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**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF KERN**

MARTIN HERNANDEZ, individually, and on
behalf of all others similarly
situated,

Plaintiff,

v.

KW CALIFORNIA, a corporation; KW
PLASTICS OF CALIFORNIA, an unknown
entity; and DOES 1 through 10, inclusive,

Defendants.

Case No. BCV-23-100346

CLASS ACTION

[Assigned for all purposes to: Hon. T. Mark
Smith, Dept. T-2]

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

FINAL APPROVAL HEARING

Date: December 4, 2024
Time: 8:30 a.m.
Dept.: T-2

Complaint filed: February 3, 2023
FAC filed: July 25, 2023
Trial date: Not set

1 **NOTICE OF MOTION AND MOTION**

2 **TO ALL PARTIES AND THEIR COUNSEL OF RECORD:**

3 **PLEASE TAKE NOTICE** that on December 4, 2024 at 10:00 a.m., in Department T-2 of
4 the Kern County Superior Court, located at 3131 Arrow Street, Bakersfield, CA 93308, Plaintiff
5 Martin Hernandez (“Plaintiff”) will, and hereby do, move for an order as follows:

- 6 1. Certifying the Class for settlement purposes;
- 7 2. Approving the settlement as fair and reasonable and finding that class members were given
8 notice of the settlement, and advised of their rights to participate in the settlement, object to
9 the settlement, or exclude themselves from the settlement, in a reasonable manner;
- 10 3. Appointing Plaintiff Martin Hernandez as a Class Representative for settlement purposes,
11 and approving a Class Representative Service Award of \$10,000.00 to Plaintiff;
- 12 4. Appointing Plaintiff’s Counsel, Justin F. Marquez, Benjamin H. Haber, and Daniel J.
13 Kramer of Wilshire Law Firm, PLC as Class Counsel for settlement purposes, and
14 approving payment of \$100,000.00 in attorneys’ fees, which is 33 1/3% of the Gross
15 Settlement Amount;
- 16 5. Approving costs in the amount of \$20,000.00 for litigating this action to Class Counsel;
- 17 6. Approving payment of administrative expenses to Apex Class Action, LLC as the Settlement
18 Administrator in the amount of \$5,990.00;
- 19 7. Directing that the clerk of the Court to enter the Court’s order as a final judgment; and,
- 20 8. Without affecting the finality of the final judgment, reserving continuing jurisdiction over
21 the parties for the purposes of implementing, enforcing and/or administering the Settlement
22 or enforcing the terms of the judgment.

23 This motion will be based on the accompanying Memorandum of Points and Authorities,
24 the Declarations of Justin F. Marquez, Plaintiff, and Madely Nava, and such oral argument as
25 may be heard by the Court, and all other papers on file in this action, those previously submitted
26 in support of Plaintiff’s Motion for Preliminary Approval of Class Action Settlement.

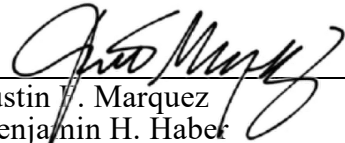
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28 ///

Dated: November 7, 2024

Respectfully submitted,

WILSHIRE LAW FIRM, PLC

By: 
Justin J. Marquez
Benjamin H. Haber
Daniel J. Kramer

Attorneys for Plaintiff and the Class

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff Martin Hernandez (“Plaintiff”) seeks final approval of a proposed \$350,000 non-reversionary, class action settlement with Defendant Testing Company LLC (“Defendant”, and collectively with Plaintiff, the “Parties”). The Settlement will provide substantial monetary payments to approximately 62 class members. And, as set forth more fully below, the proposed Settlement satisfies all the criteria for settlement approval under California law.

The proposed settlement satisfies all the criteria for settlement approval under California law. A presumption of fairness exists as the Settlement was reached through extensive, mediated arm’s-length negotiations, sufficient investigation and discovery allowed Class Counsel to act intelligently, and Class Counsel is experienced in similar wage-and-hour litigation. Upon the Court’s approval of the settlement, participating class members will receive an *average estimated individual net settlement payment of approximately \$2,322.74*, with the *highest individual net settlement payment to be paid of approximately \$5,639.58*. (Declaration of Madely Nava of Apex Class Action, LLC in Support of Motion for Final Approval of Class Action Settlement [“Nava Decl.”], ¶ 15.) As of filing this Motion, there are **no objections to the settlement** and **no requests for exclusion**. (*Id.* at ¶¶ 11-12.) Thus, the proposed Settlement is fair, reasonable, and adequate and is in the best interests of the Settlement Class Members.

Final approval of the settlement is warranted as it satisfies all the criteria for approval under California law. As demonstrated in the motion for preliminary approval the proposed Settlement provides excellent benefits to the class, particularly considering the complexities and risks of the case. Accordingly, Plaintiff requests that the Court grant final approval of the proposed Settlement.

II. SUMMARY OF THE LITIGATION AND SETTLEMENT

A. Plaintiff’s Claims

This is a wage and hour class and Private Attorneys General Act (“PAGA”) (Labor Code §§ 2699, *et seq.*) representative action. Plaintiff and putative class members worked in California as hourly-paid or non-exempt employees for Defendant during the class period.

Defendant provides COVID-19 testing centers for businesses, schools and universities, municipalities, governments, events and other organizations. Defendant is shutting down its operations in California. (Declaration of Justin F. Marquez in Support of Plaintiff’s Motion for Final Approval of Class Action Settlement [“Marquez Decl.”], ¶ 2.)

Plaintiff alleges that Defendant’s payroll, timekeeping, and wage and hour practices resulted in Labor Code violations. (Marquez Decl., ¶ 3.) Plaintiff alleges that Defendant failed to pay for all hours worked. Plaintiff further alleges that Defendant failed to provide employees with legally compliant meal and rest periods, and Defendant failed to reimburse business expenses. (*Id.*) Based on these allegations, Plaintiff asserts related claims for failure to provide accurate wage statements, failure to pay all final wages at termination, unfair business practices, and civil penalties under PAGA. (*Id.*) Defendant denies these allegations.

