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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN BERNARDINO

ERIK CLEMENTE, individually, and on behalf
of all others similarly situated,

Plaintiff,

vs.

MIDWAY CONTRUCTION CORP, a
California corporation; and DOES 1 through 10,
inclusive,

Defendants.

Case No.: CIVSB2228816

[Assigned for all purposes to the Hon. Christian
Towns, Dept. S-26]

CLASS ACTION

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

Date: September 29, 2025
Time: 8:30 a.m.
Courtroom: Dept. S26 - SBJC
Judge: Hon. Christian Towns

Action Filed: December 27, 2022
Trial Date: Not Set

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

2 PLEASE TAKE NOTICE that on September 29, 2025, at 8:30 a.m., in Department S-26 of the
3 above-captioned Court, located at 247 West 3rd Street, San Bernardino, California 92415-0210, Plaintiff
4 ERIK CLEMENTE (“Plaintiff”) will and hereby does move this Court for an order:

5 1. Granting class certification of the Class, solely for settlement purposes pursuant to
6 Code of Civil Procedure § 382;

7 2. Finally approving the CLASS ACTION AND PAGA SETTLEMENT
8 AGREEMENT AND CLASS NOTICE (“Agreement”);

9 3. Appointing counsel for Plaintiff, Moon Law Group, PC, as Class Counsel;

10 4. Appointing Plaintiff as the Class Representative;

11 5. Approving ILYM Group, Inc., as the third-party administrator;

12 6. Awarding the sums requested in the Motion;

13 7. Entering a Final Judgment; and,

14 8. Without affecting the finality of the final judgment, reserving continuing
15 jurisdiction over the parties for the purposes of implementing, enforcing and/or administering
16 the settlement as set forth in the Agreement or enforcing the terms of the Final Judgment.

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

24 This Motion is made pursuant to Rule 3.769 and Rule 3.1113(e) of the California Rules of Court,
25 which require approval by the Court of a class action settlement and permit the Court to extend the page
26 limit for memoranda.

27 **TENTATIVE RULINGS:** A judicial officer may provide tentative rulings on law and motion
28 matters after 3:00 p.m. and 7:00 p.m. on the court day before the scheduled hearing. The Court follows

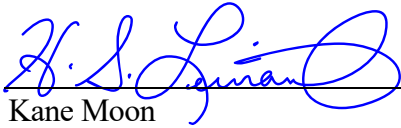
1 the procedure set forth in CRC 3.1308(a)(2). If you experience difficulty accessing the rulings you may
2 obtain the tentative ruling by calling the Administrative Assistant, between 3:00 p.m. and 5:00 p.m., at
3 (909) 708-8756.

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

9
10 Respectfully submitted,

11 Dated: September 2, 2025

MOON LAW GROUP, PC

12
13 By: 
14 Kane Moon
H. Scott Leviant
Jaeyoung Lee

15 Attorneys for Plaintiff
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1 **I. INTRODUCTION**

2 Pursuant to California Rules of Court, Rules 3.769, Plaintiff requests that this Court finally
3 approve the class action settlement set forth in the CLASS ACTION AND PAGA SETTLEMENT
4 AGREEMENT AND CLASS NOTICE (“Agreement”; the resolution of the matter, in accordance with
5 the requested Judgment and Agreement is referred to as the “Settlement”) with MIDWAY
6 CONSTRUCTION CORPORATION (“Defendant” or “MCC”).

7 After the exchange of documents and data, and an arm’s-length mediation session with mediator
8 Hon. Carl J. West (Ret.), Plaintiff and Defendant (collectively referred to herein as the “Parties”) reached
9 a proposed class action settlement with a gross settlement amount (“GSA”) of **\$350,000.00** in
10 compromise of disputed claims asserted on behalf of the below-defined Class consisting of **751**
11 members. Preliminary approval was granted by this Court, and the Notice process approved by the
12 Court was completed, without issue, in accordance with the Agreement. Plaintiff believes this settlement
13 is a fair, adequate, and reasonable compromise of disputed claims for alleged wage and hour violations
14 and penalties asserted in this case.

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

18 **II. THE NOTICE PROCESS WAS COMPLETED WITHOUT ISSUE**

19 Plaintiff and Defendant have fulfilled the class notice procedures set forth in the Settlement and
20 as dictated by the Court’s preliminary approval Order. The Administrator, ILYM Group, Inc. (“ILYM”),
21 sent individual Notices to all 751 Class Members on May 6, 2025. (Declaration of Nick Castro [“Castro
22 Decl.”], ¶ 7.) There have been **zero** requests for exclusion from the Settlement, and **zero** written
23 objections. (*Id.*, at ¶¶ 11-12.) Of the 751 Notices that were mailed, 46 have been deemed undeliverable.
24 (*Id.*, at ¶ 10.)

