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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ALAMEDA

AGUSTIN UMANA VILLATORO, individually, and BRYAN HERNANDEZ, individually and on behalf of all others similarly situated,

Plaintiff,

vs.

AMERICAN ASPHALT REPAIR AND RESURFACING COMPANY, INC.; and DOES 1 through 10, inclusive,

Defendants.

Case No.: 22CV024706

[*Assigned for all purposes to the Hon. Somnath Raj Chatterjee, Dept 21*]

CLASS ACTION

PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR PRELIMINARY APPROVAL OF CLASS AND REPRESENTATIVE ACTION SETTLEMENT; MEMORANDUM OF POINTS AND AUTHORITIES

Date: May 27, 2025
Time: 2:30 p.m.
Courtroom: Dept. 21
Judge: Hon. Somnath Raj Chatterjee

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

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

PLEASE TAKE NOTICE that on May 27, 2025, at 2:30 p.m.., or as soon thereafter as the matter may be heard, in Department 21 of the above-captioned Court, located at 1221 Oak Street, Oakland, CA 94612, Plaintiffs AGUSTIN UMANA VILLATORO and BRYAN HERNANDEZ ("Plaintiffs") will and hereby do move this Court for an order:

1. Granting class certification of the Class, solely for settlement purposes pursuant to Code of Civil Procedure § 382;
2. Preliminarily approving the CLASS ACTION AND PAGA SETTLEMENT AGREEMENT AND CLASS NOTICE ("Settlement" or "Agreement");
3. Appointing counsel for Plaintiffs, Moon Law Group, PC, as Class Counsel;
4. Appointing Plaintiffs AGUSTIN UMANA VILLATORO and BRYAN HERNANDEZ as the Class Representatives;
5. Approving the use of the proposed notice procedure and related notice form;
6. Approving PHOENIX CLASS ACTION ADMINISTRATION as the third-party administrator;
7. Directing that notice be mailed to the Class; and,
8. Scheduling a hearing date for motions for final approval of class action settlement and awards of attorneys' fees and costs.

Good cause exists to grant this Motion because: (1) the Class meets all of the requirements for class certification for settlement purposes under Code of Civil Procedure § 382; (2) the Settlement Agreement is a fair, adequate, and reasonable compromise of the disputed wage and hour claims asserted by Plaintiffs; (3) Plaintiffs and Class Counsel are adequate to represent the Class; (4) the proposed notice procedures and related forms comply with California Rules of Court 3.766(d) and (e), adequately apprise Class Members of their rights, and fully comport with due process; and, (5) based on the foregoing, notice should be directed to the Class Members and a final fairness hearing should be scheduled (Plaintiffs suggest about 145 days after preliminary approval is granted).

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

TENTATIVE RULINGS: The court adopts the tentative ruling procedure set out in California Rules of Court, rule 3.1308(a)(1). The tentative ruling or notice to appear will generally be available by 4:00 p.m. two court days prior to the scheduled hearing and no later than 3:00 p.m. the court day before the hearing. Unless the court directs otherwise, the court's tentative ruling will be available online or by calling (866) 223-2244. The process for viewing a tentative ruling online are subject to change. Instructions for access to tentative rulings online can be found at http://www.alameda.courts.ca.gov/Pages.aspx/Tentative-Rulings. Whenever a tentative ruling has not been issued, the parties are to appear at the hearing unless otherwise ordered.

To find a tentative ruling online, you can search by department number or by case number. Go to eCourt Public Portal and proceed through the following steps:

1. Log into eCourt Public Portal
2. Case Search
3. Enter the Case Number and select "Search"
4. Select the Case Name
5. Select the Tentative Rulings Tab
6. Select "View"

Oral argument is only permitted if a party notifies all other parties and the court by 4:00 p.m. on the court day before the hearing of the party's intention to appear. To do so, notify the Court and all the other parties no later than 4:00 PM one court day before the scheduled hearing, and briefly identify the issues you wish to argue through the following steps:

1. Log into eCourt Public Portal
2. Case Search
3. Enter the Case Number and select "Search"
4. Select the Case Name
5. Select the Tentative Rulings Tab
6. Select "Click to Contest this Ruling"
7. Enter your Name and Reason for Contesting

