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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SACRAMENTO

JEFFREY REYES, as an individual on behalf of himself and on behalf of all others similarly situated,

Plaintiff,

vs.

THE YERBA MATE CO., LLC, a Delaware Limited Liability Company; GUAYAKI SUSTAINABLE RAINFOREST PRODUCTS, INC., a California Corporation; and DOES 1-100, inclusive,

Defendants

Case No.: 34-2022-00331592

Assigned for All Purposes to:
Hon. Jill Talley
Dept. 23

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND REQUEST FOR ATTORNEY'S FEES AND COSTS

[Filed concurrently with Notice of Motion and Motion; Declarations of Brandon K. Brouillette and Taylor Mitzner; [Proposed] Order]

Date: August 23, 2024
Time: 9:00 a.m.
Dept. 23

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

I. INTRODUCTION

Plaintiff Jeffrey Reyes seeks final approval of a non-reversionary class action settlement resolving wage and hour claims on behalf of 258 individuals employed by Defendants The Yerba Mate Co., LLC and Guayaki Sustainable Rainforest Products, Inc. (together "Yerba Mate" or "Defendants") as non-exempt employees in California at any time within the Class Period of December 18, 2018 to October 14, 2023, excluding certain individuals covered by a prior class action settlement. The proposed $276,689.29 total settlement (as addressed below the Settlement's escalator clause was triggered) provides about $133,456 in cash payments to the Class, with an average award of about $517, plus additional amounts payable under PAGA. The remaining balance will cover a modest service award to Plaintiff, settlement administration costs, civil penalties to the state, and reasonable attorney's fees and costs. The parties and their counsel finalized the settlement after extensive and difficult arms-length negotiations overseen by an experienced and highly-regarded mediator. The Court conditionally certified the Class and preliminarily approved the settlement on March 7, 2024. Since then, the Court-approved notice form was mailed to the Class Members on May 1, 2024, and they have reacted very favorably to the settlement. As of the date of this motion, there are no objections and only one class member opted out.

Further, Class Counsel secured an excellent settlement with Yerba Mate after some two years of investigation, litigation, and settlement negotiation and administration, all without any compensation for services rendered or costs expended. The class notice duly informed the class members that Class Counsel would request attorney's fees not to exceed 33.33% of the Gross Settlement Amount, or $91,666.00, along with reimbursement of no more than $20,000 for actual costs incurred litigating this matter. As of the filing of this motion, *not one Class Member objected* to the proposed fee award. Consistent with the Settlement and notice, Plaintiff now respectfully requests the Court award Class Counsel's fees in the amount of $91,666.00 and costs in the amount of $18,066.46, as described in the Declaration of Brandon Brouillette ("Brouillette Decl.") filed herewith. The requested attorney's fees are well within the range of reasonableness, especially considering the complex and risky nature of this litigation, the contingent risk assumed, and the two-plus year delay in payment and, when subjected to a lodestar crosscheck, result in a modest 1.14 enhancement to the base lodestar.

Accordingly, on behalf of himself and the Settlement Class, Plaintiff respectfully requests the Court grant this motion, give full and final approval to the settlement, grant Class Counsel's request for attorney's fees and costs, and enter judgment accordingly.

II. FACTUAL BACKGROUND AND PROCEDURAL POSTURE

The details of the procedural and factual background of this matter were outlined in the Plaintiff's Motion for Preliminary Approval of Class Action Settlement (filed on or about October 25, 2023). To re-familiarize the Court with this litigation, Defendants manufacture and distribute yerba mate drinks and related products. Plaintiff worked for Defendants as delivery route driver for which he reported to Defendants' locations in San Francisco and Sebastopol, California and completed delivery routes to vendors across Northern California including to Sacramento, San Francisco, and San Jose, California. Plaintiff was hired on or around November 14, 2018. [Brouillette Decl., ¶ 2.]

Plaintiff alleges a number of wage and hour violations by Defendants. First, he claims the company pressured employees to complete routes at a breakneck pace in order to minimize labor hours, and any applicable overtime and double time pay. Per Plaintiff, this included pressure to continue driving through meal periods and to clock out but continue working if he was unable to finish his duties in the allotted timeframe. Plaintiff further alleges he and class members regularly missed rest breaks and routinely had meal breaks interrupted. Plaintiff's employment ended on January 5, 2022.[1] [Brouillette Decl."), ¶ 3.]

Based on these allegations, on December 19, 2022, Plaintiff filed a class action complaint in Sacramento Superior Court alleging claims for: (1) failure to pay all wages due, including minimum and overtime wages (2) failure to provide all required meal and rest breaks or compensation in lieu thereof; (3) failure to provide accurate, itemized wage statements; and (4) failure to pay all wages due upon termination of employment. Plaintiff also alleged claims for unfair competition premised on the same Labor Code violations. Plaintiff subsequently filed a First Amended Complaint adding a PAGA cause of action. [Brouillette Decl., ¶ 4.]

Yerba Mate has at all times denied Plaintiff's allegations and maintained its meal and rest break and payroll policies and procedures comply with California law, that it paid the class member wages due, and provided them with required meal and rest breaks or paid the required compensation for any documented meal/rest violations. Additionally, Yerba Mate strongly contends the case cannot be maintained as a class action, arguing for example that to the extent class members missed meal and/or rest breaks, or that such breaks were non-compliant, it was intermittent and infrequent and evidence of such missed breaks would be anecdotal, and therefore individualized issues would predominate. Defendants further emphasized they reached a class and PAGA settlement in *Troyer v. The Yerba Mate Co., LLC, et al.,* Alameda County Superior Court Case Nos. RG20074741 and RG200683071, that released many of the wage and hour claims alleged in this matter. [Brouillette Decl., ¶ 5.]