25 **III. THE MAJOR TERMS OF SETTLEMENT**

26 The provisions of the proposed Settlement include the following:

- 27 • Defendant agrees not to oppose certification for purposes of Settlement. (Agreement, ¶ 12.1.)
- 28

- 1 • Class: all persons who worked for Defendant in California as non-exempt employees during
2 the Class Period (the “Class Period” is the period from December 27, 2021 through August
3 24, 2024). “Participating Class Member” means a Class Member who does not submit a
4 valid and timely Request for Exclusion from the Class portion of the Settlement. (Agreement,
5 ¶¶ 1.5, 1.9, 1.12, 1.34.)
- 6 • Settlement Amount: Defendant will pay a maximum of **\$350,000.00**, referred to as the Gross
7 Settlement Amount (or GSA herein), resulting in an estimated average **gross** benefit per
8 Class Member of about **\$466.04**. (Agreement, ¶¶ 1.21, 3.1; Leviant Decl., ¶¶ 11, 17.)
- 9 • Escalator Clause: If the number of actual work weeks as of the close of the Class Period is
10 more than 10% higher than the estimated Workweeks (i.e., exceeds 35,530 work weeks),
11 SLA may, at its election, opt to (a) increase the Gross Settlement Amount in the exact
12 proportionate amount as to any additional Workweeks (i.e., 17% more Workweeks than
13 estimated will result in a 7% proportionate increase in the GSA) or (b) end the Class Period a
14 week prior to when the total Workweeks surpasses 35,530 Workweeks. (Agreement, ¶ 8.)
- 15 • Funding of Gross Settlement Amount: Defendant shall fully fund the Gross Settlement
16 Amount, and also fund the amounts necessary to fully pay Defendant’s share of payroll taxes
17 by transmitting the funds to the Administrator in two installment payments, with the first
18 payment due 60 days after the Effective Date and the second due six months after the first
19 installment. (Agreement, ¶ 4.3.)
- 20 • Class Size: **751** individuals who worked 34,321 workweeks. (Castro Decl., ¶ 5.)
- 21 • PAGA Group Size: **751** aggrieved employees who worked 17,369 pay periods during the
22 PAGA Period. (Castro Decl., ¶ 13.)
- 23 • PAGA Period: December 27, 2021, through August 24, 2024. (Agreement, ¶ 1.30.)
- 24 • Kullar/Munoz Analysis: Plaintiff addresses the claims analysis herein, at Part VI.B.3, and in
25 the Declaration of Leviant, at Paragraph 18.
- 26 • No Reversion: The Settlement is a **non-reversionary** settlement. (Agreement, ¶ 3.1.)
- 27 • Certification: Plaintiff addresses certification requisites herein, at Part VI.A. Certification was
28 addressed in greater detail in the Motion for Preliminary Approval.

- 1 • No Claim Form: No claim form is required. (Agreement, ¶ 3.1.)
- 2 • Class Release: The Settlement will release wage-and-hour claims for Participating Class
- 3 Members, (those Class Members who do not opt out of the Settlement) including all claims
- 4 that were alleged, or reasonably could have been alleged, based on the facts stated in the
- 5 Operative Complaint. (Agreement, ¶ 5.)
- 6 • PAGA Release: Plaintiff, on behalf of himself and the State of California, will release the
- 7 Released Parties from all claims for civil penalties under PAGA, based on the facts and
- 8 Labor Code sections that were alleged or reasonably could have been alleged in Plaintiff's
- 9 PAGA Notice of violations and the Operative Complaint. (Agreement, ¶ 5.3.)
- 10 • Net Settlement Amount: The Gross Settlement Amount, less the following payments in the
- 11 amounts approved by the Court: Individual PAGA Payments, the LWDA PAGA Payment,
- 12 Class Representative Service Payment, Class Counsel Fees Payment, Class Counsel
- 13 Litigation Expenses Payment, and the Administration Expenses Payment. The remainder is
- 14 to be paid to Participating Class Members as Individual Class Payments. The Net Settlement
- 15 Amount is estimated to be at least **\$170,783.33**, resulting in an average **net** payment per
- 16 Class Member of at least **\$227.41**, before any tax withholdings. (Agreement, ¶ 1.27.)
- 17 • Tax Allocation: The amounts distributed to Class Members will be characterized as 20%
- 18 alleged unpaid wages, 80% to interest and penalties, and PAGA Settlement payments to
- 19 Aggrieved Employees will be allocated as 100% penalties. (Agreement, ¶¶ 3.2.4.1, 3.2.5.)
- 20 • Employer's Portion of Payroll Taxes Paid Separately: Defendant's portion of payroll taxes
- 21 (e.g., FICA, FUTA, etc.) owed on any settlement payments to Class Members that constitute
- 22 wages will be paid separate and apart from the GSA. (Agreement, ¶ 3.1.)
- 23 • Settlement Administrator: The notice portion of the Settlement has been administered by a
- 24 third-party Administrator, ILYM, with the costs of administration not to exceed \$8,550.00.
- 25 ILYM's actual costs for settlement administration services are **\$8,550.00**. (Agreement, ¶
- 26 3.2.3; Castro Decl., ¶ 14.)
- 27 • Class Data for Administration: The Settlement Administrator received the Class Data within
- 28 14 days after the Court granted Preliminary Approval, used the National Change of Address

1 (“NCOA”) database to update the Class Data, and then used skip tracing on returned Notices
2 (Agreement, ¶¶ 1.10, 4.2; Castro Decl., ¶¶ 5-10.)