On February 3, 2023, Plaintiff filed a putative wage-and-hour class action complaint against Defendant for: (1) failure to pay minimum and straight time wages (Labor Code §§ 204, 1194, 1194.2, and 1197); (2) failure to pay overtime wages (Labor Code §§ 1194, and 1198); (3) failure to provide meal periods (Labor Code §§ 226.7 and 512); (4) failure to authorize and permit rest periods (Labor Code §§ 226.7 and 512); (5) failure to provide accurate itemized wage statements (Labor Code § 226); (6) failure to timely pay final wages at termination (Labor Code §§ 201-203); (7) failure to indemnify employees for expenditures (Labor Code § 2802); and (8) unfair business practices (Business and Professions Code 17200 et seq.). (Marquez Decl., ¶ 4.) On July 25, 2023, Plaintiff filed the First Amended Complaint against Defendant adding claims for civil penalties under Private Attorneys General Act “PAGA” (Labor Code § 2698 et seq.). (*Id.*) Plaintiff sent a notice to Defendant and the California Labor & Workforce Development Agency (“LWDA”) alleging similar wage and hour violations pursuant to the PAGA (Cal. Lab. Code §§ 2699, *et seq.*) on February 13, 2023. (*Id.*)

B. Discovery and Investigation

Following the filing of the Complaint, the parties exchanged documents and information before mediating this action. Defendant produced a sample of time and pay records for class members. Defendant also provided documents of its wage and hour policies and practices during

1 the class period, and information regarding the total number of current and former employees in
2 its informal discovery responses. (*Id.* at ¶ 5.)

3 After reviewing documents regarding Defendant’s wage and hour policies and practices,
4 analyzing Defendant’s timekeeping and payroll records, and interviewing Class Members, Class
5 Counsel was able to evaluate the probability of class certification, success on the merits, and
6 Defendant’s maximum monetary exposure for all claims. (Marquez Decl., ¶ 6.) Class Counsel
7 also investigated the applicable law regarding the claims and defenses asserted in the litigation.
8 (*Id.*) Class Counsel reviewed these records and prepared a damage analysis assessing Defendant’s
9 potential liability prior to mediation. (*Id.*)

10 **C. Settlement Negotiations and Agreement**

11 On November 1, 2023, the Parties participated in private mediation with experienced
12 class action mediator, Hon. Howard Broadman (Ret.). (Marquez Decl., ¶ 7.) The mediation
13 was conducted via Zoom. (*Id.*) The settlement negotiations were at arm’s length and, although
14 conducted in a professional manner, were adversarial. (*Id.*) The Parties went into the mediation
15 willing to explore the potential for a settlement of the dispute, but each side was also prepared
16 to litigate their position through trial and appeal if a settlement had not been reached. (*Id.*)
17 After extensive negotiations and discussions regarding the strengths and weaknesses of
18 Plaintiff’s claims and Defendant’s defenses, the Parties reached a settlement the material terms
19 of which are encompassed within the Settlement. (Marquez Decl., ¶ 8, **Ex. 1** [Class Action and
20 PAGA Settlement Agreement and Class Notice].)

21 Class Counsel has conducted a thorough investigation into the facts of this case. Based
22 on the foregoing discovery and their own independent investigation and evaluation, Class
23 Counsel is of the opinion that the Settlement is fair, reasonable, and adequate and is in the best
24 interests of the Settlement Class Members in light of all known facts and circumstances, the risk
25 of significant delay, the defenses that could be asserted by Defendant both to certification and
26 on the merits, trial risk, and appellate risk. (*Id.* at ¶ 9.)

27 **D. Preliminary Approval and Overwhelming Support for the Settlement**

28 The Court granted Plaintiff’s Motion for Preliminary Approval of the Settlement on July

10, 2024. (Marquez Decl., ¶ 10.) The deadline for class members to opt out or object to the Settlement was September 29, 2024, and October 13, 2024 for individuals who received remailed notice packets. (*Id.*) The reaction of the Class to the settlement has been overwhelmingly positive. Indeed, as of the filing of this Motion, Indeed, as of the filing of this Motion, zero Class Members have opted out of the settlement, and no Class Members have objected to the settlement. (*Id.*)

E. Key Terms of the Proposed Settlement

Under the Settlement Agreement, Defendants will pay \$300,000.00 to resolve this litigation. The key terms include:

1. Class Definition: For settlement purposes only, the Parties agree to the certification of a class pursuant to California Code of Civil Procedure § 382 defined as: “all persons employed by KW California in California as hourly-paid or non-exempt employees at any time during the Class Period.” (Settlement, § 1.5.)

2. Class Period: “means the period from February 3, 2019 through March 15, 2024 or the date of Preliminary Approval, whichever occurs earlier.” (Settlement, § 1.12.)

3. Participating Class Members: “means a Class Member who does not submit a valid and timely Request for Exclusion from the Settlement.” (Settlement, § 1.38.)

4. Aggrieved Employees: “means a person employed by KW California in California as an hourly-paid or non-exempt employees at any time during the PAGA Period.” (Settlement, § 1.4.)

5. PAGA Period: “means the period from February 13, 2022 through March 15, 2024 or the date of Preliminary Approval, whichever occurs earlier.” (Settlement, § 1.37.)

6. Gross Settlement Amount: “means Three Hundred Thousand Dollars (\$300,000) which is the total amount Defendant agrees to pay under the Settlement except as provided in Paragraph 8 below. The Gross Settlement Amount will be used to pay Individual Class Payments, Employee’s Taxes and Required Holdings, Individual PAGA Payments, the LWDA PAGA Payment, Class Counsel Fees, Class Counsel Litigation Expenses Payment, Class Representative Service Payment and the Administrator’s Expenses. The Gross Settlement Amount does not

1 include Employer Taxes.” (Settlement, § 1.25.)