Once the matter was at issue, the Parties initiated discovery and later, after engaging in meet and confer discussions regarding discovery, potential law and motion, and the merits of the case, ultimately agreed to attempt mediation. They then engaged in significant informal discovery to facilitate an exchange of information necessary to engage in a meaningful mediation. In September 2023, the Parties participated in mediation with the Hon. Carl J. West (Ret.), a

[1] Plaintiff retained separate counsel for a wrongful termination lawsuit against Defendants that is currently pending.

respected wage and hour class action mediator and, after a full day of mediation, reached the proposed settlement. [Brouillette Decl., ¶¶ 6-7.] This Court preliminarily approved the settlement on March 7, 2024.

Class notices were mailed to class members on May 1, 2024, with a 60-day window (to July 1, 2024) for class members to opt out of or object to the proposed settlement. [Declaration of Taylor Mitzner ("Mitzner Decl."), ¶¶ 5, 8-9.]

III. <u>THE PROPOSED SETTLEMENT TERMS</u>

Under the settlement, Yerba Mate will pay $276,689.76[2] into a common fund, the Gross Settlement Amount ("GSA"). Attorney's fees of up to $91,666.00 (1/3 of the GSA), litigation costs of up to $20,000 (only $18,066.46 is requested), settlement administration costs of 8,500, a service award to Plaintiff of no more than $5,000, and PAGA civil penalties of $20,000, all will be paid from the GSA. The balance of around $133,456 will be allocated pro rata to the Class Members based on their weeks worked during the Class Period. No portion of the GSA will revert to Yerba Mate. [Brouillette Decl., ¶ 8.]

A. <u>Certification of the Settlement Class</u>

The Court conditionally certified a settlement class defined to include all non-exempt employees, including Plaintiff, who worked for Defendants during the Class Period of December 18, 2018 through October 14, 2023, but excluding those non-exempt employees covered by the settlement in *Casey Troyer v. The Yerba Mate Co., LLC, et al.,* Case No. 3:20-cv-06065-WHA (N.D. Cal.) and as Alameda County Superior Court Case No. RG20068307, whose employment ended prior to April 12, 2021. The Settlement Administrator ultimately mailed class notices to 259 individuals identified as members of the Class. [Mitzner Decl., ¶ 5.] Nothing has changed to require reconsideration of the Court's certification of the Settlement Class.

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[2] As noted, the Settlement's escalator clause was triggered and Defendants elected to increase the Gross Settlement Amount under Section 57 of the Settlement Agreement. [Mitzner Decl., ¶ 12.]

B. <u>The Benefit Conferred on the Settlement Class</u>

As noted, after application of the escalator clause, the settlement obligates Yerba Mate to pay $276,229.76 to resolve the Settlement Class's claims, inclusive of attorney's fees and costs. At least $133,456 from the GSA will be distributed to the Participating Class Members. This is a cash settlement that <u>does not</u> require Participating Class Members to submit a claim form to receive their settlement share. Participating Class Members will receive their settlement checks automatically via First Class U.S. Mail. Twenty-five percent of each settlement share will be allocated to wages and the remaining seventy-five percent will be allocated to penalties and interest, which allocation is consistent with Yerba Mate's potential liability. Yerba Mate will pay any and all applicable employer-side payroll taxes separately and in addition to the GSA. Subject to the Court's approval, any amounts not claimed (because a class member does not cash their settlement check) will be forwarded to the State Controller's Unclaimed Property Fund. [Brouillette Decl., ¶ 9.]

Each Participating Class Member will receive a share of the Net Settlement Amount based on his or her total weeks worked in California as a non-exempt employee during the Class Period. Thus, each Class Member's Individual Settlement Payment will be calculated using criteria typically used in determining appropriate amounts of unpaid wages, unpaid premium wages for missed meal and rest breaks, and potential statutory penalties under applicable law. These methods are intended to ensure each Class Member receives a settlement award corresponding to the relative value of their potential claims. The proposed allocation provides a reasonable way to compensate Class Members based on the amount of time they worked for Yerba Mate in California and the amount unpaid overtime, the number of missed meal breaks and/or rest breaks, etc. [Brouillette Decl., ¶ 10.]

The average award to the Participating Class Members will be approximately $517 with a maximum award of over $2,370, while the average PAGA award will be about $30. [Mitzner Decl., ¶¶ 14-15.]

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C. Settlement Administration

Phoenix Settlement Administrators, as the Court-approved Settlement Administrator, mailed the Notice Packet to the Class members after making all reasonable effort to ascertain the best mailing address, including running each address through the National Change of Address database and "skip-tracing" any Notice Packets returned as undeliverable. [Mitzner Decl., ¶¶ 3-7.] The Class Notice, previously approved by the Court, duly informed Class Members of the settlement terms, including the estimated relief each Class Member will receive, the amounts to be requested for attorney's fees and the class representative enhancement awards, and the right to opt out of or object to the settlement. [Mitzner Decl., ¶ 5; Exh. A.] Phoenix mailed 259 Notice Packets on May 1, 2024. [Mitzner Decl., ¶ 5.] As of the filing of this motion, two Notice Packets were deemed undeliverable, for a 99.2% success rate. [Mitzner Decl., ¶¶ 8-9.] The response window for opting out, objecting to the settlement, or submitting a dispute, expired on July 1, 2024. [Mitzner Decl., ¶¶ 8-10.] As of the filing of this motion, Phoenix has received one request for exclusion, zero objections to the settlement, and no disputes have been submitted regarding the information used to calculate class member settlement shares. [Mitzner Decl., ¶¶ 8-10.]

D. Release of Claims

All Participating Class Members will release Yerba Mate from all claims alleged in the operative complaint, or that could have been brought based on the factual allegations in the complaint during the Class Period. The release is limited to the claims that were actually pleaded or could have been pleaded based on the alleged facts in the complaint. [Brouillette Decl., ¶ 11.]