- 3 • Notice: The Notice was be issued within 14 days of receipt of the Class Data. (Agreement, ¶
4 7.4.2.) The Notice describes how to dispute workweeks, submit an objection in writing, in
5 person, or through an attorney, or request exclusion. (Agreement, ¶¶ 7.5 – 7.7.)
- 6 • Notice Language: Notice issued in English and Spanish. (Agreement, ¶ 1.11; 7.4.2.)
- 7 • Objections: Objections can be submitted in person, by attorney, or in writing to the
8 Administrator, with no pre-requisite to being heard. (Agreement, ¶¶ 7.7.1 – 7.7.3.)
- 9 • Exclusion Requests: The procedure for exclusion requests, mailing a request to the
10 Settlement Administrator, is the same as the procedure for submitting a written objection
11 (Agreement, ¶¶ 7.5.1 and 7.7.2.)
- 12 • PAGA Allocation: From the GSA, **\$35,000.00** will be allocated to settle claims brought
13 pursuant to the California Private Attorneys General Act, Labor Code § 2699 *et seq.*
14 (“PAGA”), and seventy-five percent (75%), or **\$26,250.00**, will be paid to the California
15 Labor & Workforce Development Agency. (Agreement, ¶ 1.33; 3.2.5.)
- 16 • Notice to LWDA: Notice was provided prior to the filing of this Motion. Evidence is
17 attached to the Leviant Declaration.
- 18 • Enhancement/Service Award to Plaintiff: Defendant will not oppose the application for a
19 Class Representative Service Payment of up to **\$5,000.00** to be paid from the GSA
20 (Agreement, ¶ 3.2.1.)
- 21 • Fees and Costs: Defendant will not oppose Class Counsel’s application for fees of not more
22 than one-third of the GSA (**\$116,666.66**), and costs, in an amount of **\$14,000.00** to be paid
23 out of the GSA (Agreement, ¶ 3.2.2.)
- 24 • Check Void Period: Settlement checks will be valid for 180 days (Agreement, ¶ 4.4.1.)
- 25 • Uncashed Checks: Any settlement checks that are mailed to the Class Members and remain
26 uncashed after 180 days of the date of issuance will be cancelled, and the moneys represented
27 by such checks will be sent to *cy pres* recipient, the State Bar’s Justice Gap Fund.
28 (Agreement, ¶ 4.4.3.)

- Judgment Notice: Judgment will be posted on the Administrator’s website after entry. (Agreement, ¶ 7.8.1.)
- Confidentiality Provisions: The Agreement permits Class Counsel to discuss the proposed Settlement with Class Members. (Agreement ¶ 12.2.)

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

IV. FACTUAL AND PROCEDURAL BACKGROUND

A. Plaintiff’s Claims

On December 27, 2022, Plaintiff commenced this Action by filing a Complaint alleging causes of action against Defendant for failure to pay minimum and regular rate wages, failure to pay overtime compensation, failure to provide meal periods, failure to authorize and provide rest breaks, failure to timely pay final wages at termination, failure to provide accurate itemized wage statements, and unfair business practices. Defendant operates in the commercial and residential construction industry, focusing on painting and drywall work. (Leviant Decl., ¶ 4.)

Plaintiff sent a letter to the Labor and Workforce Development Agency (“LWDA”), pursuant to California Labor Code § 2699.3, providing notice of his intent to seek civil penalties under the Private Attorneys General Act, California Labor Code § 2698, *et seq.* (Leviant Decl., ¶ 5.) The LWDA did not indicate that it intended to investigate the alleged violations referenced in the letter, and the 65-day time period permitted for the LWDA to provide such a notification expired. (*Id.*) On April 21, 2023, Plaintiff filed a First Amended Complaint alleging an additional cause of action against Defendant for civil penalties under the Private Attorneys General Act (“PAGA”). (*Id.*) The First Amended Complaint is the operative complaint in the Action (the “Operative Complaint.”). (*Id.*)

B. Pre-Mediation Data Production and Analysis

The Parties conducted informal discovery and investigation of the facts and law. (Leviant Decl., ¶ 6.) Investigation included, *inter alia*, the exchange of extensive data and discoverable information in preparation for the mediation session. The Parties have analyzed time clock, pay and other data pertaining to Plaintiff and the Class during the relevant Settlement Period, including but not limited to the numbers of former and current members of the Class, average workweeks and pay periods, and average rate of hourly pay. Time and pay data were used for Plaintiff’s pre-mediation analysis. In addition,