2 7. Uncashed Checks: If a settlement check is returned to the Settlement Administrator
3 as undeliverable, the Settlement Administrator shall promptly attempt to obtain a valid mailing
4 address by performing a skip trace search and, if another address is identified, shall mail the check
5 to the newly identified address. Any settlement checks remaining uncashed after one hundred and
6 eighty (180) days shall be transmitted to the Court Appointed Special Advocates (“CASA”) of
7 Kern County, 1717 Columbus Street, Bakersfield, California 93305, thereby leaving no "unpaid
8 residue" subject to the requirements of California Code of Civil Procedure Section 384, subd. (b).
9 (Settlement, § 4.4.3.)

10 8. Release by Participating Class Members: “Upon the Effective Date, all Participating
11 Class Members, on behalf of themselves and their respective former and present representatives,
12 agents, attorneys, heirs, dependents, administrators, devisees, legatees, executors, trustees,
13 conservators, guardians, personal representatives, successors, and assigns, whether individual,
14 class, representative, legal, equitable, direct or indirect, or any other type of any capacity, shall and
15 does hereby forever release, discharge, and agree to hold harmless the Released Parties from (i) all
16 claims that were alleged, or reasonably could have been alleged, based on the Class Period facts
17 stated in the Operative Complaint and ascertained in the course of the Action including any and all
18 claims for: (1) failure to pay minimum and straight time wages; (2) failure to pay overtime wages;
19 (3) failure to provide meal periods; (4) failure to authorize and permit rest periods; (5) failure to
20 timely pay final wages at termination; (6) failure to provide accurate itemized wage statements;
21 (7) failure to produce requested employment records; and (8) violation of California’s Unfair
22 Competition Law, California Business and Professions Code §§ 17200, et seq. arising out of the
23 violations referenced in the Action (“Released Class Claims”). To the extent based on facts alleged
24 on the Operative Complaint or the PAGA Letter, the Released Class Claims encompass, but are
25 not limited to, all claims pursuant to the applicable IWC Wage Orders, and Labor Code §§ 201-
26 204, 210, 218.5, 218.6, 226, 226.3, 226.7, 510, 512, 1174, 1174.5, 1194, 1194.2, 1197, 1197.1,
27 1198, and 1198.5. Except as set forth in Section 6.3 of this Agreement, Participating Class
28 Members do not release any other claims, including claims for vested benefits, wrongful

1 termination, violation of the Fair Employment and Housing Act, unemployment insurance,
2 disability, social security, workers' compensation, or claims based on facts occurring outside the
3 Class Period.” (Settlement, § 5.2.1.) This Release will be deemed effective on the date when
4 Defendant fully funds the entire Gross Settlement Amount and funds all employer payroll taxes
5 owed on the Wage Portion of the Individual Class Payments. (Settlement, § 5.)

6 9. Release by Aggrieved Employees: “Upon the Effective Date, all Aggrieved
7 Employees are deemed to release, on behalf of themselves and their respective former and present
8 representatives, agents, attorneys, heirs, administrators, successors, and assigns, the Released
9 Parties from all claims, rights, demands, liabilities and causes of action for civil penalties under
10 the PAGA, that Aggrieved Employees have had, now have, or may have in the future against
11 Released Parties based on any acts or omissions occurring during the PAGA Period and based on
12 the PAGA Period facts stated in the Action, the PAGA Notice, or ascertained in the course of the
13 Action, including any and all claims for: (1) failure to pay minimum and straight time wages; (2)
14 failure to pay overtime wages; (3) failure to provide meal periods; (4) failure to authorize and
15 permit rest periods; (5) failure to timely pay final wages at termination; and (6) failure to provide
16 accurate itemized wage statements (“Released PAGA Claims”). The Released PAGA Claims
17 include, but are not limited to, claims for PAGA penalties pursuant to Labor Code §§ 201-204,
18 210, 218.5, 218.6, 226, 226.3, 226.7, 510, 512, 1174, 1174.5, 1194, 1194.2, 1197, 1197.1, 1198,
19 and 1198.5. Any Aggrieved Employees who submit a valid and timely Request for Exclusion are
20 still entitled to their Individual PAGA Payment and have no right or ability to opt out of the portion
21 of this Settlement releasing the Released PAGA Claims.” (Settlement, § 5.3.)

22 10. No Reversion: “None of the Gross Settlement Amount will revert to Defendant.”
23 (Settlement, § 3.1.)

24 11. PAGA Allocation: The settlement includes \$20,000.00 allocated to Plaintiff's
25 claims under PAGA, with 75% of which (\$15,000.00) being paid to the LWDA and 25%
26 (\$5,000.00) being paid to the Aggrieved Employees. (Settlement, § 1.35.) Class Counsel
27 submitted the proposed settlement to the LWDA before filing this Motion for Preliminary
28 Approval. (Marquez Decl., ¶ 10.)

12. Net Settlement Amount: “means the Gross Settlement Amount, less the following payments in the amounts approved by the Court: Individual PAGA Payments, the LWDA PAGA Payment, Class Representative Service Payment, Class Counsel Fees Payment, Class Counsel Litigation Expenses Payment, and the Administration Expenses Payment. The remainder is to be paid to Participating Class Members as Individual Class Payments.” (Settlement, § 1.31.)

13. Distribution Formula: “An Individual Class Payment calculated by (a) dividing the Net Settlement Amount by the total number of Workweeks worked by all Participating Class Members during the Class Period and (b) multiplying the result by each Participating Class Member’s Workweeks.” (Settlement, § 3.2.4.) As to PAGA: “The Administrator will calculate each Individual PAGA Payment by (a) dividing the amount of the Aggrieved Employees’ 25% share of PAGA Penalties (\$5,000) by the total number of PAGA Period Pay Periods worked by all Aggrieved Employees during the PAGA Period and (b) multiplying the result by each Aggrieved Employee’s PAGA Period Pay Periods.” (Settlement, § 3.2.5.1.)

