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UNITED STATES DISTRICT COURT

BY AND FOR THE CENTRAL DISTRICT OF CALIFORNIA

ANDREA OTANEZ VERDUGO individually and on behalf of all others similarly situated, Plaintiff, v. CAPSTONE LOGISTICS, LLC, a Delaware limited liability company with its principal place of business in Georgia, and DOES 1 to 100, inclusive, Defendants.	)))))))))))))))))	Case No: 2:22-cv-03141 FMO (Ex) **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S UNOPPOSED MOTION FOR ORDER GRANTING PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT** Date: March 9, 2023 Time: 10:00 a.m. Courtroom: 6D Judge: Hon. Judge Fernando M. Olguin

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I. INTRODUCTION AND OVERVIEW

This motion seeks preliminary approval of a non-reversionary wage-and-hour class action settlement for approximately **12,542 Class** Members in the total amount of **$1,400,000.00** between Plaintiff Andrea Otanez Verdugo ("Plaintiff") and Defendant Capstone Logistics, LLC ("Defendant"). Because the settlement is fair and reasonable and was negotiated following a private mediation with a mediator highly experienced in wage & hour class actions, and months of additional arm's-length negotiations between counsel following the mediation, it should be preliminarily approved.

In connection with the settlement, Plaintiff seeks provisional certification of a class of individuals narrowed down to two classes:

> (1) The Non-Exempt Settlement Class shall consist of all current and former employees who worked for Capstone within the State of California in a non-exempt position at any time during the Class Period.
>
> (2) The Waiting Time Settlement Class shall consist of all non-exempt former employees who worked for Capstone within the State of California during the Class Period but were no longer employed at the Effective Date.

(The Non-Exempt Settlement Class and the Waiting Time Settlement Class are together referred to as "Class Members" or "the Settlement Class") (*See* Stipulated Settlement Agreement and Release of Claims ("Settlement Agreement") ¶ 5, attached at Exh. 1 to the Declaration of James M. Treglio.)

Through this motion, Plaintiff respectfully requests that the Court enter an order: (1) preliminarily approving the Stipulated Settlement Agreement and Release of Claims (the "Settlement Agreement"); (2) conditionally certifying the Settlement Class under FRCP 23(b)(3) for settlement purposes; (3) approving the proposed Class Settlement Notice and Request for Exclusion Form to be disseminated to Class Members; (4) appointing **ILYM Group, Inc.** as the Settlement Administrator; and (5) scheduling a hearing for final approval of the class action settlement.

As discussed below, this settlement is fair and reasonable, particularly given that the Class Members signed arbitration agreements requiring individual arbitrations for the alleged wage & hour violations at issue and the claims do not arise from any alleged violation apparent on the face of Defendant's policies. The settlement amount in this case also is on par with the settlement per workweek paid in an earlier class action against Defendant for substantively the same causes of action and over the course of a longer period of time. (*See Maria Gomez, et al, v. Pinnacle Logistics, LLC, et al.,* San Bernardino Superior Court Case No CIVDS1804163, Motion for Preliminary Approval of Class Action Settlement ("*Gomez* Motion"), attached as Exhibit 2 to the Declaration of James M. Treglio.) Despite the inherent risks of a pending Motion to Compel Arbitration, in addition to the risks associated with seeking class certification, and the costs of ongoing litigation, and potential appeals, the Parties have reached a resolution that is fair, reasonable.

For these reasons, and the reasons set forth below, Plaintiff respectfully requests the Court grant the motion for preliminary approval.

II. BACKGROUND

A. General Background Information about the Parties

Defendant Capstone Logistics, LLC ("Defendant") is a Delaware limited liability company headquartered in Peachtree Corners, Georgia. Defendant is a provider of supply chain solutions throughout the country, operating in more than 550 locations, including in the State of California. It has capabilities in freight management, warehouse and distribution center support, last mile delivery, supply chain analytics and optimization, among others. Defendant's integrated, end-to-end logistics solutions help its partners reduce warehousing and transportation costs.

Specifically, Defendant is hired by its customers to manage, unload, and package freight for distribution to retail stores. To that end, Defendant employees, in this case the Class Members, work in warehouses throughout the State of California, unload freight from trucks at these warehouses/distribution centers, and then package the freight for further transport elsewhere to their final destinations

Plaintiff and the Class Members are and were employed by Defendant. In October 2020, Plaintiff was hired by Defendant as a lumper tasked with unloading freight from trailers brought in via semi-truck, and sorting the freight by product line, and then loading the freight onto pallets for distribution at retail stores. Plaintiff was assigned to work in Venice, California. At all times, she worked at the warehouse of Ralphs Grocery Stores, one of Defendant's clients. Her hours were typically from 6 p.m. to 6 a.m. Defendant paid Plaintiff $15 per hour until she was terminated in December 2020.

B. The Claims Asserted by Plaintiff in This Case, and Procedural History

1. *Claims Asserted by Plaintiff.*

Plaintiff asserts claim against Defendant on behalf of the Class. Plaintiff's First Amended Complaint asserts multiple causes of action against Defendant for: (1) Failure to provide Plaintiff and her fellow employees meal periods and pay missed meal period premiums (Labor Code §§ 226.7, 512, IWC Wage Order No. 9); (2) Failure to provide rest periods and pay missed rest period premiums (Labor Code § 226.7 and Wage Order No. 9); (3) Failure to pay all wages owed (Labor Code §§ 1194, 1194.2, 1198 and Wage Order No. 9); (4) Failure to pay all overtime wages owed (Labor Code §§ 510, 1194, 1194.2, 1198 and Wage Order No. 9; (5) Failure to provide accurate wage statements to Plaintiff and her fellow employees within the four years prior to the filing of this Complaint (Labor Code § 226 and 226.3); (6) Failure to pay all wages owed in a timely manner (Labor Code §204); (7) Waiting Time Penalties (Labor Code § 201-203); (8) Unlawful Deductions (Labor Code §§ 218, 218.5, 218.6, 221, 222, 222.5, 223, 224, 225, and 225.5); (9) Failure to keep requisite payroll records (Labor Code § 1174(d); (10) Failure to reimburse necessary business expenses (Labor Code §§ 2800 and 2802); (11) Failure to pay all wages due to former employees based on the foregoing (Labor Code § 201 – 203); (12) Unfair competition (California Business & Professions Code §17200, *et. seq.)*; and (13) Violations of the California Private Attorneys' General Act of 2004, Labor Code §§ 2698, *et seq*.