1 Defendant also provided other data pertaining to Plaintiff and the Class during the relevant Class Period,
2 including but not limited documents reflecting wage and hour policies and practices during the Class
3 Period (*e.g.*, the relevant employee handbook). (*Id.*)

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

10 C. Settlement

11 On June 25, 2024, the Parties participated in an all-day mediation presided over by Hon. Carl J.
12 West (Ret.), which led to this Agreement to settle the Action. The Parties discussed at length the burdens
13 and risks of continuing with the litigation as well as the merits of claims and defenses. After the
14 mediation, and the eventual settlement, the Parties then signed a long form settlement agreement (the
15 “Agreement”). (Leviant Decl., ¶ 8.) *In particular, the extreme risk posed by arbitration agreements was*
16 *discussed extensively during the mediation. (Id.)*

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

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

1 **V. CLASS DEFINITION**

2 The Class is defined as follows:

3 All persons who worked for Defendant in California as non-exempt employees during
4 the Class Period (the “Class Period” is the period from December 27, 2021 to August
5 24, 2024). “Participating Class Member” means a Class Member who does not submit
6 a valid and timely Request for Exclusion from the Class portion of the Settlement.
(Settlement, ¶¶ 1.5, 1.9, 1.12, 1.34.)

6 (Leviant Decl., ¶ 11 and Exhibit 1.)

7 **VI. DISCUSSION**

8 **A. Consistent with the Court’s Findings at the Time of Preliminary Approval, the**
9 **Court Should Certify the Class for Settlement Purposes**

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

15 “The certification question is ‘essentially a procedural one that does not ask whether an action is
16 legally or factually meritorious.’” *Id.*, at 326, quoting *Linder v. Thrifty Oil Co.*, 23 Cal. 4th 429, 439-440
17 (2000). The certification question asks whether the theory of recovery advanced by the plaintiff is likely
18 to prove amenable to class treatment. *See, e.g., Jaimez v. Daiohs USA, Inc.*, 181 Cal. App. 4th 1286,
19 1298 (2010). As the court noted in *Dunk*, although certification requirements are intended “to protect the
20 interests of the non-representative class members,” that concern is “protected by the trial court’s fairness
21 review of the settlement.” *Dunk v. Ford Motor Co.* 48 Cal. App. 4th 1794, 1807 n. 19 (1996). In view
22 of these standards, *as discussed more thoroughly as part of the preliminary approval motion*, the
23 Settlement Class should be certified for settlement. Code Civ. Proc. § 382; Rules of Court, Rule 3.769(c).

24 **B. The Court Should Approve the Settlement Because It Is a Fair, Adequate, and**
25 **Reasonable Compromise of Disputed Wage Claims**

26 California courts favor settlement. *See, e.g., Stambaugh v. Superior Court*, 62 Cal. App. 3d 231,
27 236 (1976). Unlike most settlements, class action settlements involve a court approval process that exists
28 to prevent fraud, collusion, and unfairness to class members. *Malibu Outrigger Bd. of Governors v.*

1 *Superior Court*, 103 Cal.App.3d 573, 578-579 (1980). For the reasons discussed below, this Court
2 should finally approve the Settlement and enter Judgment.

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

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

9 To evaluate a settlement, a court must receive “*basic*” information about the nature and magnitude
10 of the claims in question and the basis for concluding that the consideration being paid for the release of
11 those claims represents a reasonable compromise.” *Kullar v. Foot Locker Retail, Inc.*, 168 Cal. App. 4th
12 116, 133 (2008). But the record need *not* contain an explicit statement of the maximum theoretical
13 recovery. *Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles*, 186 Cal. App. 4th 399, 409 (2010).

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

17 A settlement is presumptively fair where it is reached through arms’ length bargaining, based on
18 sufficient discovery and investigation to allow counsel and the court to act intelligently, counsel is
19 experienced in similar litigation, and the percentage of objectors is small. *Dunk*, 48 Cal.App.4th at 1802;
20 *In re Microsoft I-V Cases*, 135 Cal. App. 4th 706, 723 (2006); *7-Eleven Owners for Fair Franchising v.*
21 *Southland Corp.*, 85 Cal. App. 4th 1135, 1146 (2000). In exercising the power to approve a settlement,
22 the overriding concern is to ensure that a proposed settlement is “fair, adequate, and reasonable,” *Dunk*,
23 at 1801, considering “the complexity and likely duration of further litigation, the risk of maintaining class
24 action status through trial, the amount offered in settlement, the extent of discovery completed and the
25 state of the proceedings, the experience and views of counsel, the presence of a governmental participant,
26 and the reaction of the class members to the proposed settlement. *Id.* These factors require balancing, are
27 non-exhaustive, and, as such, trial courts should tailor the factors considered to each case and give due
28 regard to “what is otherwise a private consensual agreement between the parties.” *Id.*

1 Here, the Settlement resulted from thorough, arms' length negotiations between experienced
2 counsel with the assistance of a skilled mediator, Hon. Carl West (Ret.) (Leviant Decl., ¶¶ 8-10.) Plaintiff
3 obtained data from Defendant and then carefully reviewed that information. Counsel for Plaintiff also
4 examined relevant policies and interviewed witnesses in detail about their work experiences and
5 Defendant's practices.