14. Tax Allocation: Any settlement money paid to Settlement Class Members will be allocated as 20% wages, 80% to penalties and interest. (Settlement, § 3.2.4.1.)

15. Class Representative Service Award: Subject to Court approval, Plaintiff shall be paid an enhancement award not to exceed \$10,000.00. (Settlement, § 3.2.1.) This amount is for Plaintiff’s time and effort in bringing and presenting the action, and in exchange for a general release of all claims, known or unknown, pursuant to Civil Code Section 1542. (Settlement, § 5.1.) If the Court approves a lesser enhancement, then the unapproved portion or portions shall revert into the Net Settlement Amount to be distributed between the participating Settlement Class Members on a pro-rata basis. (Settlement, § 3.2.1.)

16. Attorneys’ Fees and Costs: The Settlement provides that Defendant will not oppose a fee application of up to 33 1/3% (\$100,000.00) of the Gross Settlement Amount, plus out-of-pocket costs not to exceed \$20,000.00. (Settlement, § 3.2.2.)

17. Notice of Proposed Class Action Settlement: The Notice sets forth in plain terms, a statement of the case, the terms of the Settlement Agreement, the approximate amount of attorneys’ fees, costs, and service award being sought, and an explanation of how the settlement allocations

are calculated. (Settlement, Ex. 1, Class Notice.) Class Members will be notified by first-class mail of the settlement. (Settlement, § 7.4.) Apex Class Action, LLC (“Apex”), the proposed Settlement Administrator, will undertake its best efforts to ensure that the notice is provided to the current addresses of class members, including conducting a national change of address search and re-mailing the notice to updated addresses. (*Id.*; Marquez Decl., ¶ 11, Ex. 3.)

III. THE SETTLEMENT MERITS FINAL APPROVAL

The law favors the settlement of lawsuits, particularly in class actions and other complex cases. (*See e.g., Neary v. Regents of Univ. of California* (1992) 3 Cal.4th 272, 277-81.) Factors to be considered in evaluating a class action settlement include “the strength of plaintiffs’ case, the risk, expense, complexity and likely duration of further litigation, the risk of maintaining class action status through proceedings, the experience and views of counsel, the presence of a government participant, and the reaction of the class members to the proposed settlement.” (*Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 128.) A presumption that a settlement is fair and reasonable exists where, as here, the following four factors are present: “(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.” (*Wershba v. Apple Computers, Inc.* (2001) 91 Cal.App.4th 224, 245.)

Whether a class action settlement should be approved is a question committed to the trial court’s broad discretion. (*Id.* at pp. 234-35.) In exercising its discretion, the Court should give “[d]ue regard ...to what is otherwise a private consensual agreement between the parties.” (*Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1801.) “The inquiry ‘must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned.’” (*Id.* [internal citations omitted].)

A. The Settlement Reflects a Reasonable Compromise

A settlement is not judged against what the plaintiff might recover had she prevailed at trial, nor does the settlement have to provide 100% of the damages sought to be fair and reasonable.

(*Wershba, supra*, 91 Cal.App.4th at pp. 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.”].)

The settlement obviates the significant risk that this Court may deny certification of all or some of Plaintiff’s claims. (Marquez Decl., ¶ 11.) While Plaintiff is confident in the merits of his claims, a legitimate controversy exists as to each cause of action. (*Id.*) Plaintiff also recognizes that proving the amount of wages due to each class member would be an expensive, time-consuming, and uncertain proposition. (*Id.*) Furthermore, even if Plaintiff obtained certification of all or some of the claims, continued litigation would be expensive, involving a trial and possible appeals, and would substantially delay and reduce any recovery by the class. (*Id.*)

Because of the proposed Settlement, class members will receive timely, guaranteed relief and will avoid the risk of an unfavorable judgment. When considering the risks of litigation, the uncertainties involved in achieving class certification, the burdens of proof necessary to establish liability, the probability of appeal of a favorable judgment, it is clear that the settlement amount of \$300,000.00 is within the “ballpark” of reasonableness, and preliminary settlement approval is appropriate. (*Id.*) ***Indeed, each Settlement Class Member is eligible to receive an average benefit of approximately \$2,322.74, and the highest estimated net payout is expected to be approximately \$5,639.58.*** (Nava Decl., ¶ 15.)

B. The Settlement was Reached After Arms-Length Negotiations Following Formal and Informal Discovery

The Settlement was reached over the course of a full-day mediation with experienced employment mediator, Hon. Howard Broadman (Ret.). (Marquez Decl. ¶ 7.) The settlement negotiations were at arm’s length and, although conducted in a professional manner. (*Id.*) The parties went into the mediation willing to explore the potential for a settlement of the dispute, but each side was also prepared to litigate their or its position through trial and appeal if a settlement had not been reached. (*Id.*)

Prior to reaching this settlement, Class Counsel conducted informal discovery concerning the claims set forth in the Litigation, such as a sample of class member timekeeping and payroll records, Defendant's policies and procedures concerning the payment of wages, the provision of meal and rest breaks, issuance of wage statements, and providing all wages at separation, as well as information regarding the number of putative class members and the mix of current versus former employees, the wage rates in effect, and the amount of meal and rest period premium wages paid to class members. (*Id.* at ¶¶ 7-8.) In conjunction with their extensive factual investigation, Class Counsel investigated the applicable law regarding the claims and defenses asserted in the Litigation. (*Id.*) Thus, Plaintiff and his counsel were able to act intelligently and effectively in negotiating the proposed Settlement. (*Id.*)

C. Plaintiff's Counsel Has Substantial Class Action Experience

Class Counsel also has considerable experience and has demonstrated competence with litigating wage and hour class actions. (*Id.* at ¶¶ 28-39.) Class Counsel has substantial experience in all facets of litigation in state and federal court, including discovery, law and motion, trial, appeals, arbitration and mediation. Class Counsel has litigated numerous class actions on behalf of plaintiffs and have been lead counsel or otherwise exercised significant case handling responsibilities in numerous cases resulting in millions of dollars in class action settlements. (*Id.*)

Based on Class Counsel's experience as employment and class action attorneys, Class Counsel is eminently qualified to evaluate the strength of Plaintiff's claims, the strength of Defendant's defenses against certification, the strength of Defendant's defenses on the merits, and the fairness of the Settlement. Their opinion that final approval of the Settlement would be in the best interests of class members in light of the significant risks of litigation is entitled to great weight. (*See Kullar, supra*, 168 Cal.App.4th at p. 129 ["The court undoubtedly should give considerable weight to the competency and integrity of counsel and the involvement of a neutral mediator in assuring itself that a settlement agreement represents an arms' length transaction entered without self-dealing or other potential misconduct"].)