8. Select "Proceed"

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

Respectfully submitted,

Dated: April 30, 2025

MOON LAW GROUP, PC

By: H.S. Leviant

Kane Moon
H. Scott Leviant
Sandy Pham

Attorneys for Plaintiff

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TABLE OF AUTHORITIES

CALIFORNIA DECISIONAL AUTHORITY

I. INTRODUCTION

Pursuant to California Rules of Court, Rules 3.769, Plaintiffs AGUSTIN UMANA VILLATORO and BRYAN HERNANDEZ ("Plaintiffs") request that this Court preliminarily approve the class action settlement set forth in the CLASS ACTION AND PAGA SETTLEMENT AGREEMENT AND CLASS NOTICE ("Settlement" or "Agreement") with Defendant AMERICAN ASPHALT REPAIR AND RESURFACING COMPANY, INC. ("Defendant").

After the exchange of documents and data, and an arm's-length mediation session with mediator Jeff Ross, Esq., Plaintiffs and Defendant (collectively referred to herein as the "Parties") reached a proposed class action settlement with a gross settlement amount ("GSA") of **$790,000.00** in compromise of disputed claims asserted on behalf of the below-defined Class consisting of approximately **276** members. Plaintiffs believe this settlement is a fair, adequate, and reasonable compromise of disputed claims for alleged wage and hour violations and penalties asserted in this case.

Plaintiffs now submit this Motion for Preliminary Approval of Class Action Settlement, along with the Settlement (attached to the Declaration of H. Scott Leviant ["Leviant Decl."], Exhibit 1 thereto). For the Court's convenience, below is a summary of the key provisions of the Settlement.

II. THE MAJOR TERMS OF SETTLEMENT

The provisions of the proposed Settlement include the following:

- Defendant agrees not to oppose certification for purposes of settlement. (Settlement, ¶ 12.1.)
- Class: All persons currently or formerly employed by Defendant as a non-exempt employee in California during the Class Period (the "Class Period" is the period from August 1, 2019, through the date the Court grants preliminary approval). "Participating Class Member" means a Class Member who does not submit a valid and timely Request for Exclusion from the Class portion of the Settlement. (Settlement, ¶¶ 1.5, 1.9, 1.12, 1.34.)
- Settlement Amount: Defendant will pay a maximum of **$790,000.00**, referred to as the Gross Settlement Amount (or GSA herein), resulting in an estimated average **gross** benefit per Class Member of about **$2,862.32.** (Settlement, ¶¶ 1.21, 4.1; Leviant Decl., ¶ 17.)
- Escalator Clause: If the number of actual Workweeks at the close of the Class Period is more than ten percent (10%) higher than the estimated Workweeks per Paragraph 4.1 (i.e., exceeds

28,302 Workweeks), Defendant may, at its election, opt to (a) increase the Gross Settlement Amount on a pro-rata basis equal to the percentage increase in the number of workweeks worked by the Class Members above ten percent (10%) (*e.g.,* if the number of Workweeks increases by 11% to 28,559 Workweeks, the Gross Settlement Amount will increase by 1%); or (b) end the Class Period on a date on which the total Workweeks does not exceed 28,302 . This election must be made at the time the Class Data is delivered to the Administrator. (Settlement, ¶ 8.)

- Funding of Gross Settlement Amount: Defendant shall fund the Gross Settlement Amount, and also fund the amounts necessary to fully pay Defendant's share of payroll taxes by transmitting the funds to the Administrator no later than 14 calendar days after the Effective Date. (Settlement, ¶ 4.3.)
- Class Size: An estimated **276** individuals worked about **25,729** workweeks through September 25, 2024. (Settlement, ¶ 4.1.)
- PAGA Group Size: An estimated **192** aggrieved employees who worked about **11,105** pay periods through September 25, 2024. (Settlement, ¶ 8.)
- PAGA Period: August 1, 2022, through the date of which the Court grants preliminary approval of this Settlement. (Settlement, ¶ 1.30.)
- *Kullar/Munoz* Analysis: Plaintiffs address the claims analysis herein, at Part V.B.3, and in the Declaration of Leviant, at Paragraph 18.
- No Reversion: The Settlement is a ***non-reversionary*** settlement. (Settlement, ¶ 3.1.)
- Certification: Plaintiffs address certification requisites herein, at Part V.A., and in the Declaration of Leviant, at Paragraphs 34-40;
- No Claim Form: No claim form is required. (Settlement., ¶ 3.1.)
- Class Release: All Participating Class Members release all claims that were alleged or reasonably could have been alleged based on the facts and legal theories contained in the Operative Complaint in the Action. (Settlement, ¶ 5.2.)
- PAGA Release: Plaintiff Villatoro, on behalf of the State of California, releases the Released Parties from all claims for civil penalties under PAGA, based on the facts and Labor Code