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

12 Finally, no Class Member requested exclusion, and no Class member objected to the proposed
13 Settlement.

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

17 *a) The Class Settlement is Fair, Adequate and Reasonable*

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

26 With respect to the claims asserted on behalf of the Class, there are serious risks that support this
27 compromise amount. These risks include, but are not limited to: (i) the risk that Plaintiff would be unable
28 to establish liability for unpaid wages, *see Duran v. US Bank Nat'l Ass'n*, 59 Cal. 4th 1, 39 & n. 33

(2014) (“*Duran*”); (ii) the risk that Defendant’s meal and rest period policies might not support class certification or a class-wide liability finding; (iii) the risk that uncertainties about the legality of Defendant’s policies and practices could preclude class-wide awards of statutory penalties; (iv) the risk that individual differences between Class Members could be construed as pertaining to liability and not just damages; (v) the risk that any penalty award under PAGA could be reduced by the Court in its discretion; (vi) the risk that lengthy trial or appellate litigation could ensue; (vi) the risk that violation rates could prove lower than expected; and (vii) the extreme risk that arbitration agreements would preclude class treatment. (Leviant Decl., ¶ 16.) These risks are non-exhaustive.

In light of the uncertainties of protracted litigation, the settlement amount reflects a fair and reasonable recovery for the Class Members. (Leviant Decl. ¶¶ 13-20.) The settlement amount is, of course, a compromise figure. (Leviant Decl. ¶ 17.) By necessity it took into account risks related to liability, damages, and the defenses asserted by Defendant. (*Id.*) Moreover, each Class Member will be given the opportunity to opt-out of the Settlement, allowing those who feel they have claims that are greater than the benefits they can receive under this Settlement to pursue their own claims. (*Id.*) For the **751** members of the Class, the average **gross** benefit is **\$466.04** per class member, and the estimated average **net** recovery for each Class Member would be approximately **\$227.41**. Given that Defendant could potentially defeat certification, this is a significant sum to have achieved in settlement. Moreover, a Class Member who worked a greater number of weeks for Defendant will receive a larger share of the Settlement than a Class Member who worked for a shorter amount of time during the class period. (*Id.*)

After analyzing the claims in this matter, Plaintiff concludes that the value of this Settlement is fair, adequate, and reasonable. The GSA of **\$350,000.00** is about 97.22% of the **\$360,006.24** estimate of *risk-adjusted* recovery (excluding interest) at this stage in the litigation. (Leviant Decl., ¶ 18.) This assessment is based on a carefully constructed model of the current fair value of the case, using estimated risks, average wage rates, numbers of employees, and the length of the class period. (*Id.*)

- A reasonably estimated exposure for unpaid wages due to regular rate issues was A reasonably estimated exposure for unpaid off-the-clock wages was calculated, with the assistance of an expert, to be approximately **\$51,039.50**. However, with the high risk factor discounts for certification and liability proof, the value of that claim is estimated by Plaintiff’s counsel to be approximately **\$4,083.16**, assuming certification probability of 20% and merits success at 40%. The off-the-clock time resulted from employees having to perform cleanup tasks after clock-out times were recorded, and from waiting to start

their shifts. Here, a \$4,083.16 exposure has a value of about 8% of its maximum, given a likelihood of success on both certification and the merits, which is an approximation of the chain probability of certification multiplied by merits chances: $0.2 \times 0.4 = 0.08$. Arbitration agreements pose a very high risk for this claim. This theory of recovery also has a high degree of risk because it depends on Class Member estimates of the frequency and duration and is testimony dependent.

