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**ARBITRATION
BEFORE HUNTER R HUGHES III, ARBITRATOR
HUNTER HUGHES ADR**

**DANIEL FLAHERTY, individually and
on behalf of other Associates,**

Claimant,

v.

COLEMAN RESEARCH GROUP,

Respondent.

**CLAIMANT'S UNOPPOSED MOTION
FOR SETTLEMENT APPROVAL**

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INTRODUCTION

Subject to Arbitrator approval, Claimant Daniel Flaherty (“Claimant”), individually and on behalf of the other eligible Associates he seeks to represent, and Coleman Research Group, Inc. (“Coleman” or “Respondent”), have settled this wage and hour action for \$290,000. The settlement satisfies all criteria for approval of a Fair Labor Standards Act (“FLSA”) and California Private Attorneys General Act (“PAGA”) settlement because it resolves a *bona fide* dispute, was reached after contested litigation, and was the result of arm’s-length settlement negotiations conducted by counsel well-versed in wage and hour law with the assistance of an experienced mediator.

Accordingly, the Parties respectfully request that the Arbitrator enter the Proposed Award approving the \$290,000 settlement as set forth in the Confidential Settlement Agreement and Release and allowing notice to go out to eligible Associates to allow them to join this action (“Settlement Agreement”).¹

FACTUAL AND PROCEDURAL BACKGROUND

I. Factual Allegations

Claimant worked as an overtime-exempt Client Associate for Coleman from approximately November 2021 to March 2022. Claimant alleges that Coleman violated the FLSA, 29 U.S.C. §§ 201 *et seq.*, as well as California state law, by denying him and other similarly situated employees overtime wages. Stewart Decl. ¶ 12; Demand ¶¶ 7, 10. Coleman

¹ The Settlement Agreement is attached as Exhibit 1 to the Declaration of Melissa L. Stewart in Support of Claimant’s Unopposed Motion for Approval of Settlement Agreement (“Stewart Decl.”). Unless otherwise indicated, all exhibits are attached to the Stewart Decl. For the Arbitrator’s convenience, a Proposed Award is attached as Exhibit 3 to the Stewart Decl.

denies that it committed any wrongdoing or violated any federal, state, or local laws pertaining to payment of overtime wages and disputes the claims asserted in this litigation.

II. Overview of Investigation, Litigation, and Settlement Negotiations

Before filing this lawsuit, Claimant's Counsel conducted a thorough investigation into the merits of the potential claims and defenses. Stewart Decl. ¶ 14. Claimant's Counsel focused their investigation and legal research on the merits of the claims, the damages to which Claimant was entitled, the legal exemptions that apply to the expert research network industry, and the likelihood of collective action certification and decertification. *Id.* Claimant's Counsel obtained and reviewed documents from Claimant and interviewed him and other witnesses in-depth. *Id.*

In an effort to explore potential pre-litigation resolution of these claims, Claimant's Counsel informed Coleman, by letter dated May 17, 2022, of the allegation that Associates were misclassified as exempt. *Id.* ¶ 15. On June 14, 2022, the Parties entered into a tolling agreement, which was extended on June 30, 2022. *Id.* ¶ 16. Shortly thereafter, Coleman agreed to attempt to resolve this dispute through private mediation. *Id.*

After agreeing to participate in mediation, the Parties entered into a Confidentiality Agreement and engaged in an informal exchange of discovery. *Id.* ¶ 17. Coleman produced summary compensation and workweek information for Associates, which allowed Claimant's Counsel to construct a damages model and calculate damages for Claimant and the other Associates. *Id.*

On September 14, 2022, the Parties attended a remote mediation session with Timothy Long, Esq., an experienced and well-regarded California wage and hour mediator. *Id.* ¶ 18. The Parties were unable to reach an agreement at mediation but continued discussing the claims with the assistance of the mediator for several more weeks. *Id.* On October 24, 2022, the mediator

made a proposal to resolve the action on behalf of the 25 Associates identified in the pre-mediation dataset, which both Parties accepted. The Parties then discussed the remaining material terms and finalized a term sheet on November 16, 2022. *Id.* During the next several weeks, the Parties finalized the terms of the settlement and memorialized them in the Settlement Agreement, which was fully executed on January 6, 2023. *Id.* ¶ 20.