sections that were alleged or reasonably could have been alleged in Plaintiff's PAGA Notice of violations and the Operative Complaint. (Settlement, ¶ 5.3.)

- Net Settlement Amount: The Gross Settlement Amount, less the following payments in the amounts approved by the Court: Individual PAGA Payments to Aggrieved Employees, the LWDA PAGA Payment, Class Representative Service Payments, 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, ¶ 1.27.) The Net Settlement Amount is estimated to be at least **$399,166.67**, resulting in an average **net** payment per Class Member of at least **$1,446.26**, before any tax withholdings. (Leviant Decl., ¶ 17.)
- Tax Allocation: Twenty percent of each Participating Class Member's Individual Class Payment will be allocated to settlement of wage claims and reported on an IRS W-2 Form. Eighty percent of each Participating Class Member's Individual Class Payment will be allocated to settlement of claims for interest and penalties and reported on IRS 1099 Forms. (Settlement, ¶ 3.2.4.1.) The PAGA Settlement payments to Aggrieved Employees will be allocated as 100% penalties. (Settlement, ¶ 3.2.5.2.)
- Employer's Portion of Payroll Taxes Paid Separately: Defendant's portion of payroll taxes (e.g., FICA, FUTA, etc.) owed on any settlement payments to Class Members that constitute wages will be paid separate and apart from the GSA. (Settlement, ¶ 3.1.)
- Settlement Administrator: The notice portion of the Settlement will be administered by a third-party Administrator, Phoenix Settlement Administrators ("Phoenix"), with the costs of administration not to exceed $10,000.00, except for a showing of good cause as approved by the Court. (Settlement, ¶ 3.2.3.) Phoenix's estimate for settlement administration services, in the amount of **$8,250.00**, was selected as the most reasonable bid for all required services, with all due regard for the administrator's reputation and known quality of work from a competitive bidding process. (Declaration of Jodey Lawrence, ["Lawrence Decl."], ¶ 17.)
- Class Data for Administration: The Settlement Administrator will receive the Class Data not later than fourteen (14) calendar days after the Court grants Preliminary Approval, use the

National Change of Address ("NCOA") database to update the Class Data, and then use skip tracing on returned Notices. (Settlement, ¶¶ 1.10; 4.2; 7.4.)

- Notice: The Notice will issue within fourteen (14) calendar days of receipt of the Class Data. (Settlement, ¶ 7.5.2.) The Notice describes how to dispute workweeks, submit an objection in writing, in person, or through an attorney, or request exclusion. (Settlement, ¶¶ 7.5 – 7.8.)
- Notice Language: Notice will issue in English *and* Spanish. (Settlement, ¶¶ 1.11.)
- Objections: Objections can be timely submitted to the Administrator by fax, email, or mail. Alternatively, Participating Class Members may appear in Court (or hire an attorney to appear in Court) to present objections at the Final Approval Hearing. (Settlement, ¶ 7.7.2.)
- Exclusion Requests: Signed, written requests for exclusion can be timely submitted to the Administrator by fax, email, or mail. (Settlement, ¶ 7.5.1.)
- PAGA Allocation: From the GSA, **$80,000.00** will be allocated to settle claims brought pursuant to the California Private Attorneys General Act, Labor Code § 2699 *et seq*. ("PAGA"), allocated as seventy-five percent (75%), or at least **$60,000.00**, to the California Labor & Workforce Development Agency, and twenty-five percent (25%), or at least **$20,000.00** to Aggrieved Employees. (Settlement, ¶¶ 1.33; 3.2.5.)
- Notice to LWDA: Notice was provided prior to the filing of this Motion. Evidence is attached to the Leviant Declaration as Exhibit 2.
- Enhancement/Service Award to Plaintiffs: Defendant will not oppose application for a Class Representative Service Payments of up to **$7,500.00** each, paid from the GSA. (Settlement, ¶ 3.2.1.)
- Fees and Costs: Defendant will not oppose Class Counsel's application for fees of not more than one-third of the GSA, which is currently estimated to be **$263,333.33** subject to the escalator clause, and actual costs in an amount not to exceed **$22,500.00**, to be paid out of the GSA. (Settlement, ¶ 3.2.2.)
- Check Void Period: Settlement checks will be valid for 180 days. (Settlement, ¶ 4.2.1.)
- Uncashed Checks: For any Class Member whose Individual Class Payment check or Individual PAGA Payment check is uncashed and cancelled after the void date, the