Defendant denied (and continues to deny) all of Plaintiff's claims and that Plaintiff could proceed on a class or representative basis in litigation.

2. *Procedural History, Discovery, and Settlement.*

On March 15, 2022, Plaintiff filed her complaint before the Superior Court for the County of Los Angeles. On May 9, 2022, Defendant removed this action to the United States District Court for the Central District of California. On or about June 14, 2022, Plaintiff sent an informal discovery request to Defendant by e-mail. Defendant subsequently produced, for purposes of mediation, several documents including: (1) Defendant's 2018 Associate Handbook, (2) Defendant's CA Handbook Addendum, and (3) Gomez Settlement Agreement. On June 28, 2022, after an all-day mediation in front of the respected mediator, Lisa Klerman, Esq., the Parties have reached a tentative resolution and settlement of their action. (*See* Declaration of James M. Treglio, Esq. "Decl. Treglio" ¶ 28)

The Parties initially filed their motion for preliminary approval on December 5, 2022, which the Court denied without prejudice, requesting changes to the Settlement Agreement, and seeking additional information from the Parties. (ECF No. 43). Pursuant to the Court's Order, Plaintiff is now refiling her motion with the requested information.

3. *Information on Other Pending Matters*

At the January 12, 2023 hearing on Plaintiff's initial Motion for Preliminary Approval, the Court requested information on the other pending matters involving

Defendant. The pending matters are: *Devine v. Capstone Logistics, LLC, et al.,* Case No. 20STCV39030 (Los Angeles County Superior Court); *Escobar v. Capstone Logistics*, LLC, et al., Case No. STK-CV-UOE-2020-0009429 (San Joaquin County Superior Court); *Barba v. Capstone Logistics, LLC,* et al., Case No. RG21100895 (Alameda County Superior Court); and *Torres, et al. v. Capstone Logistics, LLC,* Case No. 5:22-cv-00228 (Central District of California). (*See* Declaration of Gerald L. Maatman, Jr. "Decl. Maatman" ¶ 8.) All of these pending matters involve factual allegations related to Defendant's pay practices and policies and assert claims similar to those asserted in this case. (*Id.* at ¶ 9.) In recognition of that fact, two of the matters were stayed pursuant to the doctrine of exclusive concurrent jurisdiction, in favor of the earlier filed matters, and the third has agreed to resolve his claims on an individual basis to avoid a motion to stay. (*Id.*)

In the first-filed case, *Devine,* the court compelled plaintiff's individual claims to arbitration and stayed the representative portion of his PAGA claim. Plaintiff asserted a PAGA claim against Defendant for alleged (1) failure to pay minimum wages; (2) failure to pay overtime wages; (3) failure to provide meal periods; (4) failure to authorize and permit rest periods; (5) failure to indemnify employees for necessary expenditures incurred in discharge duties; (6) failure to furnish accurate itemized wage statements; (7) failure to timely pay all wages due to discharged and quitting employees; (8) engagement in unlawful, unfair or fraudulent business acts or practices; and (9) failures to comply with Labor Code and IWC Wage Order No. 9-2001 provisions. (*Id.* at ¶ 10.) On January 19, 2023, the *Devine* court entered a ruling on Capstone's Motion to Compel Arbitration finding that the plaintiff's individual PAGA claim must be compelled to arbitration; and the representative portion of the plaintiff's PAGA claim is stayed pending the California Supreme Court's decision in *Adolph v. Uber Technologies Inc*. (*Id.* at ¶ 11.) This recent ruling in *Devine* further supports the risk calculation and settlement discounting in this case, because the Class Members here are subject to the same arbitration agreement.

The second-filed matter, *Escobar,* alleges that Defendant failed to provide itemized wage statements in violation of the California Labor Code, and the plaintiff seeks to bring his claims on behalf of himself and all other non-exempt employees who worked in California. (*Id.* at ¶ 12.) That matter is stayed pending resolution of Devine. (*Id.*) The third-filed matter, *Barba*, alleges claims similar to *Devine and Escobar*, and *Barba* is likewise stayed pending the resolution of *Devine and Escobar*. (*Id.* at ¶ 13.) The *Torres* matter is pending in the Central District of California. Although the *Torres* matter was brought as a class action and PAGA suit alleging violations very similar to *Devine,* to avoid a motion to stay, the parties in *Torres* have agreed to resolve the matter on an individual basis and are engaged in settlement negotiations to that effect. (*Id.* at ¶ 14.)

The evaluation of these other matters, the informal discovery, and the prior *Gomez* settlement were discussed and analyzed during the mediation, and clarified for the parties and the mediator as to the scope of the current action. This analysis helped the parties ensure that the Settlement Agreement covered the appropriate causes action relevant to the class members in this case. (*Id.* at ¶ 16.)

C. Summary of Proposed Settlement

1. *Economic Terms*

Under the terms of the Stipulated Settlement Agreement and Release of Claims ("Settlement"), Defendant is discharged of all claims asserted in the lawsuit by the Settlement Class in exchange for Defendant's agreement to pay a non-reversionary Gross Settlement Amount ("GSA") of **$1,400,000.00.** The GSA includes deductions for (1) the fees and expenses of the Settlement Administrator, not to exceed **$35,000.00** (Settlement Agreement ¶ 13); (2) Plaintiff's Service Award of **$20,000.00** (*Id.* ¶ 8); (3) attorneys' fees of up to **$350,000.00** (i.e., not to exceed ¼ of the Gross Settlement

Fund) (Id. ¶ 12); (4) litigation expenses and costs of up to **$25,000.00** (*Id.*); and (5) PAGA penalties in the amount of **$40,000.00**[1]. (*Id.* ¶ 11; Decl. Treglio ¶ 3) which will result in a Net Settlement Amount estimated to be no less than **$930,000.00** to be shared pro-rata among the Class Members. As there are 12,542 Class Members, the average amount in settlement amounts to **$74** per Class Member. This is on par with the amount paid in the *Gomez* settlement. (Decl. Treglio ¶ 3.)