D. There Are No Objections to the Settlement

No class member has objected to the Settlement, and no class member has requested

1 exclusion from the Settlement. (Singh Decl., ¶¶ 11-12.) The overwhelmingly positive response
2 of the class strongly supports final approval of the Settlement. (See, e.g., *In re Lifelock, Inc.*
3 *Marketing and Sales Practices Litigation* (D. Ariz. 2010) 2010 WL 3715138, *6 [relatively few
4 objections and requests for exclusion support approval].)

5 Factors to be considered in evaluating a class action settlement include “the reaction of the
6 class members to the proposed settlement.” (*Kullar, supra*, 168 Cal.App.4th at p. 128.) The
7 reaction here has been overwhelmingly positive. Courts have approved class action settlements in
8 lesser circumstances. (See, e.g., *Hughes v. Microsoft Corp.* (W.D.Wash. 2001) 2001 U.S. Dist.
9 LEXIS 5976, 2001 WL 34089697, *8 [court found that the “class members overwhelmingly
10 support[ed] the settlement” where there were over 37,000 notices sent out, 2,745 class members
11 participated in the settlement, “only nine objections were submitted”, and there were 86 timely
12 opt-outs and over 20 additional defective or untimely opt-outs, “these indicia of the approval of
13 the class of the terms of the settlement support a finding of fairness under Rule 23”], *citing Hanlon*
14 *v. Chrysler Corp.* (9th Cir.1998) 150 F.3d 1011, 1027 [despite vigorous objections and appeal by
15 objectors, the “fact that the overwhelming majority of the class willingly approved the offer and
16 stayed in the class presents at least some objective positive commentary as to its fairness,” and the
17 court did not abuse its discretion in approving settlement].)

18 **IV. THE COURT SHOULD AWARD PLAINTIFF THE REQUESTED AMOUNTS OF**
19 **FEES, COSTS AND ENHANCEMENT PAYMENTS.**

20 Under the Settlement, subject to the Court’s approval, Defendant has agreed to pay Class
21 Counsel reasonable attorneys’ fees in the amount of \$100,000.00, which is 33 1/3% of the Gross
22 Settlement Amount, costs up to \$20,000 for litigating this Action, and enhancement award of
23 \$10,000.00 to Plaintiff. Defendant has also agreed that it would not oppose an application for these
24 payments addressed above, and no class member has objected to these amounts.

25 In common fund cases like this one, the primary method California courts use for
26 calculating attorney’s fees is the percentage of the common fund method, which may be followed
27 by a lodestar cross-check. In *Laffitte v. Robert Half Int’l Inc.* (2016) 1 Cal. 5th 480, the California
28 Supreme Court affirmed an award of 33 1/3% of a \$19 million wage-and-hour class action

1 settlement with a 2.03 to 2.13 multiplier. (*Id.* at p. 506.) In doing so, the California Supreme Court
2 explained:

3 As to the incentives a lodestar cross-check might create for class counsel, we
4 emphasize the lodestar calculation, when used in this manner, ***does not override***
5 ***the trial court's primary determination of the fee as a percentage of the***
6 ***common fund*** and thus ***does not impose an absolute maximum or minimum on***
7 ***the potential fee award***. If the multiplier calculated by means of a lodestar
8 cross-check is extraordinarily high or low, the trial court should consider
9 whether the percentage used should be adjusted so as to bring the imputed
10 multiplier within a justifiable range, but the court is not necessarily required to
11 make such an adjustment. Courts using the percentage method have generally
12 weighed the time counsel spent on the case as an important factor in choosing a
13 reasonable percentage to apply.

14 (*Id.* at p. 505, emphasis added; *see also Beaver v. Tarsadia Hotels* (S.D. Cal. Sept. 28, 2017)
15 2017 WL 4310707, at *9 [applying *Laffitte* standard to fee request for 33 1/3% of common
16 fund].)

17 **A. A Fee Award Based on One-Third of the Common Fund is Standard**

18 According to a leading treatise on class actions, “No general rule can be articulated on what
19 is a reasonable percentage of a common fund. Usually 50% of the fund is the upper limit on a
20 reasonable fee award from a common fund in order to assure that the fees do not consume a
21 disproportionate part of the recovery obtained for the class, although somewhat larger percentages
22 are not unprecedented.” (*See Conte & Newberg, Newberg on Class Actions* (3rd Ed.) § 14.03.)
23 Attorneys’ fees at fifty percent of the fund are typically considered the upper limit, with ***thirty to***
24 ***forty percent*** commonly awarded in cases where the settlement is relatively small. (*See Id.*; *see*
25 *also, Van Vranken v. Atlantic Richfield Company* (N.D. Cal. 1995) 901 F. Supp. 294 [stating that
26 most cases where 30-50% was awarded involved “smaller” settlement funds of under \$10 million].)