Administrator shall transmit the funds represented by such checks to the California Controller's Unclaimed Property Fund in the name of the Class Member thereby leaving no "unpaid residue" subject to the requirements of California Code of Civil Procedure § 384(b). (Settlement, ¶ 4.4.3.)

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

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

III. FACTUAL AND PROCEDURAL BACKGROUND

A. Plaintiffs' Claims

Defendant operates operates within the pavement maintenance industry, specializing in all aspects of asphalt and concrete pavement solutions, sealcoating, slurry surfacing and striping. (Leviant Decl., ¶ 4.) On December 27, 2022, this action was commenced with the filing of a Complaint alleging causes of action against Defendant for failure to pay minimum wages, failure to pay overtime compensation, failure to provide meal periods, failure to authorize and provide rest breaks, failure to timely pay final wages at termination, failure to indemnify for necessary business expenses, failure to provide accurate itemized wage statements, and unfair business practices. (*Id.*)

Initial plaintiff Becerra sent a letter to the Labor and Workforce Development Agency ("LWDA"), pursuant to California Labor Code § 2699.3, providing notice of his intent to seek civil penalties under the Private Attorneys General Act, California Labor Code § 2698, *et seq*. (*Id*., at ¶ 5.) The LWDA did not indicate that it intended to investigate the alleged violations referenced in the letter, and the 65-day time period permitted for the LWDA to provide such a notification expired. (*Id.*) On August 1, 2023, plaintiff Becerra filed a First Amended Complaint (1) clarifying plaintiff Becerra's claims; (2) adding Plaintiff Umana Villatoro and Plaintiff Hernandez as additional plaintiffs and class representatives; and (3) alleging Plaintiff Umana Villatoro's causes of action against Defendant for civil penalties under the Private Attorneys General Act ("PAGA"). (*Id.*) On March 11, 2025, Plaintiff Becerra, Plaintiff Umana Villatoro, and Plaintiff Hernandez filed a Second Amended Complaint (1) dismissing plaintiff Becerra's claims and (2) alleging Defendant failed to include all non-discretionary compensation within the regular rate of pay. (*Id.*) The Second Amended Complaint is the operative complaint in the Action (the "Operative Complaint."). (*Id.*)

B. <u>Pre-Mediation Data Production and Analysis</u>

The Parties conducted informal discovery and investigation of the facts and law. (*Id.*, at ¶ 6.) Such investigation included, *inter alia*, the exchange of extensive data and discoverable information in preparation for the mediation session. (*Id.*) The Parties have analyzed time clock, pay and other data pertaining to Plaintiffs and the Class during the settlement period, including but not limited to the numbers of former and current members of the Class, average workweeks and pay periods, and the average rate of hourly pay. (*Id.*) The time and pay data, drawn from over 86% of the Class, was used for Plaintiff's pre-mediation analysis, a highly accurate sample. (*Id.*) The margin of error calculation for the sample of the Class in this case is as follows:

$$1.96\sqrt{\frac{0.5(1-0.5)}{276}}\sqrt{\frac{276-238}{276-1}} = \text{margin of error}^{1} = 0.0236 = 2.36\%$$

(*Id.*) With a random sample of data for 238 employees, the margin of error, using the population adjustment factor, was no more than 2.36 percent.[2] In addition, Defendant also provided other data pertaining to Plaintiffs and the Class during the relevant Class Period, including but not limited documents reflecting wage and hour policies and practices during the Class Period. (*Id.*)

After reviewing documents regarding Defendant's wage and hour policies and practices and

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[1] The term "1.96" is derived from a standard deviation table for a 95% confidence interval, known as a "z-table." It is not affected by sample or population size. The margin of error is an "overestimate" of the margin of error because the variance is presumed to be at its highest value, using 0.5(1-0.5) to represent p*q in the variance equation of (p*q)/n.