For tax purposes, the Parties have agreed that each Individual Settlement Payment will be characterized as 50% Form 1099 income and 50% Form W-2 income, to reflect that 50% of the payment will account for penalties and interest and 50% will account for unpaid wages. (Settlement Agreement ¶ 19.b.)

2. *Settlement Mechanics*

Within 21 calendar days of the Preliminary Approval Order, Defendant shall provide the Settlement Administrator with a database that contains the name, last-known residence phone number, last-known residence mailing address, and social security number of each person within the Settlement Class. (*Id.* ¶ 14.a.) Defendant shall also provide the Claims Administrator with the number of workweeks each person worked during the Class Period for Defendant as a non-exempt employee in California, from August 1, 2019, through the end of the Class Period. (*Id.*) Upon its receipt of the list of names and last known addresses of each Class Member, the Settlement Administrator shall send a Notice of Class Action Settlement and Request for Exclusion Form attached as Exhibit A to the Settlement Agreement to Class Members via First Class U.S. Mail, using the most current, known mailing address for each Class Member based on information provided by Defendant. (*Id.* ¶ 14.b.) This mailing shall occur no later than twenty-one (21) calendar days after receiving the Class Member data from Defendant. Upon receipt of this information from Defendant, the Settlement

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[1] Pursuant to California Labor Code Section 2699(i), 75% shall be paid to the LWDA and 25% shall be distributed to the Participating Class Members

Administrator shall perform a search based on the National Change of Address Database maintained by the United States Postal Service to update and correct any known or identifiable address changes. (*Id.*) The Class Notice shall contain an easily understood statement alerting the Class Members that, unless they elect to opt-out of the Settlement, the Class Member is releasing and waiving all Released Claims against Defendant and will be issued a check reflecting his or her Individual Settlement Amount following Final Approval of the Settlement. No submission of a Claim Form will be required for Class Members to receive their Settlement Shares. Class Members shall be given the opportunity to exclude themselves or opt out of the Settlement Class. They shall not be permitted to opt out of the PAGA Settlement Group. (*Id.* ¶ 14.e.) Any Class Member may elect to opt out of the Settlement by submitting a Request for Exclusion Form from the Settlement to the Settlement Administrator that is signed and dated. (*Id.* ¶ 14.f.) Per the Court's Request, that form is attached as Exhibit A to the Settlement Agreement. To be timely, all such Requests for Exclusion must be postmarked no later than forty-five (45) calendar days after the date the Settlement Administrator initially mails the Class Notice to the Class Members. (*Id.*) Any Request for Exclusion that does not include all of the required information or that is not submitted in a timely manner will be deemed null, void, and ineffective. (*Id.* ¶ 14.g.)

If there is a dispute regarding the timeliness or validity of a Request for Exclusion, the Settlement Administrator shall make the determination, after consultation with Class Counsel and Defendant's Counsel. (*Id.*) Any Class Member who opts out of the Settlement may not object to the Settlement, shall not receive any portion of the Net Class Settlement Fund as part of his or her Individual Settlement Payment, and shall not be bound by the Class Claims Released. (*Id.* ¶ 14.h.) If a Class Member submits both a Request for Exclusion and an Objection, the Class Member's Objection will be valid and be deemed to invalidate the Request for Exclusion. (*Id.*) Each Class Member who does not opt out of the Settlement shall be bound by the applicable Released Claims provisions in the Settlement, including the Class Claims Released. (*Id.*)

Because the Class will be certified by the Court, only Class Members who do not opt out of the Settlement shall be entitled to object to the terms of the Settlement. (*Id.* ¶ 14.i.) Class Members' objections to the Settlement or this Agreement must be made using the procedures set forth in the Notice of Class Action Settlement. (*Id.* ¶ 14.j.) As the Court has requested, any Objection must be sent to the Settlement Administrator and to the Court, and must be postmarked and received by the Claims Administrator and Court no later than 45 days after the first date of mailing of the Notice of Class Action Settlement. (*Id.*) Class Members who timely submit an Objection may be subject to deposition must be available for deposition if Plaintiff or Defendant chooses to take their deposition and receives permission from the Court to do so. (*Id.* ¶ 14.k.) Any Class Member who timely submits an Objection and refuses to be available for deposition shall be deemed to have withdrawn his or her Objection. (*Id.*) Only Class Members who timely submit a valid Objection shall have the right to appear at the Final Fairness Hearing, and may do so either in person or through counsel, but must state their intent to do so at the time they submit their written Objection. (*Id.*) Class Members may withdraw their Objection at any time. (*Id.*) Class Members who fail to make an Objection in the manner specified in the Notice of Class Action Settlement shall be deemed to have waived their Objection and shall be foreclosed from opposing this Settlement or making any Objection, whether by appeal or otherwise. (*Id.* ¶ 14.l.)

3. *<u>The Release of Plaintiff and Class Members</u>*

a. <u>Class Claims Released</u>

Upon final approval of the Settlement, each member of the Class who did not submit a timely and valid Request for Exclusion Form shall be considered to have released forever Defendant from any and all claims that were asserted in the operative complaint filed in the Action or any claims that could have been asserted based on or arising out of the allegations or facts alleged, irrespective of the theory of recovery ("The Released Claims"). (*See* Settlement Agreement ¶ 20.) This release shall apply to all Released Claims arising at any point prior to the end of the Class Period. (*Id.*) Class Members who have not submitted a timely and valid Request for Exclusion Form may hereafter discover facts in addition to or different from those they now know or believe to be true; however, upon final approval, all Class Members who have not submitted a timely and valid Request for Exclusion Form shall be barred from pursuing against any of the Released Parties and shall be deemed to have, and by operation of the final judgment shall have, fully, finally, and forever settled and released any and all of the Released Claims, whether known or unknown, suspected or unsuspected, contingent or non-contingent, which now exist, or heretofore have existed, without regard to the subsequent discovery or existence of such different or additional facts. (*Id.*)