SETTLEMENT TERMS

I. The Settlement Fund

The Settlement Agreement establishes a Gross Fund of \$290,000 to settle claims against Respondent (the “Gross Fund”). Stewart Decl. ¶ 24; Settlement ¶ 1.13. The Gross Fund covers: (1) settlement awards for Associates, covering no more than 1,120 workweeks;² (2) a Service Award of up to \$7,500 to Claimant Daniel Flaherty; (3) Claimant’s Counsel’s attorneys’ fees of up to one-third of the Total Settlement Amount; (4) reimbursement of Claimant’s Counsel’s actual out-of-pocket litigation expenses of up to \$7,900; (5) the Settlement Administrator’s fees and costs not to exceed \$4,250; (6) a Private Attorneys General Act Fund (“PAGA Fund”) of \$20,000 (allocated 25% to PAGA Members and 75% to the California Labor and Workforce Development Agency (“LWDA”)); and (7) arbitration fees and costs. Stewart Decl. ¶¶ 24. The Gross Fund does not include Employer Payroll Taxes, which Coleman will fund separately. Settlement ¶ 1.11.

² The Settlement provides that if the number of workweeks increases by more than 2.5%, Coleman will fund an additional amount in order to increase the Net Fund by a proportionate additional amount, or the Claimed Liability Period end date shall be moved to earlier in time so that the total covered and released workweeks do not exceed 1,148. Settlement ¶ 5.1(ii).

II. Eligible Employees

The Associates eligible to join this action are the 25 individuals identified in the pre-mediation data produced by Coleman who were employed as exempt-classified Associates by Coleman in the United States between June 14, 2021 and September 14, 2022. Stewart Decl. ¶ 25; Settlement ¶ 1.4.

III. Notice Process

The Settlement Administrator will distribute the money in the QSF as set forth in the Settlement Agreement. Stewart Decl. ¶ 32; Settlement ¶ 5.4. Within seven (7) days of Arbitrator's approval of the settlement, Coleman will pay the Gross Fund by wire transfer into a Qualified Settlement Fund ("QSF"). Stewart Decl. ¶ 31; Settlement ¶ 5.1(iii). Within 21 days of the Arbitrator's approval, the Settlement Administrator will mail Settlement Notices to Associates via first class U.S. Mail. Stewart Decl. ¶ 26; Settlement ¶ 4.6. The mailed Settlement Packet will contain an enclosed check with the Associate's proportionate settlement share and a "back of the check" release endorsement by which Associates will release and discharge Releasees from the Released Claims. Stewart Decl. ¶ 27; Settlement ¶¶ 4.9, 6.1. The Settlement Packet will also include a PAGA Enclosure Letter, along with the PAGA Members' PAGA Settlement Check. At the same time as the checks are mailed, the Administrator will also send e-mail notifications informing Associates about the payment mailing. Stewart Decl. ¶ 26; Settlement ¶ 4.6. The Associates will have 120 days from the date of the last re-mailing to cash their settlement checks. Stewart Decl. ¶ 29; Settlement ¶¶ 4.8. The Settlement Administrator will obtain the correct address for any Associate for whom a Settlement Packet is returned by the post office as undeliverable with no forwarding address and shall attempt re-mailings. Stewart Decl. ¶ 28; Settlement ¶¶ 4.8, 5.4(iv). Associates who do not cash a settlement check do not

participate in the settlement and do not release their claims against Respondent (except that PAGA Members release their PAGA claims whether they sign the check or not). Stewart Decl. ¶ 30; Settlement ¶ 4.8.

IV. Settlement Awards

Each Associate will be allocated a proportionate share of the Net Fund and the PAGA Fund based on weeks worked in the liability period. Stewart Decl. ¶ 33; Settlement ¶ 5.4. The Gross Fund covers no more than 1,120 total Eligible Workweeks for 25 Associates identified in the pre-mediation data who work or worked at Coleman in California between June 14, 2021 through September 14, 2022. Stewart Decl. ¶ 33; Settlement ¶ 5.1(ii). Should the number of workweeks increase by more than 2.5% (i.e., greater than 1,148 Eligible Workweeks), the Gross Fund will increase by a proportionate additional amount for each additional Eligible Workweek above 1,148, or the Liability Period end date shall be moved to earlier in time so that the total covered and released work weeks do not exceed 1,148. *Id.*

To compute each Associate's share of the Net Fund, the Settlement Administrator will: assign one (1) point for each Eligible Workweek between June 14, 2018 and September 14, 2022; add all points for all Associates together to obtain the "Denominator"; for each Associate, divide her or his number of points by the Denominator to obtain her or his "Portion of the Net Fund"; and multiply each Associate's Portion of the Net Fund to determine each Associate's Settlement Amount. Stewart Decl. ¶ 34; Settlement ¶ 5.4(i). A check in the amount of each Associate's share of the Net Fund will be mailed to the Associate in the Settlement Packet. Stewart Decl. ¶ 36; Settlement ¶ 4.6.

