 2:06-CV-02674-JAM-DAD (E.D. Cal.) (average net recovery of approximately $60); *Lim v. Victoria's Secret Stores, Inc.*, Case No. 04CC00213 (Orange County Super. Ct.) (average net recovery of approximately $35); *Gomez v. Amadeus Salon, Inc.*, Case No. BC392297 (L.A. Super. Ct.) (average net recovery of approximately $20); *Jones v. Bath & Body Works, Inc.*, No. 2:13-cv-05206-FMO-AJW (C.D. Cal.) (average net recovery of approximately $50); and *Palencia v. 99 Cents Only Stores*, No.

[2] For purposes of the FLSA portion of the Settlement, checks shall be issued to FLSA Collective Members advising them cashing their FLSA settlement, which shall be separate from the Class and PAGA settlement checks, shall constitute their consent to join the FLSA collective and release their FLSA claims. FLSA Collective Members who do not cash their FLSA settlement checks shall not be bound by the FLSA portion of the Settlement. Given the small value of the FLSA Settlement Fund (each of the 3,784 FLSA Collective Member will receive, on average, $13.21), reallocating uncashed FLSA Settlement Funds is not reasonably practicable because the cost of postage and remailing the remaining FLSA Settlement Funds may well equal or even exceed the value of the remaining FLSA Settlement Funds to be redistributed. Therefore, any unused FLSA Settlement Funds shall revert to NVI.

34-2010-00079619 (Sacramento County Super. Ct.) (average net recovery of approximately $80).

4. Release by the Settlement Class and PAGA Group

The release is tailored to the claims that were or could have been alleged in the complaints in exchange for the Gross Fund Value. Plaintiff and Participating Class Members will release the Released Claims during the Class Period as follows: the claims alleged and those claims that could have reasonably been alleged based on the facts pleaded, including all claims for any violation of California Labor Code sections 201-203, 204, 210, 218.5, 218.6, 226, 226.3, 226.7, 510, 512, 558, 1174, 1174.5, 1182.12, 1194, 1194.2, 1197, 1198, 2802, and Business and Professions Code ¶¶17200, et seq., as well as all claims arising under the listed Labor Code statutes based on the primary rights of those statutes, irrespective of the theory of recovery alleged. It is the intention of the Parties that all of the claims in the Federal Court and PAGA Actions, as well as those asserted in the consolidated Complaint, be pled and released as part of the Settlement of the Action. (Settlement Agreement ¶7(kk)).

Upon the funding of the Gross Fund Value by Defendant following the Effective Date (i.e., 14 days following the Effective Date), the PAGA Group shall release any and all Private Attorneys General Act (PAGA) claims under Labor Code section 2698 et. seq. that were or could have been alleged in the LWDA Letter, PAGA Action, or Consolidated Complaint, including but not limited to: California Labor Code sections 201-203, 204, 210, 226, 226.3, 226.7, 510, 512, 558, 1174, 1174.5, 1175, 1182.12, 1194, 1194.2, 1197, 1198, 2802, and the applicable IWC Wage Order(s), as well as all claims arising under the listed Labor Code statutes based on the primary rights of those statutes, irrespective of the theory of recovery alleged. (Settlement Agreement ¶7(ll)).

IV. ARGUMENT

A. The Court Should Preliminarily Approve the Proposed Settlement

1. Courts Review Class Action Settlements to Ensure that the Terms Are Fair, Adequate, and Reasonable

California Rule of Court ("Rule"), Rule 3.769 requires litigants to obtain court approval of class action settlements. Approval occurs in two steps: (1) an early "preliminary" review by the trial court; and (2) a subsequent "final" review after notice of the settlement has been distributed to class members for their comments and objections. Cal. R. Ct. 3.769(c)-(g); *Cellphone Termination Fee Cases*, 180 Cal. App. 4th 1230, 1118 (2010) (the court first "preliminarily approves the settlement" and later "conducts a final approval hearing to inquire into the fairness of the proposed settlement"). The motion for preliminary approval must be accompanied by (1) the settlement agreement, (2) proposed notice to the class, and (3) the proposed order. *Id.* at 3.769(c). The motion must also identify any agreement concerning the payment of attorneys' fees. *Id.* at 3.769(b).

If the trial court grants preliminary approval of a settlement, Rule 3.769(f) requires the court to (1) schedule a final approval hearing and (2) approve the method by which the parties are to provide notice to the class of the hearing and "an explanation of the proposed settlement." The court must also approve a procedure for class members to file objections to the settlement. *Id.* at 3.769(f). At the final approval hearing, the court must conduct an inquiry into the fairness of the proposed settlement. *Id.* at 3.769(g).

Although Rule 3.769 does not provide detail as to the scope of review of the proposed settlement, preliminary approval is warranted if the settlement falls within a "reasonable range." *See North County Contractor's Assn., Inc. v. Touchstone Ins. Services*, 27 Cal. App. 4th 1085, 1089-90 (1994); Conte & Newberg, *Newberg on Class Actions*, §§ 11.26 (4th ed. 2002) ("Newberg").