b. <u>PAGA Claims Released</u>

Upon approval of the Settlement, each member of the PAGA Representative Group and the LWDA shall fully release and forever discharge the Released Parties, from any and all PAGA claims that are asserted in, arise from, or reasonably relate to the factual allegations and legal assertions made in the operative complaint and amended PAGA notice. (*Id.* ¶ 21.) The PAGA Released Claims include all PAGA claims that were asserted in the complaints filed in the Action or any PAGA claims that could have been asserted based on or arising out of the allegations or facts alleged, irrespective of the theory of recovery. (*Id.*) Upon approval, Plaintiff, each member of the PAGA Representative Group, and the LWDA will be forever barred from pursuing against the Released Parties and shall be deemed to have, and by operation of the final judgment shall have, fully, finally, and forever settled and released any and all of the PAGA Released Claims alleged or that could have been alleged to have been violated in, or are reasonably related to, the Action, whether known or unknown, suspected or unsuspected, contingent or non-contingent, which now exist, or heretofore have existed, without regard to the subsequent discovery or existence of different or additional facts. (*Id.*)

c. <u>Additional Release by Class Representative</u>

In addition to the Class Release, Ms. Verdugo will also release any and all claims against Defendant and each of the Released Parties. This general release includes any and all claims arising from the employment relationship with Defendant or any of the Released Parties, including, without limitation, claims for wrongful termination, discrimination, harassment, or retaliation pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000 et seq., the California Fair Employment and Housing Act, Cal. Gov't Code Section 12900 et seq, or the California Labor Code. (*Id.* ¶ 22.) This general release by the Class Representative also includes a waiver of California Civil Code Section 1542. *Id.* The Class Representative expressly waives all rights provided by California Civil Code Section 1542, or other similar statutes, that the Class Representative may have against Defendant and each of the Released Parties. (*Id.*) This additional release applies only to Ms. Verdugo, and not any of the Class Members.

4. *<u>Uncashed Checks</u>*

In the event that a Class Payment check is not negotiated within 180 calendar days from the date initially mailed by the Settlement Administrator, the Settlement Administrator will tender those uncashed checks to the State of California's Controller's Office to be held as "Unclaimed Property" in the name of the Class Member. (*Id.* ¶ 19.c.)

III. THE COURT SHOULD CERTIFY THE CLASS FOR SETTLEMENT PURPOSES UNDER FED R. CIV. P. 23

Plaintiff seeks to certify a settlement class that includes the approximately **12,542** Class Members pursuant to Fed. R. Civ. P. 23. Rule 23 requires that all class action settlements satisfy two primary prerequisites before a court may grant certification for purposes of preliminary approval: (1) that the settlement class meets the requirements for class certification if it has not yet been certified (Fed. R. Civ. P. 23(a) and (b)); *Hanlon v. Chrysler Corp.,* 150 F.3d 1011, 1020 (9th Cir. 1998); and (2) that the settlement is fair, reasonable, and adequate (Fed. R. Civ. P. 23€(2)). Here, both of these requirements for preliminary approval of this class action settlement are satisfied.

A. <u>The Settlement Class Satisfies Fed. R. Civ. P. 23(a) and (b)</u>

Rule 23(a) sets out four prerequisites for certification: (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy of representation. Rule 23(b) (3) further provides that a class action may be maintained if "the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

1. *<u>Rule 23(a)(1) Numerosity</u>*

Numerosity is easily satisfied because there are approximately **12,542** members in the Settlement Class. *See, Ikonen v. Hartz Mountain Corp.*, 122 F.R.D. 258, 262 (S.D. Cal. 1988) (40 members are numerous enough). (Decl. Treglio ¶ 2.) The Class definition in the Settlement Agreement narrowed down to two classes that the other seven classes defined in the FAC are subsumed within these two definitions, and encompasses the same group of individuals. (*Id.*)

2. *<u>Rule 23(a)(2) Commonality</u>*

The Settlement Class satisfies commonality in that all Class Members share, *inter alia,* the following legal and factual questions of whether Defendant: 1) failed to provide required meal periods; 2) failed to provide required rest breaks; 3) failed to provide overtime wages; 4) failed to provide minimum wages; 5) failed to timely pay wages during employment; 6) failed to timely pay wages upon separation of employment; 7) failed to provide accurate itemized wage statements; 8) failed to reimburse employees for necessary business expenditures; 9) failed to maintain records;

10) owes penalties under PAGA; 11) violated the California Business and Professions Code §§ 17200, *et seq. See e.g., Taylor v. FedEx Freight, Inc.,* 2015 W.L. 2358248 (E.D. Cal. May 15, 2015) *Ridgeway v. Wal-Mart Stores, Inc*., 2014 W.L. 2600326, *6 (N.D. Cal. Sept. 10, 2014); *Mendez v. R&L Carriers, Inc.,* 2012 W.L. 5868973, *10-11 (N.D. Cal. 2012).

3. *Rule 23(a)(3) Typicality*

"Under [Rule 23(a)(3)'s] permissive standards, representative claims are 'typical' if they are reasonably co-extensive with those of absent class members; they need not be substantially identical." *Hanlon,* 150 F.3d at 1020. Here, Plaintiff's claims are typical of the claims of the Class. Both Plaintiff and Class Members sustained injuries and damages, and were deprived of property rightly belonging to them, arising out of and caused by Defendant's common course of conduct in violation of law as alleged herein, in similar ways and for the same types of unpaid wages; *See e.g., Ridgeway,* 2014 W.L. 2600326, *6; *Mendez v. R&L Carriers, Inc.,* 2012 W.L. 5868973, *10-11.