To compute each PAGA Member's share of the PAGA Fund, the Settlement Administrator will: assign one (1) point for each Eligible PAGA Workweek between June 14,

2021 and September 14, 2022; add all points for all PAGA Members together to obtain the “Denominator”; for each PAGA Member, divide her or his number of points by the Denominator to obtain her or his “Portion of the PAGA Payment”; and multiply each PAGA Member’s Portion of the PAGA Payment to determine each PAGA Member’s PAGA Amount. Stewart Decl. ¶ 35; Settlement ¶ 5.4(ii). A check in the amount of each PAGA Member’s share of the PAGA Payment will be mailed to the Associate in the Settlement Packet, along with a PAGA Enclosure Letter. Stewart Decl. ¶ 36; Settlement ¶ 4.6.

V. Service Payment

Under the Settlement Agreement, subject to Arbitrator approval, Claimant requests \$7,500 as a Service Payment, in recognition of the services he rendered to the Associates in obtaining the benefits of the settlement, as well as the risks he took in doing so. Stewart Decl. ¶ 41; Settlement ¶ 1.30. Claimant assisted counsel in the investigation of the Associates’ claims, helped counsel prepare for the mediation, reviewed the settlement agreement and demand, and provided vital assistance that helped Claimant’s Counsel achieve this settlement for the benefit of the eligible Associates. Stewart Decl. ¶ 42.

VI. Attorneys’ Fees and Litigation Costs

Under the Settlement Agreement, subject to Arbitrator approval, Claimant’s Counsel request one-third of the Gross Fund (\$96,666.66) as attorneys’ fees, plus out-of-pocket costs up to \$7,900. Settlement ¶ 5.2; Stewart Decl. ¶¶ 44.

VII. Arbitration Process

The Parties have agreed to this arbitration process for the sole purpose of obtaining approval of the Settlement and expediting payments to Associates. Settlement ¶ 2.2. The Parties have stipulated to the appointment of the Mr. Hughes to act as the Arbitrator. *Id.* ¶ 2.4.

All Notices, Settlement Checks, PAGA Enclosures, and related communications to Associates will include clear and conspicuous language regarding the arbitration of the action and explain how Participating Associates and PAGA Members consent to and are bound by such process. Stewart Decl. ¶ 27.

The Arbitration fees and costs will be paid from the Total Settlement Amount. Settlement ¶ 5.1(i).

VIII. Settlement Claims Administration

The Parties have retained ILYM, an experienced wage and hour claims administrator, to serve as the Settlement Administrator. Stewart Decl. ¶ 51. The Settlement Administrator's fees, not to exceed \$4,250, will be paid from the Gross Fund. *Id.*; Settlement ¶ 5.1(i). The fees will cover, among other things, preparing the Notice and PAGA Enclosure Letter; determining the amount of payments due to Associates and PAGA Members, along with the amount of tax withholdings and Employer's Payroll Taxes; updating addresses for Associates; maintaining an email address where Associates can make inquiries and provide updates; wiring Arbitrator-approved attorneys' fees and costs to Claimant's Counsel; providing W-2s and 1099 forms as required under the Settlement Agreement and applicable law; establishing, controlling, and maintaining the Qualified Settlement Fund; and filing all required tax returns for the QSF and paying all taxes due. Stewart Decl. ¶ 52; Settlement ¶ 4.1.

ARGUMENT

I. A One-Step Approval Process Is Standard for FLSA Settlements

Settlements under the FLSA require court or arbitrator approval. *Cheeks v. Freeport Pancake House, Inc.*, 796 F.3d 199, 200 (2d Cir. 2015). "In the context of FLSA settlements of collective actions, it is well established that the same due process issues that arise in the context

of a Rule 23 class action settlement are not implicated” *Weston v. TechSol, LLC*, No. 17 Civ. 0141, 2018 U.S. Dist. LEXIS 166574, at *10 (E.D.N.Y. Sep. 26, 2018). This is because a “plaintiff in an FLSA action may decide not to opt-in to the settlement, thereby retaining the right to sue the defendant for the same claims at a later date.” *Id.* Thus, the “standard for approval of an FLSA settlement is lower than for a class action.” *Viafara v. MCIZ Corp.*, No. 12 Civ. 7452, 2014 U.S. Dist. LEXIS 60695, at *22 (S.D.N.Y. Apr. 30, 2014). Arbitrators review a settlement under the FLSA to determine whether it is a “fair and reasonable” compromise of disputed issues and authorize notice of the settlement to similarly-situated employees. *Weston*, 2018 U.S. Dist. LEXIS 166574, at *7-9; *accord Viafara*, 2014 U.S. Dist. LEXIS 60695, at *22 (“Courts approve FLSA settlements when they are reached as a result of contested litigation to resolve bona fide disputes.”).