27 The settled-for 33 1/3% fee award is consistent with the average fee award in class actions.
28 Indeed, the custom and practice in class actions is to award approximately one-third of a fund as a
fee award. (*See Chavez v. Netflix, Inc.* (2008) 162 Cal.App.4th 43, 66, n.11 [“Empirical studies
show that, regardless whether the percentage method or the lodestar method is used, fee awards in
class actions average around one-third of the recovery.”].) Thus, Plaintiff’s fee request is in line
with the prevailing guidelines established in California case law and academic literature and is

consistent with awards in California. Accordingly, the Court should approve the attorneys' fees requested herein.

B. While the Lodestar Method is Not Necessary in Common Fund Cases, Courts May Perform a Cross-Check to Award Fees.

Although California supports the common fund doctrine, the lodestar method can be used to cross-check fee awards. "It may be appropriate in some cases, assuming the class benefit can be monetized with a reasonable degree of certainty, to "cross-check" or adjust the lodestar in comparison to a percentage of the common fund to ensure that the fee awarded is reasonable and within the range of fees freely negotiated in the legal marketplace in comparable litigation." (*In re Consumer Privacy Cases* (2009) 175 Cal.App.4th 545, 557.)

Applying the lodestar method requires a two-step process. The first step is to multiply the number of hours reasonably expended by a reasonable hourly rate. The second step is to apply a multiplier to the lodestar to take into account various factors. "The purpose of such adjustment is to fix a fee at the fair market value for the particular action. In effect, the court determines, retrospectively, whether the litigation involved a contingent risk or required extraordinary legal skill justifying augmentation of the unadorned lodestar in order to approximate the fair market rate for such services." (*Id.* at pp. 556-57.) "Under certain circumstances, a lodestar calculation may be enhanced on the basis of a percentage-of-the-benefit analysis." (*Id.* at p. 557.)

Detailed timesheets are not necessary to a lodestar cross-check. "The law is clear ... that an award of attorney fees may be based on counsel's declarations, without production of detailed time records." (*Raining Data Corp. v. Barrenechea* (2009) 175 Cal.App.4th 1363, 1375.) As the California Supreme Court explained in *Laffitte*:

With regard to expenditure of judicial resources, we note that trial courts conducting lodestar cross-checks have generally not been required to closely scrutinize each claimed attorney-hour, but have instead used information on attorney time spent to "focus on the general question of whether the fee award appropriately reflects the degree of time and effort expended by the attorneys." (5 Newberg on Class Actions, *supra*, § 15:86, p. 331; *see, e.g., Goldberger v. Integrated Resources, Inc., supra*, 209 F.3d at p. 50 [2d Cir.; "where used as a mere cross-check, the hours documented by counsel need not be exhaustively scrutinized by the district court"]; *In re Prudential Ins. Co. America Sales Practice Litigation Agent Actions* (3d Cir.1998) 148 F.3d 283, 342 [agreeing with district court that "detailed time summaries were unnecessary where, as

here, it was merely using the lodestar calculation to double check its fee award.”]; *Barbosa v. Cargill Meat Solutions Corp.* (E.D.Cal.2013) 297 F.R.D. 431, 451 [“Where the lodestar method is used as a cross-check to the percentage method, it can be performed with a less exhaustive cataloguing and review of counsel’s hours.”].)

(*Laffitte, supra*, 1 Cal.5th at p. 505.)

Class Counsel’s lodestar is at least \$118,200 based on at least 133 hours of work performed thus far. (Marquez Decl., ¶ 19.) Accordingly, the requested fee of \$100,000 is reasonable and fair as it is based on an approximate negative multiplier of 0.85. To be sure, trial courts have substantial discretion in adjusting the lodestar to account for various factors. (*See Lealao v. Beneficial California, Inc.* (2000) 82 Cal.App.4th 19, 26, 39-45; *see also Serrano, supra*, 20 Cal.3d at p. 49.) In addition, it has been held that “[m]ultipliers can range from 2 to 4 or even higher.” (*See Wershba*, 91 Cal.App.4th at p. 255; *see also Van Vranken, supra*, 901 F. Supp. At p. 298 [“[m]ultipliers in the 3-4 range are common in lodestar awards for lengthy and complex class action litigation.”] Similar multipliers have been found to be reasonable for Class Counsel. (*See, e.g., Moreno v. Pretium Packaging, L.L.C.* (C.D. Cal. Aug. 6, 2021) No. 8:19-cv-02500-SB, 2021 WL 3673845, *3 [finding Wilshire Law Firm’s multiplier of 2.57 reasonable “in light of the contingent nature of recovery, the complexity of the issues, and the result obtained”].)

1. Class Counsel’s Rates Have Been Approved by Several Courts.

Class Counsel provides a declaration to support their lodestar hourly rates. “Affidavits of the plaintiffs’ attorney and other attorneys regarding prevailing fees in the community, and rate determinations in other cases, particularly those setting a rate for the plaintiffs’ attorney, are satisfactory evidence of the prevailing market rate.” (*United Steelworkers of America v. Phelps Dodge Corp.* (9th Cir. 1990) 896 F.2d 403, 407.) Class Counsel has received final approval of their hourly rates in other wage and hour class action settlements.

For example, Mr. Marquez’ hourly rate was recently approved in *Suarez v. Bank of America, N.A.* (N.D. Cal. Jan. 11, 2024), No. 18-cv-01202-LB, 2024 WL150721. There, the court held that “[a]s for the lodestar cross-check, the billing rates are normal and customary for timekeepers with similar qualifications and experience in the relevant market.” (*Id.* at p. *3.)

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1 **2. Applying a Positive Multiplier Is Appropriate.**

2 Once this lodestar figure has been determined, the Court may take into account other
3 “enhancement” factors to adjust the lodestar award. While Plaintiff seeks a negative multiplier
4 of 0.85 here, the overall reasonableness of Plaintiff’s request is underscored by the fact that a
5 significantly higher multiplier would be justified under applicable law.