4. *Rule 23(a)(4) Adequacy*

Rule 23(a)(4) permits certification of a class only if the "representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23 (a)(4). Courts interpret this requirement to mean that (1) the proposed class representative(s) and their counsel do not have conflicts of interest with the proposed class; and (2) the plaintiff(s) and their counsel will vigorously prosecute the action on behalf of the class. *Hanlon*, 150 F.3d at 1020. Here, Plaintiff is a member of the Class and will fairly and adequately represent and protect the interests of the Class and Class Members. Plaintiff's interests do not conflict with those of Class and Class Members. Counsel who represent Plaintiff are competent and experienced in litigating large wage and hour class actions, and other employment class actions, and will devote sufficient time and resources to the case and otherwise adequately represent the Class and Class Members; *General Tel. Co. v. Falcon,* 457 U.S. 147, 157-8, n. 13 (1982).

5. *Rule 23(b)(3) Predominance*

Under Rule 23 (b) (3), plaintiff must demonstrate that common questions "predominate over any questions affecting only individual members" and that a class action is "superior to other available methods for fairly and efficiently adjudicating controversy. Predominance tests whether the proposed class is sufficiently cohesive to warrant adjudication by representation. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997). In other words, courts must determine whether the focus of the proposed class action will be on the actions and conduct of the defendants rather than the behavior of individual class members. *Hanlon*, 150 F.3d at 1022-23. Here, as many courts have held in similar cases involving challenging to wage and hour issues, the common questions exist as to whether Defendant failed to pay minimum wages, whether Defendant failed to provide lawful rest periods and rest period premiums, whether Defendant failed to issue accurate itemized wage statements, and whether Class Members are entitled to derivative penalties as a result of its compensation practices. *See e.g., Quezada v. Con-Way Freight Inc.,* 2012 WL 4901423 (N.D. Cal. Oct. 15, 2012); *Mendez v. R&L Carriers, Inc.,* 2012 WL 5868973 (N.D. Cal. Nov. 19, 2012) ("proof of a defendant's uniform pay policy [] is often sufficient to satisfy the predominance prerequisite in cases where a plaintiff-employee alleges underpayment"); *Ridgeway v. Wal-Mart Stores, Inc.*, 2014 WL 4477662, *12 (N.D. Cal. Sept. 10, 2014); *Taylor v. Fedex Freight*, 2015 WL 2358248 (E.D. Cal. May 15, 2015), and *Taylor v. FedEx Freight*, 2015 WL 4557412 (E.D. Cal. 2015).

Further, this class action is a superior method of adjudication compared to numerous individual suits. To determine whether the class method is superior to other means of adjudicating the claims of many people, courts consider: (1) the interest of class members in individually controlling the prosecution or defense of separate actions; (2) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (3) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (4) the difficulties likely to be encountered in the management of a class action. Fed. R. Civ. P. 23(b)(3)(A)-(D). Here, the superiority requirement is satisfied because it is inefficient for **12,542** Class Members to file individual cases; certification will provide the Class with a viable method of obtaining redress for their relatively modest individual damages; and public policy supports the use of the class action device to secure enforcement of workplace rights. *Hanlon,* 150 F.3d at 1023.

B. <u>The Settlement is Fair, Reasonable, and Adequate</u>

In deciding whether to approve a proposed class action settlement, the Court must find that the proposed settlement is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2); *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 625 (9th Cir. 1982). What matters are the unique facts of the case at hand and the extent to which the proposed settlement can effectively promote the State's goals. *See Cotter v. Lyft Inc*., 176 F.Supp.3d 930, 942 (N.D. Cal- 2016) ["a trial court must assess the adequacy and reasonableness of a proposed settlement in light of unique facts of the case at hand, in light of the proposed settlement as a whole, and in light of the particular risks involved").)

Furthermore, in exercising their sound discretion to approve settlements, courts regularly consider whether the settlement is fair, non-collusive, and "all the normal perils of litigation as well as the additional uncertainties inherent in complex class actions." *In re Beef Indus. Antitrust Litig.*, 607 F.2d 167, 179-80 (5th Cir. 1979). Included in this analysis are considerations of "(1) the strength of the plaintiffs' case; (2) the risk, expense, complexity, and likely duration of further litigation; (3) the risk of maintaining class action status throughout the trial; (4) the amount offered in settlement; (5) the extent of discovery completed and the stage of the proceedings; (6)

the experience and views of counsel; (7) the presence of a governmental participant; and (8) the reaction of the class members to the proposed settlement." *Churchill Village, L.L.C. v. Gen. Elec.*, 361 F.3d 566, 575 9th Cir. (2004) citing *Hanlon*, 150 F.3d at 1026. Importantly, there is a presumption of fairness "if the settlement is recommended by class counsel after arm's-length bargaining." *Wren v. RGIS Inventory Specialists*, 2011 WL 1230826, at *6 (N.D. Cal. Apr. 1, 2011). There is also "a strong judicial policy that favors settlements, particularly where complex class action litigation is concerned." *In re Syncor ERISA Litig*., 516 F.3d 1095, 1101 (9th Cir. 2008). Applying these factors, the proposed settlement is fair.

C. <u>The Settlement Amount is a Fair Compromise in Light of the Litigation Risks and Uncertainties</u>

The Settlement represents a fair compromise given the risks and uncertainties presented by continued litigation. The significant challenges with Plaintiff's case, in particular the fact that Plaintiff and the Class Members all signed arbitration agreements prohibiting class actions and PAGA representative actions. (Decl. Treglio ¶ 7.) Moreover, continued litigation would be costly, time consuming, and uncertain in outcome. (*Id*.) The Settlement ensures timely relief and a substantial recovery for the Class. (*Id*.) Plaintiff's counsel contracted with Eric Lietzow of the Desmond, Marcello & Amster (DM&A) to review the damage calculations made prior to the mediation. (Decl. Treglio ¶ 8.) Mr. Lietzow has over 25 years' experience in valuation and litigation consulting with a focus on providing economic damage and forensic accounting services to attorneys and their clients. (See Declaration of Eric R. Lietzow "Lietzow Decl." ¶ 2) Plaintiff summarizes her risks, claims and potential recoveries as follows:

1. <u>*Defendant's Arbitration Agreements with Plaintiff and the Class Members*</u>