E. PAGA and Notice to the LWDA

As noted, the Parties allocated $20,000 to resolution of Plaintiff's alleged claims under PAGA, and Plaintiff requests the Court approve that amount as fair, reasonable, and adequate, and consistent with PAGA's underlying purposes. Consistent with PAGA, $15,000 of that amount will go to the LWDA for the State's share of the civil penalties, while the remaining $5,000 will be distributed pro rata to 163 eligible PAGA Members. Prior to filing this motion, Plaintiff provided notice of the proposed settlement of the PAGA claims and the approval hearing to the LWDA. [Brouillette Decl., ¶ 12; Exh. 1.]

IV. ARGUMENT

A. Standards For Approval

The law favors settlement, particularly in class actions where substantial resources can be conserved by avoiding the time, cost, and rigors of formal litigation. H. Newberg & A. Conte, 4 Newberg on Class Actions (4th ed. 2002), § 11.41; Class Plaintiffs v. City of Seattle (9th Cir. 1992) 955 F.2d 1268, 1276, cert. denied, 506 U.S. 953; Van Bronkhorst v. Safeco Corp. (9th Cir. 1976) 529 F.2d 943,950; Potter v. Pacific Coast Lumber Co. (1951) 37 Cal.2d 592, 602. Nevertheless, to make certain the rights of absent parties are not unjustly compromised, the settlement of a class action requires court approval. Cal. Rule of Court 3.769; Dunk v. Ford Motor Co. (1996) 48 Cal.App.4th 1794, 1801; Wershba v. Apple Computer (2001) 91 Cal.App.4th 224, 245. The purpose of that judicial review is to protect against fraud or collusion, and to ensure fairness to absent class members. Dunk, 48 Cal.App.4th at 1800-01; Newberg, at §§ 11.22, *et seq.* Review is accomplished through a two-step process intended to determine whether, under the totality of circumstances, the settlement is fair, reasonable and adequate. Dunk, 48 Cal.App.4th at 1801; Wershba, 91 Cal.App.4th at 245.

On a motion for final approval, the trial court is charged with determining whether, in light of the total circumstances of the action and the response of the class members to the proposed settlement, the settlement is fair, reasonable, and adequate. Dunk, 48 Cal.App.4th at 1801-02; Wershba, 91 Cal.App.4th at 244-45. The court has broad discretion in making that determination and may consider a number of relevant factors, including: the strength of plaintiff's case; the likelihood of potential recovery; the risk, expense and likely duration of further litigation; the amount offered in settlement; the extent of discovery and stage of the proceedings; the experience and opinion of counsel; and the reaction of class members to the settlement. Id. In light of the strong judicial policy favoring the settlement of class actions, courts generally apply a presumption of fairness to a proposed class action settlement when: (1) the settlement is reached through arm's-length bargaining; (2) investigation and discovery are sufficient to allow counsel and the court to act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of objectors is small. Dunk, 48 Cal.App.4th at 1802; Wershba, 91 Cal.App.4th at 245.

B. The Proposed Settlement Merits Final Approval

The proposed settlement of this action warrants final approval under the standards summarized above. The settlement is fair, reasonable and adequate, and represents a favorable resolution of highly disputed claims. Further, the settlement was overwhelmingly approved by the class members as there are no objections and only one class member has requested exclusion.

1. The Settlement Is the Product of Arm's-Length, Informed Negotiations

The settlement is not the result of fraud or collusion. Rather, the proposed settlement was reached following arm's-length negotiations presided over by the Hon. Carl West (Ret.), a highly respected and well-known mediator with extensive experience mediating wage and hour class actions. [Brouillette Decl., ¶ 7.] Moreover, Plaintiff and his counsel were well-informed about the facts and the law, and counsel Zachary M. Crosner, Jamie K. Serb, and Brandon Brouillette have years of litigation experience, including litigating wage and hour class actions. Plaintiff’s counsel are well-qualified to evaluate the risks and benefits of pursuing further litigation or settling the matter. [Brouillette Decl., ¶¶ 28-40.] Yerba Mate likewise was represented by highly-qualified and experienced defense counsel. Both sides advocated vigorously for their clients and nothing was "left on the table."

2. The Class Reacted Favorably to the Settlement

The settlement was well-received by the class. As of the filing of this motion, no objections have been filed, and only one Class Member has requested exclusion out of 259 settlement class members. [Mitzner Decl., ¶¶ 8-9.] As many courts recognize, class member reaction to the settlement is one of the most important factors to consider in determining if final approval should be granted. Mandujano v. Basic Vegetable Prods., Inc., 541 F.2d 832, 837 (9th

Cir. 1976); see also In re: American Bank Note Holographics, 127 F.Supp.2d 418, 425 (S.D.N.Y. 2001) ("It is well-settled that the reaction of the class to the settlement is perhaps the most significant factor to be weighed in considering its adequacy") (internal quotation marks omitted).

C. The Proposed Settlement Meets the Dunk and Kullar Factors and is within the Range of Reasonableness

The proposed settlement resulted from arms-length negotiations facilitated by respected mediator the Hon. Carl J. West (Ret.), who has extensive experience mediating wage and hour class actions. [Brouillette Decl., ¶ 7.] Plaintiff's counsel Brandon Brouillette, Jamie Serb, and Zachary Crosner, and Crosner Legal PC, all have years of litigation experience, including litigating wage and hour class actions. Plaintiff's counsel are well-qualified to evaluate the risks and benefits of pursuing further litigation or settling the matter. [Brouillette Decl., ¶¶ 28-40.]

The proposed settlement involves a substantial sum of money that, when distributed, will confer meaningful monetary benefits on the Class members. As described above, each individual award will be based on an allocation consistent with the nature of the claims asserted and will fairly and equitably allocate the available funds in relation to the degree of damage each Class member incurred. While class members who worked for only a short period of time will receive relatively small sums, those with longer tenures and who worked more hours and shifts throughout the class period will receive appropriately larger awards.