A one-step settlement approval process is widely recognized as the appropriate procedure for settling an action under the FLSA. *See, e.g., Weston*, 2018 U.S. Dist. LEXIS 166574, at *28 (granting a motion for settlement approval and attorneys’ fees, as well as simultaneously “approv[ing] the proposed Notice and Claim Form, and authoriz[ing] distribution to the settlement collective”).

II. The Proposed Settlement Should Be Approved Because It Is Fair and Reasonable.

Arbitrators approve FLSA settlements when they are reached as a result of contested litigation to resolve *bona fide* disputes. *See Lynn’s Food Stores, Inc. v. U.S.*, 679 F.2d 1350, 1353 n.8 (11th Cir. 1982). Arbitrators regard the adversarial nature of a litigated FLSA case to be an adequate indicator of the fairness of the settlement. *See Beckman v. KeyBank, N.A.*, 293 F.R.D. 467, 476 (S.D.N.Y. 2013). When a “proposed FLSA settlement reflects a reasonable compromise over contested issues,” the Arbitrator should approve the settlement. *Id.*

This FLSA settlement meets the standard for approval. The settlement was reached after lengthy, vigorous arm's-length negotiations facilitated by an experienced mediator and the exchange of informal discovery. Stewart Decl. ¶ 21; *Campos v. Goode*, No. 10 Civ. 0224, 2011 U.S. Dist. LEXIS 22959, at *16 (S.D.N.Y. Mar. 4, 2011) (FLSA settlement approved after “the parties engaged in mediation with an experienced mediator in an effort to reach a resolution”).

The settlement represents a significant percentage of the recovery that Associates would have achieved had they prevailed on all of their claims and survived an appeal. The Gross Fund represents an estimated 63.3% of Associates' unpaid overtime, not inclusive of liquidated damages, assuming that Associates worked an average ten overtime hours in 90% of weeks under a time-and-a-half method of calculating overtime. Stewart Decl. ¶ 38. *See In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 459 (9th Cir. 2000) (gross recovery of approximately 16.67% of potential recovery adequate in light of litigation risks); *Castro v. Black Rose Hosp. LLC*, No. 21 Civ. 5834, 2022 U.S. Dist. LEXIS 7717, at *3 (S.D.N.Y. Jan. 14, 2022) (approving settlement of 30% of unpaid wages with damages); *Ye v. Fuji Hana Rest. Corp.*, No. 20 Civ. 2749, 2021 U.S. Dist. LEXIS 87549, at *3 (E.D.N.Y. May 7, 2021) (approving settlement that represented 34% of total damages sought); *Cardenas v. A.J. Piedimonte Agric. Dev., LLC*, No. 18 Civ. 00881, 2020 U.S. Dist. LEXIS 111475, at *9-10 (W.D.N.Y. June 25, 2020) (approving settlement representing 30% of potential recovery and collecting cases); *Gervacio v. ARJ Laundry Servs.*, No. 17 Civ. 9632, 2019 U.S. Dist. LEXIS 12760, at *3 (S.D.N.Y. Jan. 25, 2019) (approving settlement amount of approximately 20% of maximum recovery and 43% of base damages); *Weil v. Mark D. Levy Horticultural Servs., LLC*, No. 19 Civ. 4493, 2019 U.S. Dist. LEXIS 186584, at *2 (S.D.N.Y. Oct. 25, 2019) (approving individual FLSA settlement amounting to 37% of unpaid wages); *Villegas v. J.P. Morgan Chase & Co.*, No. 09 Civ. 261,

2012 U.S. Dist. LEXIS 166704, at *17 (N.D. Cal. Nov. 21, 2012) (preliminarily approving a settlement where the gross amount represented approximately 15% of the potential recovery). The net settlement represents approximately 31.6% of Associates' damages, under the same assumptions. Stewart Decl. ¶ 38. *See Adorno v. Evergreen Gourmet Deli Inc.*, No. 18 Civ. 4008, 2022 U.S. Dist. LEXIS 12435, at *3 (S.D.N.Y. Jan. 24, 2022) (approving settlement amount, net attorneys' fees, accounting for 18% of maximum damages); *Aguilar v. N & A Prods.*, No. 19 Civ. 1703, 2019 U.S. Dist. LEXIS 185030 (S.D.N.Y. Oct. 24, 2019) (finding settlement amount reasonable that constituted 7% of estimated potential recovery in light of significant risk to claims); *Beckert v. Rubinov*, No. 15 Civ. 1951, 2015 U.S. Dist. LEXIS 167052, at *4 (S.D.N.Y. Dec. 14, 2015) (approving settlement where net recovery was approximately 25% of damages). The average Associate's portion of the Net Settlement Fund is approximately \$5,797.33. Stewart Decl. ¶ 38.