6 Contingency fees should be higher than fees for the same legal services paid concurrently
7 with the provision of the services. (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1132-33.) “A
8 lawyer who both bears the risk of not being paid and provides legal services is not receiving the
9 fair market value of his work if he is paid only for the second of these functions. If he is paid
10 no more, competent counsel will be reluctant to accept fee award cases.” (*Id.* at p. 1133.)
11 Application of that rule is particularly appropriate where the case is brought to redress important
12 rights of vulnerable persons. (*Id.*) A risk enhancement is “earned compensation; unlike a
13 windfall, it is neither unexpected nor fortuitous. Rather it is intended to approximate market-
14 level compensation for such services which typically pay a premium for the risk of nonpayment
15 or delay in payment of attorney’s fees.” (*Id.* at p. 1138.)

16 “Multipliers can range from 2 to 4 or even higher.” (*Wershba, supra*, 91 Cal.App.4th at
17 p. 255; *see also Sutter Health Uninsured Pricing Cases* (2009) 171 Cal. App. 4th 495, 512
18 [applying a 2.52 multiplier on a cross-check in an antitrust class action]; *Chavez, supra*, 162
19 Cal. App. 4th at p. 60 [applying a 2.5 multiplier on a lodestar cross-check]; *Vizcaino v. Microsoft*
20 *Corp.* (9th Cir. 2002) 290 F.3d 1043, 1051 n.6 [“most” common fund cases apply a multiplier
21 of 1.0-4.0]; *Been v. O.K. Industries Inc.* (E.D. Okla. 2011) 2011 WL 4478766, *11 [citing a
22 study “reporting [an] average multiplier of 3.89 in survey of 1,120 class action cases” and
23 finding that a multiplier of 2.43 would be “per se reasonable”].) The intermediate court in
24 *Laffitte*, after finding that “2 to 4” is a reasonable range for multipliers on a cross-check,
25 affirmed a 2.13 multiplier. (*Laffitte v. Robert Half Int’l* (2014) 231 Cal. App. 4th 860, 881-82.)
26 The intermediate court opinion was affirmed in full by the California Supreme Court in its new
27 decision guiding lower courts on assessing fees.

28 Factors considered in determining whether a lodestar multiplier is appropriate generally

1 include: (1) the risks presented by the contingent nature of the case; (2) the novelty and difficulty
2 of the questions involved and the skill requisite to perform the legal service properly; (3) the
3 nature of the opposition; (4) the preclusion of other employment by the attorney due to
4 acceptance of the case; and (5) the result obtained and the importance of the lawsuit to the
5 public. (*Serrano, supra*, 20 Cal. 3d at pp. 48-49.) All of these factors favor approval of a
6 multiplier along the lines of those approved in the cases above.

7 The major consideration in determining the necessity of a multiplier is the contingent nature
8 of the award. (*Ketchum, supra*, 24 Cal.4th at pp. 1132-33.) Further, the possibility of no recovery
9 is only one of the uncertainties involved in taking on such a case. Other uncertainties are the
10 amount that will be recovered, uncertainty as to the cost, both in effort and expenses, and
11 uncertainty about how much time will pass before the recovery is obtained. (*Id.* at pp. 1132-1133,
12 1138.) Here, Class Counsel have been the only counsel to represent Class Members in this matter
13 and have borne the entire risk and costs of litigation purely on a contingency basis. Class Counsel's
14 outlay of time and money in this case has been significant.

15 The other factors are also present here. Class Counsel are skilled attorneys who have
16 had success in wage-and-hour class actions. This case required experienced and competent
17 lawyers and expertise in the issues presented herein. Defendant's contentions underscore the
18 risk of prevailing at class certification and trial, and any of these obstacles could have prevented
19 recovery completely. Further, proceeding to trial would have added years to the resolution of
20 this case because of the difficult legal and factual issues raised and the likelihood of appeals.
21 Despite these risks, Class Counsel took this case on a contingency basis. Yet, there are only so
22 many cases that Class Counsel can take at any one time. Consequently, there were other
23 meritorious cases presented to Class Counsel that would have generated substantial fees, but
24 were declined, during the pendency of this action in order to devote the attention necessary to
25 achieve favorable results. (Marquez Decl., ¶ 25.) Considered against the risks of continued
26 litigation, and the importance of the employment rights and a speedy recovery, the relief
27 provided under the Settlement represents a very strong result for the Class.

28 ///

1 **C. Costs Are Reasonable.**

2 As of the date of filing this Motion, Class Counsel has incurred around \$ 20,865.41 in
3 costs.. (Marquez Decl., ¶ 27.) Accordingly, Class Counsel respectfully requests reimbursement
4 of up to \$20,000 in costs. Notably, Defendant has agreed that they will not oppose any cost award
5 request up to \$20,000.00. The categories of costs are set forth in the accompanying Declaration of
6 Justin Marquez, and these costs are easily seen to be both reasonable and necessary.

7 Counsel can recover “out-of-pocket expenses that ‘would normally be charged to a fee
8 paying client’” including costs for “service of summons and complaint, service of trial
9 subpoenas, fee for defense expert at deposition, postage, investigator, copying costs, hotel bills,
10 meals, messenger service and employment record reproduction.” (*Harris v. Marhoefer* (9th Cir.
11 1994) 24 F.3d 16, 19.) Such costs are properly recoverable on motions for settlement approval.
12 (*See Nunez v. BAE Sys. San Diego Ship Repair Inc.* (S.D. Cal. 2017) 292 F. Supp. 3d 1018,
13 1057; *Rutti v. Lojack Corp.* (C.D. Cal. July 31, 2012) No. CV 06–00350 DOC, 2012 WL
14 3151077, at *12 [“Expenses such as reimbursement for travel, meals, lodging, photocopying,
15 long-distance telephone calls, computer legal research, postage, courier service, mediation,
16 exhibits, documents scanning, and visual equipment are typically recoverable.”].)