The biggest risk to class-wide recovery was the existence of an arbitration agreement between the Defendant and the Class Members. As outlined in Defendant's Motion to Compel Arbitration, (ECF No. 31), all employees sign a form arbitration agreement as a condition of employment. (ECF No. 31-2, Ex. 3, pp. 12-14) (Decl. Treglio ¶ 9.) This arbitration agreement explicitly includes a waiver of all collective or class claims. (ECF No. 31-2, at p. 13.) As discussed at length in Defendant's Motion to Compel Arbitration (ECF No. 31-1), the threat of individual arbitration was particularly strong. While it is true that cases such as *Southwest Airlines Co. v. Saxon*, No. 21-309, 2022 WL 1914099 (June 6, 2022), *Waithaka v. Amazon.com, Inc.,* 966 F.3d 10 (1st Cir. 2020), and *Rittmann v. Amazon.com, Inc.,* 971 F.3d 904 (9th Cir. 2020), suggest that Plaintiff and Class Members who were employed as warehouse workers might have been deemed exempt from the Federal Arbitration Act, there was a substantial risk that the Court would disagree, or the issue would be subject to protracted litigation. And, as noted above, at least one Court has determined that the claims of Plaintiff and the Class Members are subject to individual arbitration. (*Id.*) As a result, Plaintiff discounted all of her claims. (*Id.*)

2. *Alleged Off the Clock Work Related to Security Screenings*

Regarding the claims at issue in this case, each presented its own problems. The strongest claim going forward was the off the clock claim. While not part of the original complaint, Plaintiff Andrea Verdugo provided information to her counsel in preparation for the mediation that she was uniformly subject to security checks made prior to clocking into or out of her work location. Ultimately, this particular information was important in assisting the Class in resolving this case. (Decl. Treglio ¶ 11.) As the Court is aware, numerous Courts have certified such actions. (*See Heredia v. Eddie Bauer LLC* (N.D. Cal., Jan. 10, 2018) 2018 WL 369032, at *11; *Ulta Salon, Cosmetics & Fragrance, Inc.* (C.D. Cal. 2015) 311 F.R.D. 590, 605; *Ceja-Corona v. CVS Pharmacy, Inc.* (E.D. Cal., Jan. 14, 2015) 2015 WL 222500, report and recommendation adopted (E.D. Cal., Mar. 3, 2015) 2015 WL 925598; *Otsuka v. Polo Ralph Lauren Corp.* (N.D. Cal. 2008) 251 F.R.D. 439, 445; *Cervantez v. Celestica Corp.* (C.D. Cal. 2008) 253 F.R.D. 562, 572; *Frlekin v. Apple Inc.* (N.D. Cal. 2015) 309 F.R.D. 518; *Hamilton v. Wal-Mart Stores, Inc.* (C.D. Cal., Aug. 21, 2018) 2018 WL 4813082, at *5 ("whether the time spent walking from the clock to the security line or passing through the security line is considered 'hours worked' is a common question that can and should be resolved as to all class members").) (Decl. Treglio ¶ 12). Thus, as part of the negotiations, Plaintiff negotiated with an eye toward this claim as well. (*Id.*)

However, as the Court is also well-aware, security checks have also been subject to numerous denials of class certification where, as here, the Class Members worked different shifts, at different locations, and there was evidence that security checks were not uniformly completed. *Christensen v. Carter's Retail, Inc.*, 2021 WL 4932244 (C.D. Cal. October 21, 2021); *Heredia v. Eddie Bauer LLC*, 2020 WL 127489 (N.D. Cal. January 10, 2020); *Figueroa v. Delta Galil USA, Inc.*, 2021 WL 1232695 (N.D. Cal. March 30, 2021). (Decl. Treglio ¶ 13). As a result, Plaintiff had to discount her off-the clock claims understanding the potential pitfalls. (*Id.*) As stated in Mr. Lietzow's declaration, this claim had an undiscounted value of $4,669,130.80. (Decl. Lietzow ¶ 11.) Because of the risks inherent in the action, including arbitration, class certification, summary judgment, trial, and appeals, the value of this claim is discounted to just 8% of its total value, or $375,930.46. (Decl. Treglio ¶ 13.).

3. <u>*Defendant's Alleged Failure to Provide Meal/Rest Periods*</u>

IWC Wage Order 9–2001 provides that "no employer shall employ any person for a work period of more than five (5) hours without a meal period of not less than 30 minutes." See also Cal. Labor Code §§ 226.7 and 512. (Decl. Treglio ¶ 14.) Further, employees must be provided with rest periods of not less than 10 minutes, paid, once per four hours of work. (*Id.*) Where an employer fails to maintain meal period records, there is a rebuttable presumption that the meal period was not provided. *Brinker Rest. Corp. v. Superior Court,* 53 Cal. 4th 1004, 1053 (2012) (Werdeger, J., concurring); *Medlock v. Host Int'l*, Inc., 2013 WL 2278095, at *3 (E.D. Cal. May 22, 2013). IWC Wage Order No. 9, § 12 further provides that employers "shall authorize and permit all employees to take rest periods." If an employer does not authorize and permit the amount of rest break time called for by the applicable wage order, then it has violated the wage order and is liable. *Brinker Rest. Corp*, 53 Cal. 4th at 1033. *Id.*

In preparation for the mediation, Defendant provided Plaintiff with meal and rest period policies. (Decl. Treglio ¶ 15.) The policies, in general, provided legally compliant meal periods and rest periods to the Class Members. (*Id.*) Further, it was likely that these meal periods, despite the legally compliant meal period policy, were affected by the security check policy. (*Id.*) Nonetheless, the challenges to class certification, the threat of being compelled into individual arbitration, and the risks inherent in such claims, such as summary judgement, trial, and appeal, called for a discount greater to the off the clock claim. (*Id.*) According to Mr. Lietzow, the value of this meal period claim was $8,964,731.16 (Decl. Lietzow ¶ 12.) At a discount of 95%, the total value of this claim for settlement purposes was $448,236.56. (Decl. Treglio ¶ 16.)