[2] The margin of error formula does not require an adjustment factor for extremely large populations. (*Id.*) A poll of all potential voters in the United States, for example, does not require an adjustment for the population size, since the second radicand in the equation (the fraction in the second radical sign) is effectively equal to 1. (*Id.*) This is because the square root of a fraction that is very close to 1 is even closer to 1. Consider a population of 200 million and a sample of 1,000 individuals from that population. The second radicand is the fraction of 200 million minus 1,000, all divided by 200 million minus 1. (*Id.*) That is equal to 0.999995. (*Id.*) The square root is 0.99999975, which is indistinguishable from 1 when talking about a margin of error percentage even to the nearest tenth of a percent. (*Id.*) But when the population size is much smaller, the population size has a major impact on the margin of error for a given sample size. (*Id.*)

other information obtained during the exchange of discovery, Class Counsel were able to evaluate the probability of class certification, success on the merits, and the reasonably obtainable maximum monetary exposure for all claims. (*Id.* at ¶ 7.) Class Counsel reviewed these records and prepared a damage analysis prior to mediation. (*Id.*) Class Counsel also investigated the applicable law regarding the claims and defenses asserted in the litigation. (*Id.*)

C. Settlement

On September 25, 2024, the Parties participated in a full day mediation presided over by Jeff Ross, Esq., which led to this Agreement to settle the Action. (*Id.* at ¶ 8.) The Parties discussed at length the burdens and risks of continuing with the litigation. (*Id.*) At the mediation, the Parties agreed to settle the Action and thereafter prepared and signed a settlement agreement (the "Agreement"). (*Id.*)

Plaintiffs and Class Counsel are aware of the burdens of proof necessary to establish liability for the claims asserted in the Action, both generally and in response to Defendant's defenses thereto. (*Id.* at ¶ 9). Plaintiffs and Class Counsel have also taken into account Defendant's agreement to enter into a Settlement that confers substantial relief upon the Class. (*Id.*)

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

IV. CLASS DEFINITION

The Class is defined as follows:

> All persons currently or formerly employed by Defendant as a non-exempt employee in California during the Class Period (the "Class Period" is the period from August 1, 2019, through the date the Court grants preliminary approval). "Participating Class Member" means a Class Member who does not submit a valid and timely Request for Exclusion from the Class portion of the Settlement. (Settlement, ¶¶ 1.5, 1.9, 1.12, 1.34)

(Leviant Decl., ¶ 11 and Exhibit 1.)

V. DISCUSSION

A. The Court Should Conditionally Certify the Class for Settlement Purposes

The Class should be provisionally certified for settlement because: (1) the Class is ascertainable and numerous; (2) there exists a well-defined community of interest; and (3) a class action is the superior method of adjudication for this settlement. Code of Civ. Proc. § 382; *Brinker Rest. Corp. v. Super. Ct.*, 53 Cal. 4th 1004, 1021 (2012); *Linder v. Thrifty Oil Co.*, 23 Cal. 4th 429, 435 (2000); *Sav-on Drug Stores, Inc. v. Superior Court*, 34 Cal.4th 319, 326, 332 (2004). For purposes of this Settlement *only*, Defendant stipulates to conditional certification. (Settlement, ¶ 12.1.)

"The certification question is 'essentially a procedural one that does not ask whether an action is legally or factually meritorious.'" *Id.*, at 326, quoting *Linder*. Indeed, the certification question simply asks whether the theory of recovery advanced by the plaintiff is likely to prove amenable to class treatment. *See, e.g.*, *Jaimez v. Daiohs USA, Inc.*, 181 Cal. App. 4th 1286, 1298 (2010). "[I]t is also well established that trial courts should use different standards to determine the propriety of a settlement class, as opposed to a litigation class certification. Specifically, a lesser standard of scrutiny is used for settlement cases." *Global Minerals & Metals Corp. v. Superior Court*, 113 Cal. App. 4th 836, 859 (2003), citing *Dunk v. Ford Motor Co.* 48 Cal. App. 4th 1794, 1807 n. 19 (1996).