- A reasonably estimated exposure for rest break violations over the class period was calculated at **\$152,595.00**, but with chances of certification and proof of liability (20% and 20% respectively) for a risk-adjusted exposure of **\$6,103.80**. This claim is based entirely on class member testimonials that rest breaks were sometimes missed due to work demands, Plaintiff asserted value for settlement purposes, while understanding that this theory carries the potential for high risk given that employees were often allowed to determine when to take rest breaks. Arbitration agreements pose a very high risk for this claim. The exposure assumes about a quarter of the class at any one time missed a rest break every single week.
- A reasonably calculated exposure for meal break violations over the class period was calculated at **\$76,297.50**, with chances of certification and liability risks (30% and 30% respectively) resulting in a risk-adjusted exposure of **\$6,866.78**. This exposure is based upon assumed violations from class member testimony, given that the records overwhelmingly show identical, 30-minute meal periods for all class members. Employee choice is a serious issue in the context of a meal period claim. So long as an employee has the opportunity to take a lawful meal period, an employee can choose to take it late, cut it short, or skip it. Arbitration agreements pose a very high risk for this claim.
- The risk-adjusted penalty recovery for Labor Code § 203 penalties was estimated to be approximately **\$64,921.50**, on a maximum exposure of **\$1,082,025.00** (with certification and merits success chances of 20% and 30% respectively, based on all theories of unpaid wages, adjusted for the additional risk of needing to prove other elements in addition to the underlying wage claim). The need to show a knowing and intentional violation constitutes an additional risk factor.
- The risk-adjusted penalty recovery for wage statement penalties were estimated to be approximately **\$23,706.00**, on a maximum exposure of **\$395,100.00** (with certification and merits success chances of 20% and 30% respectively, based on all theories of unpaid wages, adjusted for the additional risk of needing to prove other elements in addition to the underlying wage claim). The value of this claim was just dealt a severe blow by the recent California Supreme Court decision of *Naranjo v. Spectrum Security Services, Inc.* (May 6, 2024), which significantly strengthened the good faith defense to Section 226 penalties.
- Performing risk-adjusted valuations for all claims yields a total value in the range of **\$105,681.24**, excluding PAGA.¹
- PAGA penalties exposure was calculated to be **\$1,695,500**. But, assuming issues with

¹ It is difficult to assign specific percentages to future events, but it does provide a specific method for attempting to reduce the concept of “very high risk” or “high risk” to a quantifiable amount. Certification of a claim is typically a binary event. One does not obtain a 20% certification; a claim is either certified or it is not. But the current expected value is best quantified by applying a risk reduction, based on the total experience of counsel. The numbers explain with math what can also be described conceptually in words.

proof and cooperation of aggrieved employees, along with the Court’s power to reduce penalties, the realistic exposure was calculated to be **\$254,325.00**. As an alternative method of calculating exposure, if the most common \$100 penalty per pay period is applied to the total number of pay periods (17,369), the approximated exposure is \$1,736,900, which is very close to the calculated exposure derived from actual data.

(See, Leviant Decl., ¶ 18.)

This result here is fully supportable as reasonable. Many risks are eliminated through settlement. And, with respect to those risks, certification rates in California are **lower** than conventional wisdom holds. Arbitration agreements present a very high risk to all class claims. The Judicial Council’s Class Certification in California: SECOND INTERIM REPORT FROM THE STUDY OF CALIFORNIA CLASS ACTION LITIGATION - FEBRUARY 2010 (“Second Interim Report”), at page 5, states that “less than a quarter of disposed cases in the study sample were certified, either through a litigated motion for certification or as part of a classwide settlement agreement.” See, Second Interim Report, at 5 (emphasis added).² That “**or**” is significant. The certification rates identified in the study of less than 25% includes **both** contested certifications and settlement certifications, which are the majority of certifications. In other words, one must assume in any wage and hour class action prior to certification that a contested certification motion will have a success rate of well under 25%, and probably closer to 10% as a starting point for risk evaluation. The facts of each case have significant bearing on these percentages. But it cannot be disputed that certification is an exceptionally difficult procedural hurdle to successfully overcome. Thus, it is not unreasonable to start from the proposition that a pre-certification settlement that is 10% to 15% of the maximum plausible exposure is a valid starting point for valuation. If roughly 10% of class actions are certified on a contested basis, then, on average, 90% of the time a class will not be certified and the result for the class is *zero* dollars

Here, the estimated certification probabilities are **above** the average rate at which cases were certified in California, based upon data available through the California Courts websites showing that well *under* 20% of all cases filed as proposed class actions are ultimately certified by way of a *contested* motion. (Leviant Decl., ¶ 19.) The recovery falls within the expected outcome under the likelihood of

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

1 success metric. (*Id.*) It would also be appropriate to evaluate the result by examining only the premium
2 wages at issue (approximately \$279,932.00, *with no risk reduction*), excluding penalties and interest.³
3 Because the total Settlement amount and the proportion of the Settlement allocated to PAGA penalties
4 fall within the range of what is reasonable, the Settlement should be approved.

5 *b) The PAGA Allocation is Reasonable*

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

11 Prior to the issuance of *Moniz v. Adecco USA, Inc.*, 72 Cal. App. 5th 56 (2021), the only sources
12 of persuasive guidance as to how to assess the reasonableness of a PAGA allocation were found in
13 federal court decisions. In their view, a PAGA allocation, even if a small portion of the total settlement,
14 could be reasonable if the settlement of the wage and hour claims is robust and serves the deterrent
15 purpose of PAGA. *O’Connor v. Uber Technologies, Inc.*, 201 F.Supp.3d 1110, 1135 (N.D. Cal. 2016).
16 *Moniz* provided explicit confirmation that this was an appropriate yardstick by which to measure
17 reasonableness of a PAGA settlement. *Moniz*, 72 Cal. App. 5th at 77. *Moniz*, in agreeing with federal
18 courts that considered how to evaluate a PAGA settlement, concluded that class action factors are
19 appropriately considered, along with whether the settlement furthers “PAGA’s purposes to remediate
20 present labor law violations, deter future ones, and to maximize enforcement of state labor laws.”