Prior to mediation, the parties engaged in extensive formal informal discovery to facilitate settlement discussions. As a result, Plaintiffs reviewed documents and information regarding Yerba Mate's payroll practices, pay stubs and time records for a sampling of class members, meal and rest break policies, etc., and information from Defendants regarding class size and breakdown of job positions, work weeks, rates of pay, and other information used to formulate a damages model. This extensive information then was analyzed by a consulting expert to look for meal and rest break violation rates, time spent working off the clock, etc., and other issues relevant to liability and damages. Plaintiff's counsel are confident they obtained sufficient information to enable them to understand the law and facts of this case and make an informed decision regarding the proposed settlement and whether it is in the best interests of the class. [Brouillette Decl., ¶¶ 6, 13.]

Using that data, Plaintiff ran various calculations and estimated Yerba Mate's likely maximum exposure on the class claims at approximately $1,008,000, including about $95,500 on the off the clock/unpaid wage claims, approximately $72,900 on the meal period claims, about $274,700 on the rest period claims, around $182,350 on the wage statement claims, and $382,600 on the waiting time penalty claims. [Brouillette Decl., ¶ 14.] Plaintiff and counsel substantially discounted the value of these claims, however, in light of Defendant's multi-layered defenses on both class certification and on the merits, and the multiple and considerable risks posed by proceeding with the litigation.

The unpaid wage claims focus primarily on Yerba Mate's alleged failure to pay Class Members at least minimum wages and/ or overtime wages for all of their hours worked. First, Plaintiff alleged a policy whereby management pressured Plaintiff and other driver employees to complete their routes while off the off the clock, both during meal periods and, at times, after clocking out in order to reduce overtime and double time hours and ensure routes were completed within an allotted timeframe Plaintiff also alleges Defendants failed to incorporate one time flat-sum bonus payments for sales contests into their regular rate of pay calculations when paying overtime as required by Alvarado v. Dart Container Corp. (2018) 4 Cal.5th 542 (2018), although he does acknowledge the damages on this claim are minimal. [Brouillette Decl., ¶ 15.]

In response, Yerba Mate argued its payroll policies are fully compliant, that it properly tracked and paid for all hours worked at the appropriate hourly wage. Defendants also argued that, if any class members failed to record and report time it was in violation of company policy and would have occurred on a haphazard and individual basis. Accordingly Defendants argued the issue would not be certifiable since it would require individualized inquiries whether any compensable "off the clock" work occurred and why it was or was not documented and paid for. White v. Starbucks Corp., 497 F.Supp.2d 1080, 1083 (N.D. Cal. 2007) (employer must have actual or constructive knowledge of the off the clock work for liability to attach). [Brouillette Decl., ¶ 16.]

On the meal and rest break claims, Plaintiff contends Yerba Mate's written policies are not fully compliant, and Plaintiff and other drivers were pressured to complete their routes at a breakneck pace in order to minimize the hours worked, which policies naturally resulted in missed and non-compliant breaks. Plaintiff's review of the time and payroll records provided suggested these deficiencies in the policies affected employee breaks. For example, Plaintiff's analysis showed a 28% violation rate for meal period violations, and further showed Defendants did not start paying the required premium wage for documented violations until <u>after</u> Plaintiff filed his initial complaint. [Brouillette Decl., ¶ 17.]

In response, Yerba Mate argued its written policies are fully compliant, particularly after settling the prior wage and hour class action, and that it provided employees with the opportunity to receive all required breaks. Defendants further maintained that, in light of their compliant policies, whether a class member missed a meal period, received a late meal period, or missed a rest break would have been aberrational and against company policy. Thus, per Yerba Mate, these issues are not amenable to class or representative treatment since their resolution would require individualized inquiries as to why a break was missed or non-compliant. [Brouillette Decl., ¶ 18.]

The claims under Labor Code sections 203 and 226 are derivative of the primary unpaid wage claims, and accordingly are subject to the same risks and uncertainties plus additional risks posed by the need to take into account the discretionary nature of such awards and the "good faith" and other defenses available to Defendant. <u>Amaral v. Cintas Corp. No. 2</u> (2008) 163 Cal.App.4th 1157, 1203-4 (employer did not willfully fail to pay wages under Labor Code § 203 even though class prevailed on underlying claim for failure to pay living wages). Thus, while these claims largely are derivative of the unpaid wage claim, they also are subject to additional defenses. [Brouillette Decl., ¶ 19.]

As far as potential PAGA liability, the allegedly aggrieved employees theoretically are entitled to penalties totaling around $1.9 million in civil penalties should Plaintiff prevail on all claims and establish violations of the multiple Labor Code sections at issue. [Brouillette Decl., ¶ 20.] As with the class claims, Plaintiff discounted the potential PAGA penalties based on Defendant's various defenses on the merits and also accounted for the Court's wide discretion to reduce such penalties, or to decline to award penalties at all. Labor Code § 2699(e)(2); Carrington v. Starbucks Corp. (2018) 30 Cal.App.5th 504 (trial court awarded penalties of $5 per pay period after a bench trial, which decision was upheld on appeal); In re Taco Bell Wage and Hour Actions (E.D. Cal. Apr. 8, 2016) 2016 U.S. Dist. LEXIS 48557 (PAGA penalties denied after trial).