17 **D. The Enhancement Payments to the Plaintiff Is Reasonable.**

18 Named plaintiffs in class action lawsuits “are eligible for reasonable incentive payments to
19 compensate them for the expense or risk they have incurred in conferring a benefit on other
20 members of the class.” *Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles* (2010) 186
21 Cal.App.4th 399, 412.) Courts routinely grant approval of class action settlement agreements
22 containing enhancements for the class representatives, which are necessary to provide incentive to
23 represent the class, and are appropriate given the benefit the class representatives help to bring
24 about for the class. (*See Rodriguez v. W. Publ'g Corp.* (9th Cir. 2009) 563 F.3d 948, 958-59.) The
25 California Supreme Court has also noted that “retaliation against employees for asserting statutory
26 rights under the Labor Code is widespread,” despite anti-retaliation statutes designed to protect
27 employees. (*Gentry v. Super. Ct.* (2007) 42 Cal.4th 443, 460-61.) Plaintiff should therefore be
28 rewarded for assuming the risk of retaliation for the sake of class members. (*See Frank v. Eastman*

1 *Kodak Co.* (W.D.N.Y. 2005) 228 F.R.D. 174, 187.)

2 Under the settlement agreement, subject to the Court’s approval, Defendant agreed to pay
3 a Service Award in the amount of 10,000.00 to Plaintiff. Plaintiff has submitted a declaration
4 demonstrating his devotion to this case, including his efforts assisting counsel in the case,
5 communicating with counsel frequently for litigation, preparing for mediation, and reviewing case-
6 related documents.

7 When compared with the amounts awarded in typical class action cases, the amount
8 requested here is particularly reasonable. Indeed, a **2006** study examining the average incentive
9 award given to class action plaintiffs from **1993 to 2002** found that the “average award per class
10 representative was \$15,992 and the median award per class representative was \$4,357.” (Theodore
11 Eisenberg & Jeffrey P. Miller, “Incentive Awards to Class Action Plaintiffs: An Empirical Study”,
12 53 UCLA L. Rev. 1303, 1308 (2006).) Courts routinely approve enhancement awards for plaintiffs
13 represented by Class Counsel up to \$10,000. (*See, e.g., Moreno v. Pretium Packaging, L.L.C.*
14 (C.D. Cal. Aug. 6, 2021) 2021 WL 3673845, *3 [“The Court concludes a \$10,000 incentive award
15 is appropriate.”]; *Suarez, supra*, 2024 WL 150721 at p. *4 [“The court approves awards of \$10,000
16 for each class representative.”].)

17 “Since without a named plaintiff there can be no class action, such compensation as may
18 be necessary to induce him to participate in the suit.” (*Clark v. Am. Residential Services LLC*
19 (2009) 175 Cal. App. 4th 785, 804.) “[T]he rationale for making enhancement or incentive
20 awards to named plaintiffs is that they should be compensated for the expense or risk they have
21 incurred in conferring a benefit on other members of the class.” (*Id.* at 806.) “An incentive
22 award is appropriate ‘if it is necessary to induce an individual to participate in the suit.’”
23 (*Cellphone Term. Fee Cases* (2010) 186 Cal. App. 4th 1380, 1394, quoting *Clark, supra*, 175
24 Cal. App. 4th at 804.) The “criteria courts may consider in determining whether to make an
25 incentive award include: (1) the risk to the class representative in commencing suit, both
26 financial and otherwise; (2) the notoriety and personal difficulties encountered by the class
27 representative; (3) the amount of time and effort spent by the class representative; (4) the
28 duration of the litigation; and (5) the personal benefit (or lack thereof) enjoyed by the class

representative as a result of the litigation.” (*Id.* at pp. 1394–95.) Plaintiff’s declarations describes how each of the five *Cellphone Termination* factors are present here.

E. Administration Expenses Should be Approved.

Apex Class Action, LLC, the Settlement Administrator, estimates that it will incur a total of \$5,990.00 in costs associated with the administration of this Settlement. (Nava Decl., ¶ 18.) These expenses are reasonable, based upon the size of the class, claim and exclusion tracking, and Class Member payment processing.

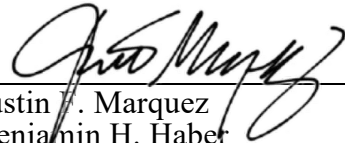
V. CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court grant final approval of the proposed settlement.

Dated: November 7, 2024

Respectfully submitted,

WILSHIRE LAW FIRM, PLC


Justin J. Marquez
Benjamin H. Haber
Daniel J. Kramer

Attorneys for Plaintiff and the Class

PROOF OF SERVICE

Hernandez v. KW California, et al.
BCV-100346

STATE OF CALIFORNIA)
) ss
COUNTY OF LOS ANGELES)

I, Rebecca Padilla, state that I am employed in the aforesaid County, State of California; I am over the age of eighteen years and not a party to the within action; my business address is 3055 Wilshire Blvd., 12th Floor, Los Angeles, California 90010. My electronic service address is rebecca.padilla@wilshirelawfirm.com.

On November 7, 2024, I served the foregoing, **PLAINTIFF'S NOTICE OF MOTION AND MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT; MEMORANDUM OF POINTS AND AUTHORITIES** on the interested parties by placing a true copy thereof, enclosed in a sealed envelope by following one of the methods of service as follows:

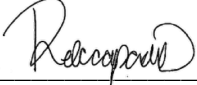
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ROSENLIB & KIMBALL, LLP**
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Telephone: (661) 395-1000
Facsimile: (661) 326-0418

Attorney for Defendant, *KW Plastics of California*

- (X) **BY UPLOAD:** I hereby certify that the documents were uploaded by my office to the State of California Labor and Workforce Development Agency Online Filing Site.
- (X) **BY E-MAIL:** I hereby certify that this document was served from Los Angeles, California, by e-mail delivery on the parties listed herein at their most recent known email address or e-mail of record in this action.

I declare under the penalty of perjury under the laws of the State of California, that the foregoing is true and correct.

Executed on **November 7, 2024**, at Los Angeles, California.



Rebecca Padilla