Reasonableness and fairness are presumed where, as here: (1) the settlement is reached through "arms-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" (collectively, "*Dunk* Factors"). *Dunk v. Ford Motor Co.*, 48 Cal. App. 4th 1794, 1802 (1996).[3]

[3] The presumption of fairness is consistent with California's public policy goal of favoring settlements. *Stambaugh v. Super. Ct.*, 62 Cal. App. 3d 231, 236 (1976) ("the law wisely favors settlements"); *Cellphone Termination Fee Cases*, 180 Cal. App. 4th at 1118 ("public policy generally favors the compromise of complex class action litigation"); *7-Eleven Owners for Fair Franchising v. Southland Corp.*, 85 Cal. App. 4th 1135, 1151 (2000) ("voluntary conciliation and settlement are the preferred means of dispute resolution . . . [t]his is especially true in complex class action litigation"); *Skulnick v. Roberts Express, Inc.*, 2 Cal. App. 4th 884, 891 (1992) ("public policy strongly discourages litigation and encourages settlement [because settlements] can produce peace and goodwill in the community while reducing the expense and persistency of litigation"). Additionally, in reviewing the fairness of a class action settlement, due regard should be given to what is "otherwise a private consensual agreement between the parties." *Cellphone Termination Fee Cases*, 180 Cal. App. 4th at 1117. The inquiry "must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned." *Id.* at 1118.

2. Plaintiff's Counsel Conducted a Thorough Investigation of the Factual and Legal Issues and Were Thus Able to Objectively Assess the Settlement's Reasonableness

Plaintiff's Counsel conducted a thorough investigation into the factual and legal issues implicated by Plaintiff's claims and were able to objectively assess the settlement's reasonableness. For example, prior to filing the action, Plaintiff contacted Plaintiff's Counsel to discuss the factual bases for pursuing their respective actions against Defendant for Labor Code violations. Plaintiff was intimately familiar with Defendant's labor policies and practices, and over the course of multiple interviews, knowledgeably summarized those policies and practices to Plaintiffs' Counsel. During those conversations, Plaintiff explained how the policies and practices were instituted and provided valuable insight into how they gave rise to the alleged Labor Code violations. Based on these interviews with Plaintiff, Plaintiff's Counsel determined that there were legally sufficient grounds for pursuing the Actions against Defendant and in preparation for drafting the complaint, Plaintiff's Counsel conducted their own independent preliminary investigations into the factual bases for Plaintiff's claims, which entailed, *inter alia*, a careful examination of Plaintiff's personnel files and associated records. (Hawkins Decl. ¶¶ 7-12.)

In summary, Plaintiff's Counsel performed a thorough investigation into the claims at issue, which included: (1) determining Plaintiff's suitability as private attorneys general and class representative through interviews, background investigations, and analyses of their employment files and related records; (2) evaluating all of Plaintiff's potential representative claims; (3) researching similar wage and hour class actions as to the claims brought, the nature of the positions, and the type of employer; (4) analyzing employees' time and wage records; (5) reviewing Defendant's employment policies and practices; (6) researching settlements in similar cases; (7) evaluating Plaintiff's claims and estimating Defendant's liability for purposes of settlement; (8) drafting the mediation brief; and (9) participating in the mediation. (*Id.*)

By engaging in such a thorough investigation and evaluation of Plaintiff's claims, Plaintiff's Counsel can opine that the Settlement, for the consideration and on the terms set forth in the Settlement Agreement, is fair, reasonable, an adequate, and is in the best interests of Class Members in light of all known facts and circumstances, including the risk of significant delay and uncertainty associated with litigation, and various defenses asserted by Defendant. (Hawkins Decl. ¶¶ 14-37.)

3. The Settlement Was Reached Through Arm's-Length Bargaining in which All Parties Were Represented by Experienced Counsel

"[W]hat transpires in settlement negotiations is highly relevant to the assessment of a proposed settlement's fairness." *State of Cal. v. Levi Strauss & Co.*, 41 Cal. 3d 460, 482 (1986). Courts presume the absence of fraud or collusion in the negotiation of a settlement, unless evidence to the contrary is offered; thus, there is a presumption that settlement negotiations are conducted in good faith. Newberg, ¶ 11.51.

As explained above, the Parties settled this matter with the assistance of an experienced wage and hour class and PAGA action mediator. The Mediator helped to manage the Parties' expectations and provided a useful, neutral analysis of the issues and risks to both sides. *See In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d 935, 948 (9th Cir. 2011) (the presence of a neutral mediator is a factor weighing in favor of finding of no collusion); *In re Apple Computer, Inc. Derivative Litig.*, No. C 06-4128 JF (HRL), 2008 U.S. Dist. LEXIS 108195 (N.D. Cal. Nov. 5, 2008) (mediator's participation weighs considerably against any inference of a collusive settlement); *D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001) (a "mediator's involvement in pre-certification settlement negotiations helps to ensure that the proceedings were free of collusion and undue pressure."); *Villegas v. J.P. Morgan Chase & Co.*, No. 09–00261, 2012 WL 5878390, at *6 (N.D. Cal. Nov. 21, 2012) (participation in mediation "tends to support the conclusion that the settlement process was not collusive"); *Ogbuehi v. Comcast of California/Colorado/Fla./Oregon, Inc.*, 303 F.R.D. 337, 350 (E.D. Cal. 2014) (participation in mediation "tends to support the conclusion that the settlement process was not collusive"). At all times, the Parties' negotiations were adversarial and non-collusive. (Hawkins Decl. ¶ 6.)