Accordingly, the Parties allocated $20,000 to PAGA penalties, and Plaintiff submits this amount is reasonable under the circumstances and in line with comparable settlements in other wage and hour class actions in California. *E.g.*, Van Kempen v. Matheson Tri-Gas, Inc. (N.D. Cal. Aug. 25, 2017) 2017 U.S. Dist. LEXIS 137182 (granting final approval of $5,000 PAGA penalty from $370,000 settlement, or 1.4 percent of total settlement); Slavkov v. First Water Heater Partners I (N.D. Cal. July 25, 2017) 2017 U.S. Dist. LEXIS 116303 (finding a $7,500 PAGA payment reasonable when measured against the overall settlement of $345,000 and the possible weaknesses in Plaintiffs' case, or 2.2 percent of total settlement). Additionally, the LWDA has been informed of the terms of the PAGA portion of the settlement, and will be able to weigh in as necessary. Jennings v. Open Door Mktg. Inc. (N.D. Cal. Oct. 3, 2018) 2018 U.S. Dist. LEXIS 171356, at *27 (approving settlement with PAGA penalties of 0.6% where "[p]laintiffs [have] submitted the settlement agreement to the LWDA, and the LWDA has not objected to the settlement.

Thus, Plaintiff and his counsel discounted the value of the class claims consistent with the risks discussed above, and carefully weighed the likelihood of the class receiving substantially greater benefit if the litigation continued. Plaintiff and counsel concluded – in light of these very real and substantial risks – settlement on the proposed terms and without prolonged and costly litigation was in the best interests of the class. The overall $276,689.76 recovery represents a significant percentage of Defendant's potential exposure, and given Defendant's multi-layered defenses and all other potential risks of continued litigation, a total recovery for the class of $276,229.76, which will result in average award of over $515 per class member, plus additional sums under PAGA, is a significant result well within the range of reasonableness considering all potential outcomes, and it will provide direct monetary awards to all Class Members without further delay. [Brouillette Decl., ¶¶ 21-23.]

Importantly, the mere fact that a settlement does not provide the same recovery as might be achieved at trial is not a proper indicator of whether the settlement is fair, reasonable, and adequate. Wershba, 91 Cal.App.4th at 246, 250 ("Compromise is inherent and necessary in the settlement process…even if the relief afforded by the proposed settlement is substantially narrower than it would be if the suits were to be successfully litigated, this is no bar to a class settlement because the public interest may indeed be served by a voluntary settlement in which each side gives ground in the interest of avoiding litigation"); Lane v. Facebook, Inc. (9th Cir. 2012) 696 F.3d 811, 819 ("[T]he question whether a settlement is fundamentally fair . . . is different from the question whether the settlement is perfect in the estimation of the reviewing court"); 7-Eleven Owners for Fair Franchising v. Southland Corp. (2000) 85 Cal.App.4th 1135, 1150 ("The fact that a proposed settlement may amount to only a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved"); White v. Experian Information Solutions, Inc. (C.D. Cal. 2011) 803 F.Supp.2d 1086, 1098 (rejecting contention settlement was not fair and reasonable even though it represented 99% discount off the maximum value of the claims). Importantly as well, the proposed settlement is non-reversionary and will provide timely benefits to the Class Members without a claims process. White, 803 F.Supp.2d at 1098; c.f., Federal Judicial Center, Managing Class Action Litigation: A Pocket Guide for Judges (3d ed. 2010) at 20, available at http:// www.fjc.gov/sites/default/files/2012/ClassGd3.pdf (reversionary provisions and/or cumbersome claims process may indicate lack of fairness). Plaintiff and his counsel submit the settlement is within the "range of reasonableness," and is fair and adequate for the Class.

V. PLAINTIFF'S ENHANCEMENT AWARD

Pursuant to the terms of the settlement, Plaintiff seeks a modest incentive award of $5,000 for his service in bringing these claims on behalf of the Class. The request is reasonable given the risks he undertook on behalf of the Class Members. By contacting and retaining counsel to pursue these claims, Plaintiff helped make this settlement possible for the absent Class Members, while shouldering the risk of being liable for Yerba Mate's litigation costs. Plaintiff also exposed himself to unwanted notoriety related to filing a public lawsuit (discoverable even through a simple google search) for the benefit of other employees, placing himself at risk of discrimination by future prospective employers. As set forth in more detail in his declaration submitted at preliminary approval, among taking many other actions assisting in the successful litigation of this case, Plaintiff provided substantial factual information and documents to counsel, attended numerous meetings/phone conferences with counsel to discuss the case, and kept abreast of all significant developments. [Declaration of Jeffrey Reyes, ¶¶ 2-9; Brouillette Decl., ¶ 24.] Finally, there are no class member objections submitted with respect to the amounts Plaintiff proposes to receive. [Mitzner Decl., ¶ 9.] Accordingly, the requested enhancement payment to Plaintiff is appropriate and justified as part of the settlement.

VI. SETTLEMENT ADMINISTRATION COSTS

The settlement provides for a payment to Phoenix for its services as the Settlement Administrator, and as set forth in the Declaration of Taylor Mitzner Phoenix has performed and will continue to perform its required duties through final distribution of the settlement funds, and incurred $8,500.00 in fees and expenses. [Mitzner Decl., ¶ 16.] Accordingly, Plaintiff respectfully requests the Court approve payment of $8,500 to Phoenix from the GSA. [Brouillette Decl., ¶ 25.]