The Settlement further provides that \$20,000 of the Total Settlement Amount will be allocated to the Settlement of the PAGA Group's claims,³ which represents approximately 6.9% of the Total Settlement Award.⁴ Agreement ¶ 1.20; Stewart Decl. ¶ 39. Claimant estimated maximum PAGA penalties at approximately \$118,192 based on the identified Labor Code violations. Stewart Decl. ¶ 39. The PAGA Fund therefore represents approximately 16.9% of

³ Claimant gave notice to the LWDA of his intent to pursue PAGA penalties as required by Cal. Lab. Code § 2699.3. Stewart Decl. ¶ 40. The 65-day exhaustion period expired on December 19, 2022, per Cal. Lab. Code § 2699.3(a)(2)(A). Contemporaneously with filing this motion, Claimant's Counsel submitted a copy of the proposed settlement to the LWDA, as required by Cal. Lab. Code § 2699(1)(1)(2). *Id.*

⁴ Courts that look at the proportion of the PAGA settlement to the overall settlement recovery have approved proportionate recoveries in and below this range. *See, e.g., Van Kempen v. Matheson Tri-Gas, Inc.*, No. 15 Civ. 660, 2017 U.S. Dist. LEXIS 137182, at *6, 29 (N.D. Cal. Aug. 25, 2017) (1.4 percent); *Chu v. Wells Fargo Investments, LLC*, Nos. 05 Civ. 4526, 06 Civ. 7924, 2011 U.S. Dist. LEXIS 15821, at *4 (N.D. Cal. Feb. 16, 2011) (less than 1 percent).

Claimant's maximum theoretical PAGA recovery. *Id.* This recovery is reasonable because of courts' discretion to reduce PAGA penalties (Cal. Lab. Code § 2699(e)(2)) and well within the range that courts routinely approve. *See, e.g., Ruch v. AM Retail Grp., Inc.*, No. 14 Civ. 05352, 2016 U.S. Dist. LEXIS 133832, at *21-22 (N.D. Cal. Sept. 28, 2016) (approving PAGA recovery that represented less than 2% of maximum potential recovery); *McLeod v. Bank of Am., N.A.*, No. 16 Civ. 03294, 2018 U.S. Dist. LEXIS 195314, at *10-11 (N.D. Cal. Nov. 14, 2018) (same).

This settlement is further reasonable in light of the considerable risk that Claimant and the eligible employees face. "Litigation inherently involves risks." *In re PaineWebber Ltd. P'ships Litig.*, 171 F.R.D. 104, 126 (S.D.N.Y. 1997), *aff'd sub nom. In re PaineWebber Inc. Ltd. P'ships Litig.*, 117 F.3d 721 (2d Cir. 1997). Indeed, "[i]f settlement has any purpose at all, it is to avoid a trial on the merits because of the uncertainty of the outcome." *In re Ira Haupt & Co.*, 304 F. Supp. 917, 934 (S.D.N.Y. 1969); *see also Velez v. Majik Cleaning Serv., Inc.*, No. 03 Civ. 8698, 2007 U.S. Dist. LEXIS 46223, at *19 (S.D.N.Y. June 22, 2007). "Approval of a class settlement is appropriate when 'there are significant barriers plaintiffs must overcome in making their case.'" *Betancourt v. Advantage Hum. Resourcing, Inc.*, No. 14 Civ. 1788, 2016 U.S. Dist. LEXIS 10361, at *10-11 (N.D. Cal. Jan. 28, 2016) (citation omitted). Claimant and eligible employees face substantial obstacles to a full and timely recovery here. Stewart Decl. ¶ 22.

Although Claimant believes his case is strong, it is subject to considerable risk. As an initial matter, Respondent alleges that Claimant and the other Associates all signed an arbitration agreement that purportedly waives their right to proceed as a class or collective. If Claimant were compelled to individual arbitration, the statutes of limitations for the FLSA and California Labor Code claims of other employees would continue to run and there would be no formal mechanism to advise them of their rights. Moreover, any employee who wanted to pursue a

recovery would be required to participate in intensive individual arbitrations, including document production, deposition testimony, and testifying at the arbitration hearing, only to recover on a relatively small dollar value misclassification claim. *Id.*

Even if Claimant could proceed on behalf of a collective, first, he may have issues certifying or maintaining the collective. Respondent would likely argue that the differences among various job duties and other individualized questions preclude collective certification, or would warrant decertification of a collective, if certified. Although Claimant disagrees, other defendants have prevailed on such arguments in similar cases. *See, e.g., Eng-Hatcher v Sprint Nextel Corp.*, 2009 U.S. Dist. LEXIS 127262, at *16 (S.D.N.Y. Nov. 13, 2009) (denying certification of collective of sales consultants at locations nationwide for lack of proof of common policy); *Beckman*, 293 F.R.D. at 480 (collecting misclassification cases where courts have decertified FLSA collectives).