The Parties were represented by experienced class action counsel throughout the negotiations resulting in this Settlement. Plaintiff is represented by James Hawkins, APLC. Plaintiff's Counsel employ seasoned class action attorneys who regularly litigate wage and hour claims through certification and on the merits, and have considerable experience settling wage and hour class actions. (Hawkins Decl. ¶ 33.)

Defendant is represented by Seyfarth Shaw LLP, a respected defense firm.

4. <u>The Consideration Provided for the Class Claims Is Fair and Reasonable in Light of the Amount in Controversy Discounted by the Risks of Continued Litigation</u>

In seeking approval, a settling party must provide sufficient information to "enable the court to make an independent assessment of the adequacy of the settlement terms." *Kullar v. Foot Locker Retail, Inc*., 168 Cal. App. 4th 116, 131-32 (2008). However, "[i]t is well-settled law that a cash settlement amounting to only a fraction of the potential recovery will not per se render the settlement inadequate or unfair." *See Officers for Justice v. Civil Serv. Comm'n of City & Cty. of San Francisco*, 688 F.2d 615, 628 (9th Cir. 1982). "The proposed settlement is not to be judged against a hypothetical or speculative measure of what might have been achieved by the negotiators." *Id.* at 625. "Estimates of a fair settlement figure are tempered by factors such as the risk of losing at trial, the expense of litigating the case, and the expected delay in recovery (often measured in years)." *In re Toys R Us-Delaware, Inc.-- Fair & Accurate Credit Transactions Act (FACTA) Litig.*, 295 F.R.D. 438, 453 (C.D. Cal. 2014). In other words, in valuing the claims within a realistic *range* of outcomes, the settling plaintiff should discount the value of the settled claims for risks such as changes in the law, the probability of success, and other factors.[4]

Settling parties are not, however, required to partake in a hypothetical accounting exercise: "Kullar does not … require any such explicit statement of [maximum] value; it requires a record which allows 'an understanding of the amount that is in controversy and the realistic range of outcomes of the litigation.'"' *Munoz v. BCI Coca-Cola Bottling Co.*, 186 Cal. App. 4th 399, 409-10 (2010) (quoting *Kullar*, 168 Cal. App. 4th at 120 (emphasis added)). Overall, "the most important factor" in determining "whether a

---

[4] Federal district courts also recognize that there is an inherent "range of reasonableness" in determining whether to approve a settlement "which recognizes the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion." *In re World Trade Ctr. Lower Manhattan Disaster Site Litig.*, 66 F. Supp. 3d 477, 482 (S.D.N.Y. 2015); *see also Nat'l Rural Telecomm. Coop. v. Directv, Inc.*, 221 F.R.D. 523, 527 (C.D. Cal. 2004) ("well-settled law that a proposed settlement may be acceptable even though it amounts to only a fraction of the potential recovery"); *In re Global Crossing Sec. and ERISA Litig.*, 225 F.R.D. 436, 461 (S.D.N.Y. 2004) ("settlement amount's ratio to the maximum potential recovery need not be the sole, or even dominant, consideration when assessing settlement's fairness"); *In re IKON Office Solutions, Inc. Sec. Litig.*, 194 F.R.D. 166, 184 (E.D. Pa. 2000) ("the fact that a proposed settlement constitutes a relatively small percentage of the most optimistic estimate does not, in itself, weigh against the settlement; rather the percentage should be considered in light of strength of the claims"); *Officers for Just. v. Civ. Serv. Comm'n of City & Cty. of San Francisco*, 688 F.2d 615, 628 (9th Cir. 1982) (it is "the complete package, taken as a whole rather than the individual component parts, that must be examined for overall fairness").

settlement is fair and reasonable" is the "strength of the case for plaintiffs on the merits, balanced against the amount offered in the settlement." *Id*. at 409 n.6 (quoting *Kullar*, 168 Cal. App. 4th at 130). As explained in detail below, the Gross Fund Value is within the range of reasonableness in light of the nature and magnitude of the claims being settled and the various potential impediments to recovery.

As explained in detail below and in the Hawkins Declaration, the Gross Fund Value is within the range of reasonableness in light of the nature and magnitude of the claims being settled and the various potential impediments to recovery. (Hawkins Decl. ¶¶ 14-37.)

Accounting for the risks of continued litigation and impediments to discovery, Plaintiff determined that a settlement amounting to $4,450,000.00 was fair and reasonable, and accounts for an approximate 23%-47% of total possible recovery and courts have routinely approved settlements that provided a similar discounted range of the maximum potential recovery. (Hawkins Decl. ¶¶ 23-26). *See, e.g., In re Warfarin Sodium Antitrust Litig.,* 212 F.R.D. 231, 256-58 (D. Del. 2002) (recognizing that a reasonable settlement amount can be 1.6% to 14% of the total estimated damages); *In Re Armored Car Antitrust Litig.,* 472 F. Supp. 1357, 1373 (N.D. Ga. 1979) (settlements with a value of 1% to 8% of the estimated total damages were approved); *In Re Four Seasons Secs. Laws Litig.,* 58 F.R.D. 19, 37 (W.D. Okla.1972) (approving 8% of damages); *Balderas v. Massage Envy Franchising, LLP,* 2014 WL 3610945, at *5 (N.D. Cal. July 21, 2014) (finding that settlement which amounted to 8% of maximum recovery "[fell] within the range of possible initial approval based on the strength of plaintiff's case and the risk and expense of continued litigation."); *In re Omnivision Techs., Inc.,* 559 F. Supp. 2d 1036, 1042 (N.D. Cal. 2008) (approving settlement of 6% to 8% of estimated damages).[5] (Id.)