21 As to the first set of elements (the class-type analysis), it is embodied in Plaintiff’s discussion of
22 the adequacy of the settlement generally. Here, the expense, complexity and likely duration of future
23

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

1 litigation was to some extent an unknown. However, what is certain is that to adequately establish the
2 violations that would support a substantial penalty, tremendous time and expense would be invested.

3 The second element (the PAGA purposes element) is also satisfied here. As held by *Moniz*,
4 PAGA's purposes include (1) remediation of present labor law violations, (2) deterrence of future
5 violations, and (3) maximization of enforcement of state labor laws. Here the allocation of a major
6 portion of settlement funds to class members still advances the goal of labor law violation remediation.
7 The allocation of a major portion of settlement funds to class members also deters future violations. This
8 is a \$355,000.00 settlement, a good result. Deterrence is fulfilled. Finally, allocation of a major portion
9 of settlement funds to class members still advances the goal of enforcement of state labor law. This
10 settlement is, by definition, a response to alleged violations of labor laws, balanced against risks.

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

16 Finally, the PAGA allocation is fair. The LWDA is receiving \$26,250.00. The Class is
17 receiving, net, an estimated \$170,783.33 for the releases of *all* other claims. While the proportion is
18 tipped in favor of employees, the allocation satisfies California's wage and hour policies.

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

20 The proposed method of allocating the Settlement Fund to Class Members also is fair and
21 reasonable. The Settlement Fund is to be allocated between all Class Members, based on time worked by
22 the Class Member during the Class Period, in relation to the total amount of time worked by all
23 participating Class Members. This proposed method is fair and reasonable because each Class Member's
24 actual potential damages vary based on the number of workweeks he or she worked (e.g., Lab. Code §
25 226.7 provides for an extra hour of pay at the employee's regular rate of pay for each violation, resulting
26 in a higher potential damage when a higher number of incidents occur). A Class Member who worked a
27 greater number of work weeks will receive a larger payment under the Settlement than a Class Member
28 who worked for a shorter amount of time. (Leviant Decl., ¶17.)

1 **5. The Proposed Enhancement Award to Plaintiff Warrants Approval.**

2 The proposed enhancement of \$5,000.00 to Plaintiff is intended to recognize substantial initiative
3 and significant efforts on behalf of the Class. Courts routinely approve incentive awards to compensate
4 named plaintiffs for the services they provide and the risks they incur during class action litigation, often
5 in much higher amounts than that sought here. Factors considered when awarding an incentive include
6 the actions the plaintiff has taken to protect the class, the degree to which the class has benefitted, the
7 amount of time and effort the plaintiff expended in the litigation, the risk to the class representative in
8 commencing suit (financial and otherwise), the notoriety and personal difficulties encountered, the
9 duration of the litigation, and the personal benefit (or lack thereof) enjoyed by the plaintiff as a result of
10 the litigation. *Clark v. Am. Residential Servs. LLC*, 175 Cal. App. 4th 785, 804 (2009). Here, Plaintiff
11 contributed time to the prosecution of this matter, including bringing the case forward, and providing
12 assistance prior to the mediation with information and substantial time conferring with counsel over the
13 course of this litigation and before it was filed. (Clemente Decl., ¶¶ 5-19; Leviant Decl., ¶ 33.) The
14 enhancement also recognizes risks Plaintiff took to be personally liable for costs regardless of the success
15 of the litigation, as well as the personal risk of facing intrusive discovery and potential disclosure to
16 future employers that Plaintiff sued an employer, making future employment less certain.

17 **6. The Proposed Award of Class Counsel Attorneys' Fees and Costs Is Also**
18 **Fair, Adequate, and Reasonable and Merits Approval.**

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

21 The request for fees as a percentage of a settlement is supported by the “common fund theory,”
22 where “one who expends attorneys’ fees in winning a suit which creates a fund from which others derive
23 benefits, may require those passive beneficiaries to bear a fair share of the litigation costs.” *Serrano v.*
24 *Priest*, 20 Cal. 3d 25, 35 (1977). The common fund doctrine has been applied “consistently in California
25 when an action brought by one party creates a fund in which other persons are entitled to share.” *City*
26 *and County of San Francisco v. Sweet*, 12 Cal. 4th 105, 110 (1995). The lodestar may be cross-checked
27 against the percentage. *See In re Consumer Privacy Cases*, 175 Cal. App. 4th 545, 556-58 (2009).