Second, a hearing on the merits would involve significant risks for Claimant on liability issues. Claimant's misclassification claims hinge on his ability to prove that Associates performed duties that made them eligible for overtime and therefore not exempt under the overtime protections of the FLSA and relevant state laws. The exempt status of Associates is highly contextual with facts pointing in both directions. Although Claimant believes that Associates' duties do not qualify them for any of the relevant exemptions, Claimant's Counsel recognizes that each exemption inquiry is highly contextual, and litigation of exemption defenses inherently poses significant risks. Stewart Decl. ¶ 23.

Third, a trial on the merits would involve significant risks for Claimant as to damages. To obtain a third year of FLSA damages, Claimant would have to prove that Coleman willfully violated the FLSA. 29 U.S.C. § 255. Claimant would also have to establish that Associates

consistently worked over 40 hours a week – a risk given the absence of contemporaneous time records.

The allocation of the settlement is also reasonable. It reflects the proportion of damages owed to each Associate based on the number of weeks she or he worked for Respondent as an exempt-classified Associate from June 14, 2018 through September 14, 2022. Settlement ¶ 5.4; *see Johnson v. Brennan*, No. 10 Civ. 4712, 2011 U.S. Dist. LEXIS 105775, at *8-9 (S.D.N.Y. Sept. 16, 2011) (approving allocation formula based upon weeks worked for defendant); *Hens v. Clientlogic Operating Corp.*, No. 05 Civ. 381, 2010 U.S. Dist. LEXIS 139126, at *5 (W.D.N.Y. Dec. 21, 2010) (allocation formula based on length of service was equitable and reasonable).

III. The Notice of Settlement Adequately Informs Associates of the Terms of the Settlement.

The Arbitrator should approve the proposed Notice of Settlement because it provides accurate and timely notice of the pending action and will allow Associates to make an informed decision regarding whether to participate. *See* Settlement, Ex. A (Notice). The proposed Notice sufficiently informs Associates of the terms of the settlement, including the allocation formula and the scope of the release. *See Johnson*, 2011 U.S. Dist. LEXIS 105775, at *8; *see also Morris v. Affinity Health Plan, Inc.*, No. 09 Civ. 1932, 2011 U.S. Dist. LEXIS 144543, at *10 (S.D.N.Y. Dec. 15, 2011) (“The Proposed Notice is appropriate because it describes the terms of the settlement [and] informs the class about the allocation of attorneys’ fees[.]”); *In re Milos Litig.*, No. 08 Civ. 6666, 2010 U.S. Dist. LEXIS 3038, at *3 (S.D.N.Y. Jan. 11, 2010) (notice should “provide[] accurate and timely notice concerning the pendency of the collective action, so that [an individual receiving the notice] can make an informed decision about whether to participate.” (internal quotation marks omitted)).

IV. A Service Award Is Appropriate.

In addition to his *pro rata* share of the Net Fund, Claimant requests a \$7,500 service award for his participation and assistance in the identification, investigation, and prosecution of this lawsuit. Stewart Decl. ¶ 41; Settlement ¶ 5.3. Such service awards are standard in FLSA settlements and are designed to reward the lead Claimant for the time, effort, and inconvenience of consulting with counsel over the time a case was active. *See Frank v. Eastman Kodak Co.*, 228 F.R.D. 174, 187 (W.D.N.Y. 2005) (recognizing the important role that a plaintiff plays as the “primary source of information concerning the claim[,]” including by responding to counsel’s questions and reviewing documents).

Here, Claimant’s actions exemplify the very reasons Arbitrators award service payments. Claimant assisted counsel in the development and prosecution of the claims by providing detailed factual information and documents. Stewart Decl. ¶ 42. Throughout the investigation, mediation, and settlement negotiations, he regularly made himself available to communicate with Counsel. *Id.*

In addition, service awards acknowledge that the lead Claimant plays a crucial role in bringing justice to those who would otherwise be hidden from judicial scrutiny,⁵ and that in doing so, Claimant assumes the “risk of adverse actions by the employer or co-workers.” *Velez*, 2007 U.S. Dist. LEXIS 46223, at *23 (internal quotation marks omitted); *Rodriguez v. W. Publ’g Corp.*, 563 F.3d 948, 958-59 (9th Cir. 2009) (explaining that service awards are intended to “compensate class representatives for work done on behalf of the class, to make up for financial

⁵ See generally Nantiya Ruan, *Bringing Sense to Incentives: An Examination of Incentive Payments to Named Plaintiffs in Employment Discrimination Class Actions*, 10 Emp. Rts. & Emp. Pol’y J. 395 (2006).

or reputational risk undertaken in bringing the action, and, sometimes, to recognize their willingness to act as a private attorney general”). Here, Claimant took a chance that he would be barred from employment in the industry for the sake of the group. Stewart Decl. ¶ 43.