[5] *See also In re Uber FCRA Litig*., No. 14-cv-05200-EMC, 2017 U.S. Dist. LEXIS 101552, at *23- 24 (N.D. Cal. June 29, 2017) (granting preliminary approval to class action settlement where gross settlement fund, prior to deducting attorneys' fees and services awards, was valued at 7.5% or less of total possible verdict); *Viceral v. Mistras Grp., Inc*., No. 15-cv-02198-EMC, 2016 U.S. Dist. LEXIS 140759, at *21 (N.D. Cal. Oct. 11, 2016) (granting preliminary approval to class action settlement representing "8.1% of the full verdict value" with net settlement amount representing approximately 5.3% of full verdict value); *Stovall-Gusman v. W.W. Granger, Inc.*, No. 13-cv-02540-HSG, 2015 WL 3776765, at *4 (N.D. Cal. June 17, 2015) (granting final approval to settlement with net recovery to Plaintiffs valued at 7.3% of potential maximum recovery); *Cruz v. Sky Chefs, Inc*., No. 12-cv-02705-DMR, 2014 WL 7247065, at *5 (N.D. Cal. Dec. 19, 2014) (granting final approval where Gross Fund Value represented 8.6% of the maximum potential recovery from the class claims and estimated amount distributable to class after accounting for attorneys' fees and other deductions represented approximately 6.1% of maximum potential recovery); *In re LDK Solar Sec. Litig.*, No. 07-cv-05182-WHA, 2010 WL 3001384, at *2 (N.D. Cal. July 29, 2010) (granting final approving where "[t]he proposed

B. The Consideration Provided for the PAGA Claim Is Fair and Reasonable In Light of the Amount in Controversy Discounted by the Risks of Continued Litigation

Pursuant to the Settlement Agreement, $250,000.00 from the Gross Fund Value shall be allocated to the resolution of the PAGA claim, of which 75% ($187,500.00) will be paid directly to the LWDA, and the remaining 25% ($62,500.00) will be paid to PAGA Members who worked during the PAGA Period of September 25, 2021 through June 17, 2024 (Settlement Agreement ¶7(dd)).

However, a number of courts have found that the "subsequent" penalty under PAGA applies only after a court or the Labor Commissioner determines that the employer has violated the Labor Code. *See Vieyara-Flores v. Sika Corp.*, No. EDCV19606JVSKKX, 2019 WL 2436998, at *5 (C.D. Cal. June 10, 2019) ("employers are not subject to heightened penalties . . . until a court or commissioner notifies the employer that it is in violation of the Labor Code . . . [Plaintiff] has not offered evidence that the Labor Commission or a court has notified them of PAGA violations [thus] PAGA's heightened penalty of $200 for subsequent violations will not be calculated to determine the amount in controversy"); *Steenhuyse v. UBS Fin. Servs., Inc.*, 317 F. Supp. 3d 1062, 1067 (N.D. Cal. 2018) (same); *Chen v. Morgan Stanley Smith Barney, LLC*, No. 8:14-CV-01077 ODW (FFMx), 2014 WL 4961182 (C.D. Cal., October 2, 2014) ("Under the Labor Code, if an employer does not have notice that they are committing a violation, they are not subject to the heightened penalties."); *Trang v. Turbine Engine Components Technologies Corp.*, No. CV 12–07658 DDP (RZx), 2012 WL 6618854 (C.D. Cal. Dec. 19, 2012) ("courts have held that employers are not subject to heightened penalties for subsequent violations unless and until a court or commissioner notifies the employer that it is in violation of the Labor Code"), citing *Amaral v. Cintas Corp. No. 2*, 163 Cal. App. 4th 1157 (2008).

It should be noted that PAGA gives the Court wide latitude to reduce the amount of civil penalties "based on the facts and circumstances of a particular case" when "to do otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory." Cal. Lab. Code ¶ 2699(h). In reducing PAGA penalties, courts have considered issues including whether the employees suffered actual injury from the violations, whether the Defendant was aware of the violations, and the employer's willingness to fix the

---

settlement amount is [. . .] only about five percent of the estimated damages before fee and costs—even before any reduction thereof for attorney's fees and costs.").

violation. *Carrington v. Starbucks Corp.*, 30 Cal. App. 5th 504, 528 (2018) (awarding PAGA penalties of only 0.2% of the maximum); *see also Cotter v. Lyft, Inc.*, 193 F. Supp. 3d 1030, 1037 (N.D. Cal. 2016); *Fleming v. Covidien Inc.*, No. ED CV 10-01487 RGK (OPX), 2011 WL 7563047, at *4 (C.D. Cal. Aug. 12, 2011).

For example, during the penalty phase of trial in *Carrington*, the plaintiff requested PAGA penalties in the amount of approximately $70 million. The trial court instead awarded only $150,000—**or 0.21% of the maximum**—and stated that this reduction was warranted because imposing the maximum penalty would be "unjust, arbitrary, and oppressive" based on Starbucks's "good faith attempts" to comply with meal period obligations and because the court found the violations were minimal. *Carrington*, 30 Cal. App. 5th at 517. The Court of Appeal affirmed the lower court's reduced award of a $150,000 penalty under PAGA. *Id.* at 529.