28 The California Supreme Court removed any lingering doubt about the use of the percentage of

1 the fund method to award attorney's fees in California Courts. *Laffitte v. Robert Half Intern. Inc.*, 1 Cal.
2 5th 480, 503 (2016).⁴ Thus, this Court may and, as strongly encouraged by the California Supreme
3 Court, *should* award fees to Class Counsel based upon the percentage of the fund methodology.

4 "Empirical studies show that, regardless whether the percentage method or the lodestar method is
5 used, fee awards in class actions average around one-third of the recovery." *Chavez v. Netflix, Inc.*, 162
6 Cal. App. 4th 43, 47 n. 11 (2008). This is consistent with counsels' experience in class cases. Here,
7 Plaintiff's attorneys request attorneys' fees of up to **\$116,666.66** (33 and 1/3% of the GSA), and actual
8 costs in the capped amount of **\$14,000.00**. (Leviant Decl., ¶ 32.) Given the efforts and risks involved in
9 this case, as well as the results achieved, these amounts are within the range of reasonableness and
10 warrant *final approval*.

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

13 Plaintiff's fee application is also reasonable based on lodestar. Under the lodestar method, the
14 court considers a compilation of the time spent and a reasonable hourly compensation of each attorney to
15 evaluate the reasonableness of the fee. *Ramos v. Countrywide Home Loans, Inc.*, 82 Cal. App. 4th 615,
16 622 (2000). The moving party meets its burden by submitting "declarations evidencing the reasonable
17 hourly rate for their services and establishing the number of hours spent working on the case" as
18 "California case law permits fee awards in the absence of detailed time sheets." *Wershba*, 91 Cal. App.
19 4th at 254-55; *Dunk*, 48 Cal. App. 4th at 1810; *Nightengale v. Hyundai Motors America*, 31 Cal. App.
20 4th 99, 103 (1994). The hours spent and the reasonable hourly compensation are used to arrive at a
21 "lodestar" figure which may then be augmented or diminished taking into account various "multiplier"
22 factors. *See Ramos*, 82 Cal. App. 4th at 622 (*citing Serrano*, 20 Cal. 3d at 48-49).

23 Here, Class Counsel's *total* lodestar is **\$130,507.50** (including past and anticipated time not
24 billed by Mr. Leviant). (Leviant Decl., ¶ 32.) Plaintiff contends the request for **\$116,666.66** in attorneys'
25

26 ⁴ The Supreme Court also corrected the misconception that *Dunk* should be viewed as expressing
27 doubt about the use of the percentage method: "The *Dunk* court, while finding the percentage method
28 inapplicable to the settlement before it due to the lack of a readily valued common fund, did not purport
to bar its usage generally in common fund cases." *Laffitte*, 1 Cal. 5th at 501.

fees, which is **0.89** times the estimated total lodestar, is reasonable under the lodestar method, given the recovery obtained for the Class.

(1) Class Counsel's Hours Are Reasonable

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

(2) Class Counsel's Hourly Rates Are Reasonable

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

Class Counsel are experienced litigators who specialize in employment law, with a substantial wage and hour practice. (Leviant Decl., ¶¶ 21-27.) Courts throughout California have approved Class Counsel’s hourly rates. (Leviant Decl., ¶ 21.) Given the skill and experience of Class Counsel, and the excellent result achieved, Plaintiff contends Class Counsel’s hourly rates are reasonable.

c) Class Counsel's Costs Are Reasonable

The Agreement provides for reimbursement of costs not to exceed \$14,000.00. Because actual costs exceed the cap by about \$239.99, Moon Law Group, PC seeks costs in the capped amount of **\$14,000.00** (Leviant Decl., ¶ 32, Exh. 2.) These costs were reasonably incurred in prosecuting the Action on behalf of the Class Members and should be approved by the Court. Accordingly, Class Counsel respectfully requests the Court approve total costs in the amount of **\$14,000.00**. (*Ibid.*)

ILYM, which was selected due to its competitive bid, states that administration will cost **\$8,550.00**. (Castro Decl., ¶ 14.) In counsel's experience, based on similar wage-and-hour actions, a cost of **\$8,550.00** is a fair and reasonable amount for administration fees and should be approved. (Leviant Decl., ¶ 34.) ILYM has previously confirmed its capabilities to perform administration services.

VII. CONCLUSION

For all the foregoing reasons, because the Class meets the requirements for certification for settlement purposes, only, because the Settlement bears all requisite indicia of fairness, reasonableness, and adequacy, and because the notice procedure and forms complied with Rule 3.766 and Due Process, this Court should grant this Motion for Final Approval, adopt the [Proposed] Order Granting Final Approval of Class Action Settlement submitted herewith, and enter the [Proposed] Judgment.

Respectfully submitted,

Dated: September 2, 2025

MOON LAW GROUP, PC

By:

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