Plaintiff's additional claim for rest periods was even more challenging. While there were time records to indicate whether employees took meal periods and when, no such records exist for rest periods. (Decl. Treglio ¶ 17.) Further, the fact that Defendant kept and maintained a legally compliant rest period policy made the chances of certification even smaller. (*Id.*) As a result, rest periods is discounted to 4% of their total value. *Id.* According to Mr. Lietzow, those claims were worth $8,964,731.16. (Decl. Lietzow ¶ 13.) With a 96% discount, those claims were worth $358,589.25. (Decl. Treglio ¶ 17.)

4. *Defendant's Alleged Failure to Provide Accurate Wage Statements*

Finally, with regard to wage statement claims under California Labor Code § 226(a) and IWC Wage Order No. 9 require that Defendant semimonthly, or at the time of each payment of wages, to furnish Plaintiff and putative class members with accurate, itemized written statements containing all the information described in § 226 and Wage Order No. 9, § 7. (Decl. Treglio ¶ 18.) Because this claim is subsidiary to the claims as described above, the value of this claim had to be discounted by an equal measure. (*Id.*) According to Mr. Lietzow, the total value of this claim was $11,765,450.00. (Decl. Lietzow ¶ 15.) At a 95% discount, the settlement value was $588,272.50. (Decl. Treglio ¶ 18.)

5. *Defendant's Alleged Failure to Pay All Wages Owed Upon Termination*

Lastly, with regard to the Labor Code §203 waiting time claim, an employer who willfully fails to pay an employee all wages owed upon termination is subject to a penalty of up to 30 days of pay. (Decl. Treglio ¶ 19.) Mr. Lietzow calculated the potential 203 penalties at $46,754,400.00. (Decl. Lietzow ¶ 14.) However, 203 penalties are only incurred when the employer willfully fails to pay all wages owed. (Decl. Treglio ¶ 19.) Any legal argument that such wages are not owed is a total defense to said penalties. (*Id.*) As described above, Plaintiff's claims were subject to numerous defenses, and as such, the odds of such penalties being awarded is virtually nil. (*Id.*)

6. *The Effect of Defendant's Prior Settlement*

In preparation for the mediation, Class Counsel was informed of, and reviewed a similar matter that settled, referenced herein as the *Gomez* Motion. (Decl. Treglio ¶ 21.) That earlier settlement encompassed more claims, for a longer time period than was at issue here. *Id.* The class period in *Gomez* was October 18, 2013 to July 31, 2019, approximately six years. (*See* Gomez Motion, Ex. 2, p. 13.) The class period in this case is August 1, 2019, through the date of approval, approximately four years. (*See* Settlement Agreement ¶ 4.) The *Gomez* settlement thus cut the Class Period in this case significantly. In *Gomez*, the Defendant resolved a matter of over 11,000 Class Members for $2.275 million. (Decl. Treglio ¶ 22.) This resulted in an average settlement payment per class member of approximately $120. While the class size was smaller in *Gomez*, the number of workweeks was, in fact, much greater due to the longer class period. During the mediation, the parties used *Gomez* as a benchmark toward negotiating the final $1.4 million amount in this case. (*Id.*) The average settlement amount per class member here is approximately $74 per class member, which is on par with Gomez taking into account the highlighted differences. (Decl. Treglio ¶ 6.) Additionally, given that in *Gomez* there was no threat of arbitration wiping out the possibility of all class-wide or representative recovery, this is an excellent result for the Parties. (*Id.* ¶ 22.) Lastly, with regard to the PAGA cause of action, the settlement here mirrors the PAGA settlement reached in the *Gomez* action. (Decl. Treglio ¶ 26.) Given the fact that *Viking River* had not yet been decided when *Gomez* was decided, the PAGA recovery here is even stronger. (*Id.*)

7. <u>*Additional Claims*</u>

As part of the settlement, the Parties have agreed to include additional causes of action for a failure to keep accurate records in violation of Cal. Labor Code §1174, a failure to reimburse business expenses in violation of Labor Code §2802, and unlawful deductions in violation of Labor Code §§221-223, 400-410. (Decl. Treglio at ¶23.) The failure to keep accurate records claim, based on Cal. Labor Code §1174(d), while pleaded separately, is essentially a PAGA only claim, with a civil penalty of $500, and is based upon the off-the-clock and meal period claims described above. Its inclusion in the settlement effectively made no difference in the calculations above. (*Id.)*

Similarly, the failure to reimburse business expenses claim, is related to some class members using their cell phones for communications purposes. (Dec. Treglio at ¶

24.) Labor Code §2802 requires that an employer reimburse an employee for all "reasonable and necessary" business expenses, including cell phones. However, here, the employee manuals of the Defendant actually prohibit the practice, and there were apparently landline phones available for employees. As a result, to the extent that expenses were incurred, the Court would likely find them neither reasonable nor necessary. To that end, the inclusion of this claim did not change or modify the damage calculations above. (*Id*.)

Finally, with regard to the unlawful deduction claims, in violation of Labor Code §§221-223, 400-410, this claim was raised in the *Devine* action, and it relates as an alternative theory to the failure to pay all wages, and the failure to pay meal period premiums. Although Plaintiff seeks to add this claim to the Complaint to cover the full scope of claims available, it does not impact the overall damages calculation. (Decl. Treglio at ¶25.)

D. The Parties Investigated this Matter to Allow Counsel and this Court to Conclude that the Settlement is Fair and Reasonable

As detailed above, the parties engaged in a significant exchange of substantive information relating to Class Members' claims, including informal discovery, and exchanges of numerous documents. Based upon the record that was developed through this investigation and discovery process Plaintiff's Counsel were able to realistically estimate class damages and assess the risks of further litigation. It was only after the parties investigated and evaluated the strengths and weaknesses of the case and engaged in hard-fought negotiations that the settlement was completed. (Decl. Treglio ¶ 3.)