In view of these standards, the Class should be certified for purposes of settlement. Code Civ. Proc. § 382; Rules of Court, Rule 3.769(c).

1. The Members of the Class Are Both Ascertainable and Numerous.

Whether an ascertainable class exists turns on three factors: (1) the class definition, (2) the size of the class, and (3) the means of identifying the class members. *See Miller v. Woods*, 148 Cal. App. 3d 862, 873 (1983). A class is ascertainable when "it is defined 'in terms of objective characteristics and common transactional facts' that make 'the ultimate identification of class members possible when that identification becomes necessary.'" *Noel v. Thrifty Payless, Inc.*, 7 Cal. 5th 955, 980 (2019). The class definition is sufficiently specific to enable the Parties, Class Members, and the Court to determine the parameters of the class. *See Clothesrigger, Inc. v. GTE Corp.*, 191 Cal. App. 3d 605, 617 (1987). Here, there were about 276 Class Members, all of whom may be identified by reference to Defendant's records. (Leviant Decl., ¶ 35.) The Class is not only ascertainable, but also numerous.

2. There Are Common Questions That Predominate Over Any Questions That May Be Unique to Individual Class Members.

The community of interest requirement embodies three factors: (1) predominant questions of law and fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class. *Dunk,* 48 Cal. App. 4th at 1806; *Richmond,* 29 Cal. 3d at 473-75. A question of law or fact is common to the members of a class if it may be resolved through common proof. *See*, *Jaimez,* 181 Cal.App.4th at 1305. As for predominance, it "is a comparative concept, and 'the necessity for class members to individually establish eligibility and damages does not mean individual fact questions predominate.'" *Sav-on*, 34 Cal. 4th at 334.

In this case, common questions include, but are not limited to: (i) whether or not Defendant paid proper wages to the Class; (ii) whether or not Defendant provided meal periods to the Class; (iii) whether or not Defendant provided rest periods to the Class; (iv) whether or not Defendant paid compensation timely upon separation of employment to former Class Members; (v) whether or not Defendant paid compensation timely throughout Class Members' employment; (vi) whether or not Defendant provided accurate itemized wage statements to the Class; and, (vii) whether or not Defendant engaged in unlawful or unfair business practices affecting the Class in violation of the California Business and Professions Code §§ 17200-17208. (Leviant Decl., ¶ 37.) In addition, common defenses, including an exemption defense, apply to most of the Class.

In the Action, Plaintiffs' claims present sufficient common issues of law and fact that predominate over individual issues and warrant class certification. From their review of the documentation provided, Class Counsel determined that for purposes of these claims, Defendant's policies and practices are either identical, or sufficiently similar, to raise the same questions of liability, and applied to all Class Members. Because Class Members would have to prove the same issues of law and fact to prevail, and because their potential legal remedies are identical, it would be preferable to resolve all Class Members' claims by means of the Settlement than to require each Class Member to litigate his or her individual claims. Therefore, common questions predominate over questions that may be unique to individual Class Members, and class-wide settlement is superior to any other resolution.

3. Plaintiffs' Claims Are Typical of Those of the Class.

Typicality "requires a showing that the class representative has claims or defenses typical of the class." *See, e.g.*, *Ghazaryan v. Diva Limousine, Ltd.*, 169 Cal. App. 4th 1524, 1534 (2008), approved by *Brinker Rest. Corp. v. Super. Ct*., 53 Cal. 4th 1004 (2012). California law does not require that plaintiffs have claims identical to the other class members. Rather, the test of typicality for a class representative is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct. *Seastrom v. Neways, Inc*., 149 Cal. App. 4th 1496, 1502 (2007).

In light of these standards, Plaintiffs are typical of class members. (Leviant Decl., ¶ 36.) Like other Class Members, Defendant employed Plaintiffs as hourly employees during the Class Period. (*Id*.) Plaintiffs allege that they and other Class Members share the same claims stemming from Defendant's alleged violations of the Labor Code and relevant wage order. (Declaration of Augustin Umana Villatoro, ["Villatoro Decl."], ¶¶ 9-11; Declaration of Bryan Hernandez, ["Hernandez Decl."], ¶¶ 9-11). In addition, Defendant's main defense, that the wage and hour policies and practices fully comply with California law, apply equally to the claims of all Class Members. Thus, Plaintiffs are typical of the Class.