Likewise, in *Covidien*, the Court reduced the potential penalties by over 82%, awarding $500,000 instead of maximum penalties of $2.8 million. *Covidien*, 2011 WL 7563047 at *4; *see also Thurman v. Bayshore Transit Mgmt.*, 203 Cal. App. 4th 1112, 1135-36 (2012) (affirming 30% reduction under specified PAGA claim where the employer produced evidence that it took its obligations seriously); *Elder v. Schwan Food Co.*, No. B223911, 2011 WL 1797254, at *5-*7 (Cal. Ct. App. May 12, 2011) (reversing trial court decision denying any civil penalties where violations had been proven, remanding for the trial court to exercise discretion to reduce, but not wholly deny, civil penalties); *Li v. A Perfect Day Franchise, Inc.*, No. 5:10-CV-01189-LHK, 2012 WL 2236752, at *17 (N.D. Cal. June 15, 2012) (denying PAGA penalties for violation of California Labor Code section 226 as redundant with recovery on a class basis pursuant to California Labor Code section 226, directly); *Aguirre v. Genesis Logistics*, No. SACV 12-00687 JVS (ANx), 2013 WL 10936035 at *2-*3 (C.D. Cal. Dec. 30, 2013) (reducing penalty for past PAGA violations from $1.8 million to $500,000, after rejecting numerous other PAGA claims).

Plaintiff therefore determined an appropriate range of settlement for PAGA penalties as a percentage of the settlement range that was consistent with other hybrid class/PAGA settlements approved by California courts.[6] Where PAGA penalties are negotiated in good faith and "there is no indication that

[6] *Dearaujo v. Regis Corp.*, No. 2:14-cv-01408-KJM-AC, 2016 WL 3549473 at *3 (E.D. Cal. June 29, 2016) (preliminarily approving $1.95 million settlement containing $10,000 PAGA penalties with $7,500 paid to LWDA); *Garcia v. Gordon Trucking, Inc.*, No. 1:10–CV–0324 AWI

[the] amount was the result of self-interest at the expense of other Class Members," such amounts are generally considered reasonable. *Hopson v. Hanesbrands Inc.*, Case No. 08-00844, 2009 U.S. Dist. LEXIS 33900, at *24 (N.D. Cal. Apr. 3, 2009); *see*, *e.g.*, *Nordstrom Com. Cases*, 186 Cal. App. 4th 576, 579 (2010) ("[T]rial court did not abuse its discretion in approving a settlement which does not allocate any damages to the PAGA claims.").

C. The Court Should Preliminarily Approve the Enhancement Payment

Enhancement payments "are fairly typical in class action cases." *Cellphone Termination Fee Cases*, 186 Cal. App. 4th 1380, 1393 (2010) (affirming incentive awards of $10,000); *Rodriguez v. West Publishing Corp.*, 563 F.3d 948, 958 (9th Cir. 2009), citing 4 Newberg on Class Actions (4th ed. 2002) ¶ 11:38, and Eisenberg & Miller, *Incentive Awards to Class Action Plaintiffs: An Empirical Study*, 53 UCLA L. Rev. 1303 (2006). Enhancement payments "are intended to compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action, and, sometimes, to recognize their willingness to act as a private attorney general." *Rodriguez*, 563 F.3d at 958–59. "[T]he rationale for making enhancement or incentive awards to named plaintiffs is that they should be compensated for the expense or risk they have incurred in conferring a benefit on other members of the class." *Clark v. American Residential Services LLC*, 175 Cal. App. 4th 785, 806 (2009).

Approximately 3,962 current and former employees will share a $4,450,000.00 settlement fund due entirely to the effort and commitment of Plaintiff. Subject to Court approval, therefore, the Settlement

---

SKO, 2012 WL 5364575 at *7 (E.D. Cal. Oct. 31, 2012) (approving $3.7 million settlement containing $10,000 PAGA penalties with $7,500 paid to LWDA); *Chu v. Wells Fargo Invst., LLC*, No. C 05–4526 MHP, 2011 WL 672645 at *1 (N.D. Cal Feb. 16, 2011) (approving $6.9 million settlement containing $10,000 PAGA penalties with $7,500 paid to LWDA); *Guerrero v. R.R. Donnelley & Sons Co.*, Case No. RIC 10005196 (Riverside County Super. Ct. July 16, 2013; Judge Matthew C. Perantoni) (gross settlement fund of $1,100,000, of which $3,000 (or 0.3%) was allocated to the settlement of PAGA penalties); *Parra v. Aero Port Services, Inc.*, No. BC483451 (L.A. County Super. Ct. April 20, 2015; Judge Jane Johnson) (gross settlement fund of approximately $1,458,900, of which $5,000 (or 0.3%) was allocated to the settlement of PAGA penalties); *Thompson v. Smart & Final, Inc.*, No. BC497198 (L.A. County Super. Ct. Nov. 18, 2014; Judge William F. Highberger) (gross settlement fund of $3,095,000, of which approximately $13,333 (or 0.4%) was allocated to the settlement of PAGA penalties); *Chavez v. Vallarta Food Enterprises, Inc.*, No. BC490630 (L.A. County Super. Ct. Nov. 10, 2014; Judge William F. Highberger) (gross settlement fund of $1,545,900, of which $10,000 (or 0.6%) was allocated to the settlement of PAGA penalties); *Coleman v. Estes Express Lines, Inc.*, No. BC429042 (L.A. County Super. Ct. Oct. 3, 2013; Judge Kenneth R. Freeman) (gross settlement fund of $1,535,000, of which $1,000 (or 0.1%) was allocated to the settlement of PAGA penalties).

provides for Enhancement Payment of $25,000.00 to the Class Representative. The Enhancement Payment is fair and reasonable compensation for Plaintiff's effort in pursuing the action, assisting counsel with the litigation and settlement, regularly conferring with counsel on the status of their case and the strategies for prosecuting the claims, and reviewing the proposed settlement to ensure that its terms are fair and provide adequate relief for the Settlement Class. (Hawkins Decl. ¶ 27; *see also generally*, Maisnier Decl.)