VII. ATTORNEY'S FEES AND COSTS

A. The Attorney's Fees Requested Are Fair and Reasonable and Should Be Approved

This Court has discretion over the amount of attorneys' fees awarded and court approval is required for Class Counsel's fees. Cal. Rule of Court 3.769; Levy v. Toyota Motor Sales, U.S.A. (1992) 4 Cal.App.4th 807, 813; Lealao v. Beneficial Cal., Inc. (2000) 82 Cal.App.4th 19. In defining a reasonable fee, the Court should attempt to mimic the marketplace for cases involving significant contingent risk, such as this one. Deposit Guaranty Nat'l Bank, Jackson, Miss. v. Roper (1980) 445 U.S. 326, 338, rehg. den. 446

U.S. 947; Lealao, 82 Cal.App.4th at 49-50 (court should attempt "to award the fee that informed private bargaining, if it were truly possible, might have reached" in determining a reasonable fee, and a fee award should approximate a "range of fees freely negotiated in comparable litigation"). Here, Class Counsel's request for attorney's fees and costs is reasonable and justified by the work performed, the benefits obtained, and the contingent risk assumed. As addressed in detail above, at the time the parties reached the tentative settlement success for Plaintiff and the putative class was far from certain. Plaintiff faced a real risk that some or all the claims would not be certified for class treatment, as Yerba Mate had strong arguments that its compensation policies were legal and properly compensated the class members. Even if Plaintiff certified some or all of the claims and ultimately prevailed on the merits, it undoubtedly would have taken several years to realize any recovery while they pursued class certification, trial, and an almost certain appeal. [Brouillette Decl., ¶¶ 15-21.]

Nonetheless, Plaintiff succeeded and expeditiously obtained the relief he set out to obtain, and the settlement provides substantial cash payments to Class Members, with an average award of about $517, and with a maximum award of about $2,370. Importantly as well, the Class Members have been overwhelmingly supportive of the Settlement – as of the filing of this motion, there are no objections to the settlement and zero individuals have opted out. [Mitzner Decl., ¶¶ 8-9, 12.]

B. The Requested Fee Award Is Reasonable and Appropriate

The United States Supreme Court has ruled the parties to a class action properly may negotiate not only the settlement of the action itself but also the payment of attorney's fees. Evans v. Jeff D. (1986) 475 U.S. 717, 734-35, 738, fn. 30.) In Hensley v. Eckerhart (1983) 461 U.S. 424, 437, the Supreme Court explained that negotiated, agreed-upon attorney's fee provisions are the ideal towards which the parties should strive: "A request for attorney's fees should not result in a second major litigation. Ideally, of course, litigants will settle the amount of a fee." The United States Supreme Court has reemphasized this policy and further stressed trial courts have “a responsibility to encourage agreement" on fees. Blum v. Stenson (1984) 465 U.S. 886, 902 n.19.

As part of the Settlement, Yerba Mate agreed not to object to an award of no more than 33.33% of the GSA for attorney's fees, or $91,666.00, and up to $20,000 in reimbursement for litigation costs and expenses. Such a fee is commensurate with what the market would provide for similar services and the Court therefore can most certainly enforce the agreement. As California's Court of Appeal has instructed:

> Given the unique reliance of our legal system on private litigants to enforce substantive provisions of law through class and derivative actions, attorneys providing the essential enforcement services must be provided incentives roughly comparable to those negotiated in the private bargaining that takes place in the legal marketplace, as it will otherwise be economic for defendants to increase injurious behavior.

Lealao, 82 Cal.App.4th at 47.

Here, the parties did not negotiate the inclusion of attorney's fees until after extensive arms-length bargaining regarding relief to the Class was completed. [Brouillette Decl., ¶ 26.] The requested fee and cost award was a product of these arms-length negotiations and fairly reflects the marketplace value of the services rendered by Class Counsel in this case. As a result, the fee agreed to by the parties should be approved.

C. Class Counsel's Fees are Justified When Calculated as a Percentage of the Common Fund

In approving fee applications, courts typically apply either a percentage-of-recovery method or the lodestar method. Laffitte v. Robert Half Int’l., Inc. (2016) 1 Cal.5th 480, 489; Wershba v. Apple Computer, Inc. (2001) 91 Cal.App.4th 224, 254, disapproved on other grounds, Hernandez v. Restoration Hardware, Inc. (2018) 4 Cal.5th 260. The California Supreme Court recently recognized the advantages and equities of calculating attorney’s fees using the percentage-of-the-common-fund method in another wage-and-hour case:

> The recognized advantages of the percentage method-including relative ease of calculation, alignment of incentives between counsel and the class, a better approximation of market conditions in a contingency case, and the encouragement it provides counsel to seek an early settlement and avoid unnecessarily prolonging the

> litigation convince us the percentage method is a valuable tool that should not be denied our trial courts.

Laffitte, 1 Cal.5th at 503 (citations omitted).

Indeed, both California and federal courts have long recognized an appropriate method for determining the award of attorney's fees is based on a percentage of the total value of benefits afforded to class members by the settlement. Serrano v. Priest (1977) 20 Cal.3d 25, 34; Boeing Co. v. Van Gernert (1980) 444 U.S. 472, 478; Vincent v. Hughes Air West, Inc. (9th Cir. 1977) 557 F.2d 759, 769. Awarding a fee based on a percentage of the common fund recovered operates to "spread litigation costs proportionately among all the beneficiaries so that the active beneficiary does not bear the entire burden alone." Vincent, 557 F.2d at 769.

In determining a reasonable common fund fee award, courts should also consider the fact that fees serve as an economic incentive for lawyers to bring class action litigation to achieve increased access to the judicial system for meritorious claims and to enhance deterrents to wrongdoing. Conte, Attorney Fee Awards (2d ed. 1993) § 104. Without prosecution on a contingent basis and use of the class action mechanism, the courthouse door would effectively be closed to most class members due to the relatively small size of their individual claims in relation to the enormous time and cost associated with class action litigation.

Here, Class Counsel seek a fee award for their successful prosecution and resolution of this action of no more than 33.33% of the total amount recovered by the Class via the lawsuit, or $91,666.00. The percentage requested is justified for the reasons set forth further below, and comports with fee awards calculated on a percentage-of-the-benefit basis. Indeed, review of class action settlements shows that courts have historically awarded fees in the range of 20 to 50 percent, depending upon the circumstances of the case. In re Warner Communications Sec. Litig. (S.D.N.Y. 1985) 618 F.Supp. 735, 749-50 (concluding that percentage fees in common fund cases range from 20 to 50 percent); Newberg, Newberg on Class Actions (3d ed.) § 14.03, pp. 13-14 ("Usually 50% of the fund is the upper limit on a reasonable fee award from a common fund in order to assure that the fees do not consume a disproportionate part of the recovery obtained for the class, although somewhat larger percentages are not unprecedented.").