The \$7,500 service award requested is well within the range awarded by courts in similar matters and should be approved as part of the settlement. *See, e.g., Rabin v.*

PricewaterhouseCoopers LLP, No. 16 Civ. 02276, 2021 U.S. Dist. LEXIS 41285, at *32 (N.D. Cal. Feb. 3, 2021) (\$20,000 to lead plaintiffs); *Vedachalam v. Tata Consultancy Servs., Ltd*, No. 6 Civ. 963, 2013 U.S. Dist. LEXIS 100799, at *7 (N.D. Cal. July 18, 2013) (\$35,000 and \$25,000 to named plaintiffs); *Trujillo v. City of Ontario*, No. 04 Civ. 1015, 2009 U.S. Dist. LEXIS 79309, at *13 (C.D. Cal. Aug. 24, 2009) (\$30,000 to each of six class representatives).

V. An Award of Attorneys’ Fees and Costs Is Appropriate.

The Arbitrator should approve Claimant’s Counsel’s requested attorneys’ fees and litigation costs incurred in the successful prosecution of this case.

The fee Claimant’s Counsel seeks – one-third of the settlement fund – is the standard award in wage and hour settlements. *See, e.g., Lusby v. GameStop Inc.*, No. 12 Civ. 37832015 U.S. Dist. LEXIS 42637, at *8-14 (N.D. Cal. Mar. 31, 2015); *Raniere v. Citigroup Inc.*, 310 F.R.D. 211, 221-22 (S.D.N.Y. 2015) (same); *DeLeon v. Wells Fargo Bank, N.A.*, No. 12 Civ. 4494, 2015 U.S. Dist. LEXIS 65261, *12-14 (S.D.N.Y. May 11, 2015) (same); *Puglisi v. TD Bank, N.A.*, No. 13 Civ. 637, 2015 U.S. Dist. LEXIS 100668, at *4 (E.D.N.Y. July 30, 2015) (same); *Behzadi v. Int’l Creative Mgmt. Partners, LLC*, No. 14 Civ. 4382, 2015 U.S. Dist. LEXIS 90117, at *8 (S.D.N.Y. July 9, 2015) (same); *Capsolas v. Pasta Res., Inc.*, No. 10 Civ. 5595, 2012 U.S. Dist. LEXIS 144651, at *24-25 (S.D.N.Y. Oct. 5, 2012) (same); *Toure v.*

Amerigroup Corp., No. 10 Civ. 5391, 2012 U.S. Dist. LEXIS 110300, at *13-16 (E.D.N.Y. Aug. 6, 2012) (same).

These fees are also consistent with the retainer agreement entered into by Claimant, which provides that counsel will receive one-third of any recovery. Stewart Decl. ¶ 46. “This fee arrangement is routinely approved by courts” considering FLSA settlements. *Rangel v. 639 Grand St. Meat & Produce Corp.*, No. 13 Civ. 3234, 2013 U.S. Dist. LEXIS 134207, at *4 (E.D.N.Y. Sep. 19, 2013).

The risk of litigation is “‘perhaps the foremost factor to be considered’ in determining the award of appropriate attorneys’ fees.” *Taft v. Ackermans*, No. 02 Civ. 7951, 2007 U.S. Dist. LEXIS 9144, at *30 (S.D.N.Y. Jan. 31, 2007) (quoting *In re Elan Sec. Litig.*, 385 F. Supp. 2d 363, 374 (S.D.N.Y. 2005)) (cleaned up); *In re Glob. Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 467 (S.D.N.Y. 2004) (noting that “[t]he contingent nature of . . . Lead Counsel’s representation is a key factor in determining a reasonable award of attorneys’ fees”).