D. The Court Should Preliminarily Approve the Negotiated Attorneys' Fees and Costs

The purpose of an attorneys' fee award in class action litigation is to reward counsel who took the risk of non-payment and invested in a case that achieved a substantial positive result for the class. California courts routinely award attorneys' fees equalling one-third or more of the potential value of the common fund. *See Laffitte v. Robert Half, Inc.*, 1 Cal. 5th 480 (2016) (affirming a fee award representing one-third of the common fund); *Chavez v. Netflix, Inc.*, 162 Cal. App. 4th 43, 66 n.11 (2008) ("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."). At final approval, Plaintiff will seek Court-approval of attorneys' fees of $1,483,000.00 (33.33% of the Gross Fund Value) and litigation costs and expenses not to exceed $30,000.00 which are currently approximately $15,197.74.

E. California Law Authorizes Provisional Certification for Settlement Purposes

1. <u>The California Standard for Class Certification</u>

Class actions are statutorily authorized "when the question is one of common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court." Cal. Civ. Proc. Code § 382; *Lee v. Dynamex, Inc.*, 166 Cal. App. 4th 1325, 1332 (2008). Class certification is appropriate when there is an "ascertainable class and a well-defined community of interest among class members." *Sav-On Drug Stores, Inc. v. Superior Court*, 34 Cal. 4th 319, 326 (2004). Class treatment is appropriate even if class members at some point may be required to make an individual showing as to eligibility for recovery. *Bufil v. Dollar Financial Group, Inc.*, 162 Cal. App. 4th 1193, 1207 (2008); *Sav-On*, 34 Cal. 4th at 333.

Conditional certification of the proposed Settlement Classes is particularly warranted here given the relatively relaxed standard for certification at the preliminary approval stage. *See Dunk v. Ford Motor*

Co., 48 Cal. App. 4th 1794 (1996) (courts can apply a "lesser standard of scrutiny" for class certification in settlement cases).[7] In *Dunk*, the California Court of Appeal specifically rejected the argument that the standard for certifying a class for purposes of settlement is identical to the standard for certifying the same class for purposes of litgiation:

> Geer argues the court must use the same standard under Federal Rules of Civil Procedure, rule 23 (28 U.S.C.) to determine the propriety of both settlement and litigation class certifications . . . That rule is contrary to the Ninth Circuit rule, stated in *Officers for Justice v. Civil Service Com. supra*, 688 F.2d at p. 633, and the position of the leading commentators (Newberg & Conte, supra, ¶ 11.28 at p. 11–58), which allow a lesser standard of scrutiny for settlement cases . . . We agree with the latter. The two basic purposes for the Rule 23 certification requirements, as they relate to questions of a nationwide class, are: (1) to keep the lawsuit manageable for trial; and (2) to protect the interests of the non-representative class members. The first purpose is inapposite in the settlement context, and the second, as it relates to commonality of issues, only makes a difference if the non-representative class members would do much better by litigating on their own or in their own jurisdiction. The second category concerns are protected by the trial court's fairness review of the settlement. *Id.* at n19.

2. <u>The Proposed Settlement Class Is Ascertainable and There Is a Well-Defined Community of Interest Among Class Members</u>

Whether a class is "ascertainable" within the meaning of Code of Civil Procedure section 382 is "determined by examining (1) the class definition, (2) the size of the class, and (3) the means available for identifying class members." *Lee*, 166 Cal. App. 4th at 1334. Class members are ascertainable where they may be readily identified without unreasonable expense or time by reference to official records. *Id.*

The community of interest requirement embodies three factors: (1) predominant common questions of law or fact; (2) a class representative with claims or defenses typical of the class; and (3) a class representative and counsel who can adequately represent the class. Cal. Civ. Proc. Code § 382.

In April of 2012, the California Supreme Court expounded on the element of predominance:

---

[7] *See also* Newberg on Class Actions § 13:18 (5th ed.) (courts "declin[e] to treat formal class certification as a prerequisite for preliminary approval and undertak[e] a more cursory class certification analysis at the preliminary approval stage."); *Dearaujo v. Regis Corp.*, No. 2:14-CV-01408-KJM-AC, 2016 WL 3549473, at *6 (E.D. Cal. June 30, 2016) ("[D]espite the Supreme Court's cautions in *Amchem* . . . , a cursory approach appears the norm."); *In re Amtrak Train Derailment in Philadelphia, Pennsylvania*, No. 15-MD-2654, 2016 WL 1359725, at *4 (E.D. Pa. Apr. 6, 2016) ("[A] settlement class can be preliminarily certified based on a less rigorous analysis than that necessary for final certification."); *In re Processed Egg Prod. Antitrust Litig.*, No. 08-MD-2002, 2014 WL 828083, at *2 (E.D. Pa. Feb. 28, 2014) (at the preliminary approval stage, "the Court must determine whether the proposed class should be conditionally certified, and leave the final certification decision for the Fairness Hearing.").