E. The Settlement was the Product of Informed, Non-Collusive, and Arm's Length Negotiations Between Experienced Counsel

Courts routinely presume a settlement is fair where it is reached through arms'-length bargaining as it was here. *See Hanlon*, 150 F.3d at 1027. As the U.S. Supreme

Court has held, "[o]ne may take a settlement amount as good evidence of the maximum available if one can assume that parties of equal knowledge and negotiating skill agreed upon the figure through arms-length bargaining…" *Ortiz v. Fibreboard Corp*., 527 U.S. 815, 852 (1999). Here, the Settlement was a product of intensive, adversarial litigation between the parties. In addition, the parties are represented by skilled and experienced counsel with extensive backgrounds in complex litigation and experience litigating and settling similar wage and hour class actions. Moreover, the views of the attorneys actively conducting the litigation is entitled to significant weight in deciding whether to approve the settlement. *Ellis v. Naval Air Rework* 26 *Facility*, 87 F.R.D. 15, 18 (N.D. Cal. 1980), *aff'd*, 661 F.2d 939 (9th Cir. 1981); *Kullar v. Foot Locker Retail, Inc.*, 168 Cal. App. 4th 116, 128 (2008). Plaintiff's counsel believes that this settlement is fair, adequate, and reasonable and in the best interests of Class, and should be preliminarily approved. If the Settlement is approved by the Court, the estimated **12,542 Class** Members will enjoy substantial and meaningful relief.

F. <u>The Proposed Class Notice is Adequate.</u>

Fed. R. Civ. P. 23 (c)(2)(B) provides that the Court must direct to class members the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must concisely and clearly state in plain, easily understood language: (1) The nature of the action; (2) the definition of the class certified; (3) the class claims, issues or defenses; (4) that a class member may enter an appearance through counsel if the member so desires; (5) that the Court will exclude from the class any member who requests exclusion, stating when and how members may elect to be excluded; and (6) the binding effect of a class judgment on class members under Rule 23(c)(3). Fed. R. Civ. P. 23(c)(2)(B).

The content of the proposed Class Notice fully complies with due process and Fed. R. Civ. P. 23. The Class Notice provides specifics regarding the date, time, and place of the Final Approval Hearing, and informs Class Members that they may enter an appearance through counsel. The Notice informs Class Members how to exercise their rights and make informed decisions regarding the proposed Settlement Agreement, and tells them that if they do not request to be excluded, the judgment will be binding upon them. The Notice describes the terms of the Settlement Agreement, informs Class Members how individual recoveries will be determined, and provides an estimated settlement amount for each Class Member. The Proposed Class Notice is more than adequate to put Class Members on notice of the Settlement Agreement. *See, e.g., Mendoza v. Tucson School Dist. No. 1,* 623 F.2d 1338, 1351 (9th Cir. 1980) ("very general description of the… settlement" satisfies standards). Additionally, to ease the burden on Class Members in exercising their rights under the proposed settlement, the Class Notice provides for a Request for Exclusion Form.

G. <u>The Requested Service Award is Reasonable.</u>

Plaintiff will request a Service Award in an amount of **$20,000.00** to recognize her time and efforts on behalf of the Class, including time spent providing factual background for the mediation and the allegations in the class action complaint; reviewing the relevant documents and complaint; participating in phone calls with my lawyers to respond to discovery requests, to discuss litigation and settlement strategy; and reviewing the settlement documents. The requested Service Award falls well within the range of incentive payments typically awarded to Class Representatives in wage and hour class actions. *See e.g. Bond v. Ferguson Enterprises, Inc*., 2011 WL 2648879 (E.D. Cal. 2011) (approving $11,250 service award to each of the two class representatives in a wage and hour class action); *Vasquez v. Coast Valley Roofing, Inc*., 266 F.R.D. 482, 493 (E.D. Cal. 2010) (approving $10,000 service award with $300,000 settlement fund). Further, as discussed in her declaration, and as discussed in the declaration of Class Counsel, Ms. Verdugo's contributions were essential in resolving this matter. (*See* Declaration of Andrea Otanez Verdugo ¶ 6-8)

H. <u>The Requested Attorney's Fees is Reasonable.</u>

In addition, Plaintiff's counsel will request a Class Counsel Fees Payment of up to $350,000.00 (*i.e.*, up to 25% of the Settlement Amount) and Class Counsel Litigation Expenses Payment of up to $25,000.00. (Settlement Agreement ¶ 8.) The fee amount is fair, reasonable and in line with the Ninth Circuit's benchmark. The fees sought are reasonable in light of the result achieved for the Class, which compares favorably with amounts deemed fair, adequate and reasonable in similar settlements under similar circumstances. Underscoring the benefit conferred upon the Class is the fact that litigating wage and hour class actions is inherently risky. Class Counsel Litigation Expenses Payment of up to $25,000.00 is also reasonable and based on documentation, as will be discussed in detail in Plaintiff's request submitted as part of with the Motion for Attorneys' Fees.

The Court noted previously that it will require a lodestar cross-check to determine if the fees sought are fair and adequate. Class Counsel will provide the Court with its lodestar, including all hourly rates, as part of its Motion for Attorneys' Fees, Costs, and Representative Enhancements, which will be filed 28 days prior to the close of the Notice Period to allow the Class Members to comment upon the motion.

I. <u>Plaintiff Has Complied with PAGA Requirements and the Amount Offered In PAGA Settlement is Reasonable</u>

Plaintiff duly provided the LWDA with notice of the proposed Settlement. The LWDA has not contacted Plaintiff's counsel to date. Further, while the amount offered is small, that is the result of the same considerations for the Class recovery, as well as the knowledge that civil penalties under PAGA are discretionary. (Decl. Treglio ¶ 24.) Here, since the Class is already receiving a substantial recovery, the Class Counsel believes the Court would likely reduce the PAGA recovery anyway. (*Id.*)

IV. CONCLUSION

For these reasons, Plaintiff's motion for preliminary approval of the parties' class action Settlement should be granted. The Court should also set a final fairness hearing at which time it will consider final approval following the Class Notice distribution process.

Dated: February 2, 2023 POTTER HANDY, LLP.

By: ____*/s/James M. Treglio*____
James M. Treglio
Counsel for Plaintiff,
and the Putative Class