Here, Claimant’s Counsel undertook this action without any assurance of payment for their services, pursuing the case on a wholly contingent basis in the face of the risk that Claimant’s claims would not be successful. Stewart Decl. ¶ 47. Any lawyer undertaking representation of large numbers of affected employees in wage and hour actions inevitably must be prepared to make a tremendous investment of time, energy, and resources. *Id.* Due also to the contingent nature of the customary fee arrangement, lawyers are asked to be prepared to make this investment with the very real possibility of an unsuccessful outcome and no fee of any kind. *Id.* Claimant’s Counsel stood to gain nothing in the event the case was unsuccessful. *Id.*; see *Hart v. RCI Hosp. Holdings*, No. 09 Civ. 3043, 2015 U.S. Dist. LEXIS 126934, at *42

(S.D.N.Y. Sep. 22, 2015) (granting counsel’s “substantial fee award” to “recognize the outsize risks that [class counsel] took in investing in [that] uncertain lawsuit”).

In addition to the factors enumerated above, public policy considerations also weigh in favor of granting Claimant’s Counsel’s requested fees. *See DeLeon*, 2015 U.S. Dist. LEXIS 65261, at *13 (“In wage and hour class action lawsuits, public policy favors . . . attorneys’ fee award[s]”); *Sukhnandan v. Royal Health Care of Long Island LLC*, No. 12 Civ. 4216, 2014 U.S. Dist. LEXIS 105596, at *39 (S.D.N.Y. July 31, 2014) (“The remedial purposes of [the FLSA and PAGA] require adequate compensation for attorneys who protect those rights.”). Here, public policy is served when lawyers enforce the FLSA’s remedial purpose to protect workers’ wages. *See, e.g., A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945) (recognizing the FLSA’s objective of ensuring that every employee receives “a fair day’s pay for a fair day’s work”); *Ching v. Siemens Indus., Inc.*, No. 11 Civ. 4838, 2014 U.S. Dist. LEXIS 89002, at *25 (N.D. Cal. June 27, 2014) (“Courts have long recognized that the public interest is served by rewarding attorneys who assume representation on a contingent basis with an enhanced fee to compensate them for the risk that they might be paid nothing at all for their work.”). Adequate compensation for attorneys who protect those rights by taking on such litigation furthers the remedial purpose of such statutes. “If not, wage and hour abuses would go without remedy because attorneys would be unwilling to take on the risk.” *Sukhnandan*, 2014 U.S. Dist. LEXIS 105596, at *27; *see also Sand v. Greenberg*, No. 08 Civ. 7840, 2010 U.S. Dist. LEXIS 1120, at *9 (S.D.N.Y. Jan. 7, 2010) (noting that attorneys’ fees are meant to “encourage members of the bar to provide legal services to those whose wage claims might otherwise be too small to justify the retention of able, legal counsel”).

Claimant's counsel also requests reimbursement of up to \$7,900 in out-of-pocket expenses, to be paid from the Gross Fund. Attorneys may recover litigation costs that are incidental and necessary to the litigation. *Cohan v. Columbia Sussex Mgmt., LLC*, No. 12 Civ. 3203, 2018 U.S. Dist. LEXIS 170192, at *17 (E.D.N.Y. Sept. 28, 2018) (approving \$19,336.01 in costs). "[Recoverable] costs routinely include filing fees, process servers, postage, travel, and photocopying." *Capone v. Patchogue-Medford Union Free Sch. Dist.*, No. 04 Civ. 2947, 2011 U.S. Dist. LEXIS 18194, at *14 (E.D.N.Y. Feb. 23, 2011). Here, the estimated costs of up to \$7,900 were incidental and necessary to the representation of the Class. *See* Stewart Decl. ¶ 45. These reasonable expenses include Claimant's share of the mediator's fees, filing fees, and computerized research.⁶ *Id.*; *see* Ex. 2 (Cost Summary).

VI. The Settlement Administrator Should Be Approved.

The Parties retained ILYM, an experienced wage and hour claims administrator, to serve as the Settlement Administrator. Stewart Decl. ¶ 51. The Settlement Administrator's fees are estimated to be no greater than \$4,250 which will be paid from the Gross Fund. *Id.*; Settlement ¶ 1.13. Settlement Administrator fees in this amount (and higher) are routinely found to be reasonable, given the work necessary to administer the Settlement. *See Durham v. Sachs Elec. Co.*, No. 18 Civ. 04506, 2022 U.S. Dist. LEXIS 113075, at *26 (N.D. Cal. June 27, 2022) (approving \$11,000 administrator's fee).

⁶ During the negotiation process, Claimant filed a demand for arbitration with JAMS. If this Settlement is approved, Claimant will withdraw the JAMS demand. The Cost Summary includes the JAMS filing fees.

CONCLUSION

For the reasons set forth above, Claimant respectfully request that the Arbitrator approve the settlement as set forth in the Settlement Agreement.

Dated: January 13, 2023
New York, NY

Respectfully submitted,

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