> The "ultimate question" the element of predominance presents is whether "the issues which may be jointly tried, when compared with those requiring separate adjudication, are so numerous or substantial that the maintenance of a class action would be advantageous to the judicial process and to the litigants."

Brinker Rest. Corp. v. Super. Ct., 53 Cal. 4th 1004, 1021 (2012) (citations omitted).

The proposed Class Members consists of the individual Class Members who did not opt-out of the Settlement by submitting a valid request for exclusion. The Class is defined as all non-exempt employees who have been employed by Defendant in California at any time during the Class Period, May 1, 2020 through June 17, 2024. Defendant represents there are approximately 3,962 Class Members. Because all Class Members are either current or former employees of Defendant, subject to the same policies and practices, the class is readily ascertainable from Defendant's regular business records. (Hawkins Decl. ¶¶ 7-38).

Here, common issues of fact and law predominate because the California statutes relating to each of Plaintiff's claims, and Defendant's defenses thereto, apply with equal force and effect to all Class Members. Factually, Plaintiff contends that Defendant's policies and practices apply class-wide and Defendant's liability can be determined by facts common to all members of the class. The wage and hour issues are both numerous and substantial, and a class action is the most advantageous method of dealing with the claims of the Class Members. (*Id.*).

Plaintiff's wage and hour claims are typical of the proposed Settlement Class because they arise from the same factual bases and are based on the same legal theories applicable to the other Class Members. Likewise, Plaintiff's interests are entirely coextensive with the interests of the Class. Plaintiff maintains that Plaintiff was injured by the same company-wide practices to which the proposed Settlement Class was subject and seek the same relief. Plaintiff has already demonstrated the ability to advocate for the interests of the Class by initiating this litigation, undertaking representative investigation and informal discovery, and evaluating the proposed settlement to assure that it is fair. (*Id.*)

Additionally, Plaintiff is represented by competent counsel who have extensive experience in litigating wage and hour class action cases. (Hawkins Decl. ¶ 33.) Plaintiff's Counsel has successfully briefed, argued, certified, and gained state and federal court settlement approval of the same class-wide causes of action that are at issue in this case. (*Id.*) Plaintiff's Counsel's wage and hour class action expertise establishes that they are well qualified to represent the interests of this Class.

A class action is superior to a multitude of individual lawsuits. Given the size and amount of each individual Class Member's claim, Class Members likely have little incentive to litigate their claims on an individual basis because the out-of-pocket expense and personal commitment necessary to litigate each claim outweighs any potential recovery. In sum, class treatment is superior to individual, case-by-case adjudication.

3. The Proposed Notice Properly Informs Class Members about the Case and the Settlement

Class members are entitled to the best practical notice under the circumstances. *Kass v. Young*, 67 Cal. App. 3d 100, 106 (1977). The purpose of the notice is to give class members sufficient information to decide whether they should accept the benefits offered, opt out and pursue their own remedies, or object to the settlement. *Trotsky v. Los Angeles Fed. Savings & Loan Assn.*, 48 Cal. App. 3d 143, 151-52 (1975). The notice must advise class members "that they may be excluded from the class if they so request and that they will be bound by the judgment, whether favorable or not, if they do not request exclusion." *Kass*, 67 Cal. App. 3d at 106. In a case such as this involving a significant number of class members, California authorities generally require service of the class notice by mail or similar reliable means. *Chance v. Super. Ct.*, 58 Cal. 2d 275, 290 (1962); *Cartt v. Super. Ct.*, 50 Cal. App. 3d 960, 972 (1975).[8]

The Parties have jointly drafted the Notice of Class Action settlement ("Class Notice") which fairly and neutrally informs Class Members of their rights and remedies in this action. (Hawkins Decl., Exhibit B; Hawkins Decl. ¶¶ 31-32.)

Accordingly, both the method of disseminating the Class Notice and content of the Class Notice satisfy due process and the requirements of California law. *See* Cal. R. Ct. 3.776(e)-(f); *State of Cal. v. Levi Strauss*, 41 Cal. 3d 460, 485 (1986) (the class notice must "fairly apprise the class members of the terms of the proposed compromise and of the options open to dissenting class members.").

F. The Court Should Approve The FLSA Portion Of The Settlement

With respect to FLSA collective action settlements, if a bona fide dispute exists, "[c]ourts often

[8] Due process does not require that each Class Member actually receive a notice, but rather a procedure reasonably certain to reach Class Members. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 1789, at 253 (2d ed. 1986). If appropriate notice is given, Class Members will be bound by the judgment even if they never actually receive the notice. *Fontana v. Elrod*, 826 F.2d 729, 732 (7th Cir. 1987).

apply the Rule 23 factors in evaluating the fairness of an FLSA settlement, while recognizing that some do not apply because of the inherent differences between class actions and FLSA collective actions." *Khanna v. Inter-Con Sys., Inc.*, No. 2:09-cv-02214KJM-EFB, 2013 WL 1193485, at *2 (E.D. Cal. Mar. 22, 2013) (internal quotations and citations omitted). "Under this approach, a 'district court must ultimately be satisfied that the settlement's overall effect is to vindicate, rather than frustrate, the purposes of the FLSA.'" *Cavazos v. Salas Concrete Inc.*, No. 1:19-cv-00062-DAD-EPG, 2022 WL 506005, *6 (E.D. Cal., Feb. 18, 2022)). Each factor is addressed in turn above and, for those reasons, Plaintiff requests the Court approve the FLSA settlement in full. All FLSA Collective Members are also Class Members so the FLSA Settlement Fund represents an additional payment FLSA Collective Members will receive *on top* of their class settlement payment.