D. A Lodestar Cross-Check Also Supports Class Counsel's Fee Request

To ensure the fairness of an attorney's fee award, courts frequently conduct a lodestar cross check of counsel's fees. "A lodestar cross-check thus provides a mechanism for bringing an objective measure of the work performed into the calculation of a reasonable attorney fee." Laffitte, 1 Cal.5th at 504. Here, Class Counsel spent 103.2 hours of time on this matter, resulting in a modest and very reasonable lodestar of $80,135.00.

As is fully detailed in the Brouillette Declaration, Class Counsel's efforts included: (1) extensive pre-lawsuit investigation of the claims of Plaintiff and the putative class, including legal research, research into similar claims and claims against other employers in the same industry, and attempts to locate and contact other Yerba Mate employees; (2) drafting a PAGA notice letter; (3) drafting the initial complaint and related documents; (4) case management, including communications with defense counsel, meeting and conferring/preparing case management statements, etc.; (5) drafting a first amended complaint; (6) propounding initial written discovery, (7) lengthy discussions with defense counsel regarding settlement/mediation and informal discovery needed for meaningful settlement discussions; (8) engaging in substantial informal discovery, including propounding informal discovery “requests” and reviewing documents and other information produced; (9) drafting a mediation brief and accompanying damages model after review and analysis of Yerba Mate’s informal discovery production; (10) attending an all-day mediation; (11) negotiating and drafting the settlement agreement and related documents; (12) drafting an amended complaint to effectuate the settlement; (13) drafting the motion for preliminary approval, and attending the hearing; (14) administration of the settlement, including communications with the Settlement Administrator and settlement class members; (15) drafting the motion for final approval and motion for attorney’s fees, and attending the final approval hearing; and (16) extensive communications with the Plaintiff regarding case status, case investigation and document review, mediation, and settlement terms. Additionally, Class Counsel will incur additional time following final approval to, inter alia, respond to class member inquiries, work with the Settlement Administrator on the distribution of settlement funds, and on the compliance hearing. [Brouillette Decl., ¶ 27, Exh. 2.]

In pursuing this matter, Class Counsel incurred total attorney's fees of $80,135, based on 103.2 attorney hours. The lodestar is based on an eminently reasonable number of hours worked to litigate this matter to a successful conclusion, and the requested attorney hourly rates are reasonable and comport with hourly rates charged by other attorneys with similar experience in this practice area in California. [Brouillette Decl., ¶¶ 28-45.] On a lodestar basis, the fee request of $91,666.00 results in a multiplier of 1.14, which is a modest enhancement entirely in line with California law. [Brouillette Decl., ¶¶ 44-45.] Indeed, California courts routinely approve multipliers in the in the 2-4 range to compensate for the time and risk of class action cases. <u>Chavez v. Netflix, Inc.</u> (2008) 162 Cal.App.4th 43, 66 (affirming attorneys' fee award including an upward multiplier of 2.5); <u>Wershba</u>, 91 Cal.App.4th at 255 ("Multipliers can range from 2 to 4 or even higher."); <u>City of Oakland Oakland Raiders</u> (1988) 203 Cal.App.3d 78, 85 (affirming a multiplier of 2.34).) Class Counsel submits that the requested 1.14 multiplier effectively operates to show that the percentage fee request is reasonable considering the challenges presented in this contingency fee matter, and appropriately compensates Class Counsel for the contingent risk assumed and delay in payment during the approximately two years counsel has been representing Plaintiff. Thus, the multiplier results in a fee constituting a fair return on the contingency.

E. <u>The Award is Supported By 1) the Results Achieved; 2) the Risk, 3) the Skill Required, 4) the Contingent Nature of the Fee and 5) Awards in Similar Cases</u>

What has now emerged in most fee award decisions is the recognition that fee determinations in both common fund and statutory fee situations are incapable of mathematical precision because of the intangible factors that must be resolved in the court's discretion based on the circumstances of each particular case. Conte, § 207, p. 44. In determining an appropriate fee in a common fund case, a Court must decide, based on the unique posture of each case, what percentage of the common fund would most reasonably compensate Class Counsel given the nature of the litigation and the performance of counsel. <u>Paul, Johnson, Alston & Hunt v. Graulty</u> (9th Cir. 1989 886 F.2d 268, 272) (the benchmark percentage fee may be adjusted to account for the circumstances involved in a case).

Courts apply a five-part test in calculating a reasonable percentage fee in common fund cases: (1) the results achieved; (2) the risk of litigation; (3) the skill required and the quality of work; (4) the contingent nature of the fee and the financial burden carried by the plaintiffs; and (5) awards made in similar cases. <u>Laffitte</u>, l Cal.5th at 489.

1. The Results Achieved.

Class Counsel obtained an excellent result in this case for the Class Members. The Settlement provides real monetary benefits to the Class Members, and the Settlement is particularly advantageous to the Class Member because the proceeds will be distributed shortly as opposed to waiting additional years for a similar, or possibly, less favorable result. Considering many individual claims would be very modest and would not be cost-effective to pursue successfully, the Settlement provided them with fair compensation for their claims. Moreover, the absence of any objection to either the Settlement or the attorney's fee request bolsters the excellent results. Indeed, the approval of the Class is overwhelming as indicated by the fact that not only one class member opted out. Additionally, the settlement amounts to a substantial percentage of the maximum value of the amount the Class might have obtained if it had tried the case and recovered on all theories seeking recovery of wages and penalties. "It is well-settled law that a cash settlement amounting to only a fraction of the potential recovery does not per se render the settlement inadequate or unfair." <u>In re Omnivision Techs., Inc.,</u> 559 (N.D. Cal. 2008) F.Supp.2d 1036, 1042.