4. Plaintiffs and Plaintiffs' Counsel Will Adequately Represent the Class.

Adequacy is shown where the plaintiff is represented by counsel qualified to conduct the litigation and the plaintiff's interest in the litigation is not antagonistic to class members. *McGhee v. Bank of America*, 60 Cal. App. 3d 442, 451 (1976). In other words, where the plaintiff has adequate counsel, the plaintiff may represent the entire class absent any disabling conflicts of interest that might hinder the plaintiff's ability to represent the class. *Id.* In the Action, Plaintiffs have no conflicts of interest with other Class Members and have agreed to place Class interests above his own. (Villatoro Decl., ¶¶ 5-21; Hernandez Decl., ¶¶ 5-21; Leviant Decl., ¶ 39.) Moreover, Plaintiffs' counsel is experienced in wage and hour class litigation and has no conflicts of interest with absent Class Members. (Leviant Decl., ¶ 39). Thus, this Court should appoint Plaintiffs as the Class Representatives and appoint Plaintiffs' Counsel as Class Counsel.

5. Proceeding as a Class Action is Superior to Individual Actions

Plaintiffs contend that proceeding as a class action is a superior means of resolving this dispute, as the Class Members and the Court will derive substantial benefits. Class certification would serve as the only means to deter and redress the alleged Labor Code violations. *See Linder v. Thrifty Oil Co*. 23 Cal. 4th at 434. Furthermore, individual actions arising out of the same operative facts would unduly burden the courts and could result in inconsistent results, which may be avoided by class certification.

6. The Proposed Class Notice Complies with Rule 3.766(d) and (e)

Notice requirements are set forth in Rules of Court, Rule 3.766. In determining the manner of notice, the court must consider interests of the class, relief requested, stakes of individual class members, costs of notifying class members, resources of the parties, possible prejudice to class members who do not receive notice, and the *res judicata* effect on class members. Rules of Court, Rule 3.766(e).

a) The Notice Procedure Satisfies Due Process

The proposed procedure for distributing the Proposed Notice is robust and meets the requirement that it have "a reasonable chance of reaching a substantial percentage of the class members." *Cartt v. Sup. Ct.*, 50 Cal.App.3d 960, 974 (1975). There is no statutory or due process requirement that all class members receive actual notice, but in this matter, the Class Members will receive direct notice. Here, the proposed procedure includes safeguards, including, but not limited to, mailing notice to Class Members' last known addresses; skip tracing; searches for address changes; and the re-mailing of returned notices to any forwarding addresses. (Lawrence Decl., ¶ 8). This manner of giving notice complies with Rule of Court 3.766(c) because it provides a reasonable chance that Notice will reach most or all Class Members.

b) The Notice is Accurate and Informative

The proposed Notice of Class Action Settlement should be approved for dissemination to the Class Members because its content complies with Rule of Court 3.766(d) in that it contains a brief explanation of the case, including the basic contentions or denials of the Parties, detailed information about Class Members' rights to be excluded from the Settlement and object to the Settlement; a statement that the Settlement will bind all members who do not timely opt-out. Thus, the Notice also satisfies Rule of Court 3.769(f) regarding the contents of settlement notices.

The Notice also fulfills the requirement of neutrality in class notices. 3 NEWBERG § 8.39. It summarizes the proceedings and the terms and conditions of the proposed Settlement, in an informative and coherent manner, in compliance with the Manual for Complex Litigation ("MANUAL"), (2d Ed. 1993), which states that "the notice should be accurate, objective, and understandable to Class Members . . .." MANUAL, § 30.211. It makes clear that the Settlement does not constitute an admission of liability by Defendant and recognizes that this Court has not ruled on the merits. It also states that the final settlement approval decision has yet to be made. Accordingly, the Notice complies with the standards of fairness, completeness, and neutrality required of a combined settlement-certification class notice.

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

California courts favor settlement. *See, e.g.*, *Stambaugh v. Superior Court*, 62 Cal. App. 3d 231, 236 (1976). Unlike most settlements, class action settlements involve a court approval process that exists to prevent fraud, collusion, and unfairness to class members. *Malibu Outrigger Bd. of Governors v. Superior Court*, 103 Cal.App.3d 573, 578-579 (1980). For the reasons discussed below, this Court should preliminarily approve the Settlement, allow the Parties to give notice to the Class as proposed, and schedule a Final Approval Hearing.