As to the notice and opt-in procedure, each Collective Member's share from the FLSA Settlement Fund will be issued in a check separate from the payments to Settlement Class Members and PAGA Group Members, as a result, some individuals may ultimately receive more than one settlement check. Opt-in and release language regarding the release of the FLSA claim will be printed on the FLSA settlement checks, with instructions that cashing such check constitutes consent under the FLSA to opt into the collective action. The language to be included will be substantially similar to the following:

> "My endorsing, cashing, depositing, or otherwise negotiating of this check constitutes my consent to join the lawsuit entitled Maisnier v. National Vision, Inc., pending in the Superior Court of the State of California for the County of Sacramento, Case No. 24CV018644, pursuant to the provisions of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. Section 216(b)."

(Hawkins Dec., Ex. C.)

This method of consent has been approved in other hybrid FLSA settlements, allowing for these claims to be resolved simultaneously with state law class claims. *See, e.g., Cavazos v. Salas Concrete, Inc.*, 2002 WL 506005, *3, n. 5 (E.D. Cal., Feb. 18, 2022). "Courts in the Ninth Circuit have found such FLSA waivers enforceable where there is no concern that the settlement agreement adequately compensates the class for the release of all claims." *Contreras v. Armstrong Flooring, Inc.*, 2021 WL 4352299, at *3, 8 (C.D. Cal., July 6, 2021) (quoting *ConDawson v. Hitco Carbon Composites, Inc.*, No. CV 16-7337 PSG (FFMx), 2019 WL 6138467, at *7 n.2 (C.D. Cal. July 9, 2019); *but see Thompson v. Costco Wholesale Corp*., Case No. 15-CV-2778-CAB-WVG (S.D. Cal., May 11, 2017).

Ultimately, because the "settlement's overall effect is to vindicate, rather than frustrate, the purposes of the FLSA" it should be approved accordingly. See *Cavazos v. Salas Concrete, Inc*., 2022 WL 506005, *3, n. 5 (E.D. Cal., Feb. 18, 2022); *see also Dixon v. Cushman & Wakefield Western, Inc*., 2022 WL 1189883, at *3 (N.D. Cal., Apr. 21, 2022, No. 18-CV-05813-JSC) (granting final approval of hybrid settlement were FLSA settlement class members released all claims that were asserted or could have been asserted under federal and state overtime law). Accordingly, Plaintiff respectfully requests that the Court approve collective action settlement and approve the respective notices for distribution.

V. CONCLUSION

The Parties have negotiated a fair and reasonable settlement of claims. Having appropriately presented the materials and information necessary for preliminarily approval, the Parties request that the Court preliminarily approve the settlement.

Dated: February 13, 2025

JAMES HAWKINS APLC

By: ______________________

JAMES R. HAWKINS
GREGORY MAURO
MICHAEL CALVO
LAUREN FALK
AVA ISSARY

Attorneys for Plaintiff PAUL F. MAISNIER, individually and on behalf of all others similarly situated.

PROOF OF SERVICE, COUNTY OF ORANGE

I am a resident of the State of California, County of Orange. I am over the age of eighteen years and not a party to the within action. My business address is 9880 Research Drive., Suite 200, Irvine, California 92618.

On February 13, 2025, I served on the interested parties in this action the following document(s) entitled:

NOTICE OF MOTION AND MOTION FOR PRELIMINARY APPROVAL OF PAGA CLASS/COLLECTIVE ACTION SETTLEMENT; MEMORANDUM OF POINTS AND AUTHORITIES

[Declaration of James Hawkins In Support of Motion for Preliminary Approval of PAGA and Class Action Settlement; Declaration of Plaintiff Paul F. Maisnier; [Proposed] Order filed concurrently herewith]

[XX] BY ELECTRONIC SERVICE: Based on a court Order or an agreement by the parties to accept service by e-mail or electronic transmission, I caused the document(s) to be sent from the email addressAlma@jameshawkinsaplc.com to the persons at the e-mail addresses listed in the Service List below. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

SERVICE LIST

SEYFARTH SHAW LLP
Coby M. Turner
cturner@seyfarth.com
Phillip J. Ebsworth
pebsworth@seyfarth.com
Jeff Norlander
Jnorlander@seyfarth.com
Linda Ninelist
Lninelist@seyfarth.com
400 Capitol Mall, Suite 2300
Sacramento, California 95814-4428
Attorneys for Defendant
NATIONAL VISION, INC. dba AMERICA'S BEST CONTACTS AND EYEGLASSES

Via LWDA Website Only
Labor and Workforce Development Agency
Attn: PAGA Administrator
1515 Clay Street, Ste 801
Oakland, CA 94612
http://www.dir.ca.gov/Private-Attorneys-General-Act

[XX] **STATE:** I declare under penalty of perjury, under the laws of the State of California, that the above is true and correct.

Executed on February 13, 2025, at Irvine, California

Alma Chavarin
Alma Chavarin