2. <u>Class Counsel Bore Considerable Risk.</u>

At the time of filing the complaint, Class Counsel recognized that they would have to expend a substantial amount of time and advance significant costs to prosecute a statewide class action suit with no guarantee of compensation or reimbursement, in the hope of prevailing against a sophisticated company represented by first-rate attorneys. Despite their belief in the validity of Plaintiff's claims, they also knew they faced substantial risks of class certification and the ability to prove class-wide and individual damages. In light of the highly uncertain nature of this suit, Class Counsel also bore the risk that Yerba Mate would dig in and attempt to bury their small firms in work. Given the small size of Class Counsel's firm, not receiving any compensation for several years while simultaneously advancing litigation costs posed considerable risk and difficulty. [Brouillette Decl., ¶¶ 46-47.]

3. The Skill Required and the Quality of Work.

Practice in the narrow area of wage and hour litigation requires skill, knowledge and experience. The issues presented in this case required more than just a general appreciation of wage and hour law and class action procedure. This Settlement was possible only because counsel persuaded Yerba Mate that Plaintiff and the putative class had a realistic chance of prevailing on their claims despite Yerba Mate's contrary arguments, and that the case would be pursued through class certification and trial if necessary. In successfully navigating these hurdles, Class Counsel displayed appropriate skill while pursuing a risky and difficult case.

4. The Contingent Nature of the Fee and Risk Assumed

There is a substantial difference between the risk assumed by attorneys being paid by the hour and attorneys working on a contingent fee basis. The attorney being paid by the hour can go to the bank with his fee. Powers v. Eichen (9th Cir. 2000) 229 F.3d 1249, 1256. The attorney working on a contingent basis can only log hours while working without pay towards a result that will hopefully entitle him to a market fee considering the risk and other factors of the undertaking. Id. at 1257. Otherwise, the contingent fee attorney receives nothing. Id. In this case, Class Counsel subjected themselves to this risk in this all or nothing contingent fee case wherein the necessity and financial burden of private enforcement makes the requested award appropriate.

Counsel retained on a contingency fee basis, whether in private matters or in class action litigation, is entitled to a premium beyond their standard, hourly, non-contingent fee schedule to compensate for both the contingent risk assumed and the delay in payment. The simple fact is that despite the most vigorous and competent of efforts, success is never guaranteed. McKittrick v. Gardner (4th Cir. 1967) 378 F.2d 872, 875. Indeed, if counsel is not adequately compensated for the risks inherent in difficult class actions, competent attorneys will be discouraged from prosecuting similar cases. Ketchum v. Moses (2001) 24 Cal.4th 1122, 1132-33; Cazares v. Saenz (1989) 208 Cal.App.3d 279, 287.

Here, the contingent fee practices of Plaintiff's counsel simply do not accommodate the investment of unnecessary time in a case, and the adverse resolution of any one of several difficult issues present in this matter could have doomed the entire effort. As discussed, the attorney's fees in this case were not only contingent but fairly risky, and there was always a palpable chance Plaintiff's counsel would receive nothing for any number of reasons. [Brouillette Decl., ¶¶ 46-47.] Accordingly, the contingent nature of the fee and the financial burdens on Class Counsel and Plaintiff also support the fee requested.

5. Awards in Other Cases

As discussed, the attorney's fees requested by Class Counsel are within the range of fees awarded in comparable cases, as cross-checked against the lodestar method in light of the contingent risk assumed, the delay in payment, the result achieved, and the overall quality of the representation.

F. Class Counsel's Costs and Expenses are Reasonable

Plaintiff's counsel also request reimbursement of actual out-of-pocket expenses incurred to prosecute this action. These expenses were incidental and necessary to the effective representation of the employees, and Plaintiff's counsel is permitted to recover litigation costs and expenses under the common fund doctrine and the Settlement Agreement. Serrano, 20 Cal.3d at 35 (common fund doctrine permits recovery of fees and costs from the fund); Rider v. County of San Diego (1992) 11 Cal.App.4th 1410, 1424 n.6 (costs are recoverable from the common fund "[o]f necessity, and for precisely the same reasons discussed above with respect to the recovery of attorneys' fees by ... [Plaintiffs'] attorneys"). Plaintiffs' counsel also is entitled to recover "those out-of-pocket expenses that would normally be charged to a fee-paying client." Harris v. Marhoefer (9th Cir. 1994) 24 F.3d 16, 19.

As explained in the Brouillette Declaration, Class Counsel incurred a total of $18,066.46 in expenses incurred in connection with this litigation. These expenses include the amounts paid for court filing fees, Case Anywhere charges, service of process, expert fees, postage, and mediation fees, all of which are costs normally billed to and paid by the client. These costs were reasonably incurred in the prosecution of this matter and it is respectfully requested that the Court authorized they be reimbursed in full. [Brouillette Decl., ¶¶ 48-49.]

VII. CONCLUSION

For all the foregoing reasons, Plaintiff Jeffrey Reyes respectfully requests that the Court grant this motion and grant final approval of the proposed class action settlement and approve the payment of PAGA penalties to the State. Plaintiff further requests the Court approve payment of the Settlement Administrator's fees and expenses, approve the requested class representative enhancement payment, approve the award of attorney's fees and costs as requested, and enter judgment in this action. Finally, Plaintiff requests the Court set a non-appearance case review regarding settlement compliance for August 23, 2025, or a later date convenient for the Court.

Dated: July 30, 2024 **CROSNER LEGAL, P.C.**

By: ______________________________

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