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

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

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

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

A settlement is presumptively fair where it is reached through arms' length bargaining, based on sufficient discovery and investigation to allow counsel and the court to act intelligently, counsel is experienced in similar litigation, and the percentage of objectors is small.[3] *Dunk*, 48 Cal.App.4th at 1802; *In re Microsoft I-V Cases*, 135 Cal. App. 4th 706, 723 (2006); *7-Eleven Owners for Fair Franchising v. Southland Corp*., 85 Cal. App. 4th 1135, 1146 (2000). In exercising the power to approve a settlement, the overriding concern is to ensure that a proposed settlement is "fair, adequate, and reasonable," *Dunk*, at 1801, considering "the complexity and likely duration of further litigation, the risk of maintaining class action status through trial, the amount offered in settlement, the extent of discovery completed and the state of the proceedings, the experience and views of counsel, the presence of a governmental participant, and the reaction of the class members to the proposed settlement. *Id*. These factors require balancing, are non-exhaustive, and, as such, trial courts should tailor the factors considered to each case and give due regard to "what is otherwise a private consensual agreement between the parties." *Id.*

Here, the Settlement resulted from thorough, arms' length negotiations between experienced counsel with the assistance of a skilled mediator, Jeff Ross. (Leviant Decl., ¶¶ 8-10.) Plaintiffs obtained data from Defendant and then carefully reviewed that data. (*Id*. at ¶ 6-7). Counsel for Plaintiffs also examined policies, financial records, and interviewed witnesses in detail about their work experiences and Defendant's practices. (*Id*.)

Based on the review of data, Plaintiffs estimated potential exposure and then estimated risk factors to adjust the reasonable expected outcome. The investigation that Plaintiffs' counsel conducted was sufficient to provide them with enough information to intelligently evaluate the estimated exposure for purposes of negotiating the Settlement in view of the risks discussed below and was sufficient to

[3] Because the fourth prerequisite for the presumption to arise cannot be addressed until the final approval hearing, only the first three prerequisites are relevant at this preliminary stage of the settlement approval process.

allow this Court to do the same. *See, e.g.*, *Wershba v. Apple Computer*, *Inc.,* 91 Cal. App. 4th 224, 245 (2001). A thorough data analysis was conducted.

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

a) The Class Settlement is Fair, Adequate and Reasonable

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

With respect to the claims asserted on behalf of the Class, there are serious risks that support this compromise amount. These risks include, but are not limited to: (i) the risk that Plaintiffs would be unable to establish liability for unpaid wages, *see Duran v. US Bank Nat'l Ass'n*, 59 Cal. 4th 1, 39 & n. 33 (2014) ("*Duran*"); (ii) the risk that Defendant's meal and rest period policies might not support class certification or a class-wide liability finding; (iii) the risk that uncertainties about the legality of Defendant's policies and practices could preclude class-wide awards of statutory penalties; (iv) the risk that individual differences between Class Members could be construed as pertaining to liability and not just damages; (v) the risk that any penalty award under PAGA could be reduced by the Court in its discretion; (vi) the risk that lengthy trial or appellate litigation could ensue; and (vi) the risk that violation rates could prove lower than expected. (Leviant Decl., ¶ 16.) These risks are non-exhaustive. (*Id.*)

In light of the uncertainties of protracted litigation, the settlement amount reflects a fair and reasonable recovery for the Class Members. (Leviant Decl., ¶ 17.) The settlement amount is, of course, a compromise figure. (*Id.*) By necessity it took into account risks related to liability, damages, and the defenses asserted by Defendant. (*Id.*) Moreover, each Class Member will be given the opportunity to opt-out of the Settlement, allowing those who feel they have claims that are greater than the benefits they can receive under this Settlement to pursue their own claims. (*Id.*) For the approximately **276** members of the Class, the average ***gross*** benefit is **$2,862.32** per class member, and the estimated average ***net*** recovery for each Class Member would be approximately **$1,446.26**. (*Id.*) Given that Defendant could potentially defeat certification, this is a significant sum to have achieved in settlement. (*Id.*) Moreover, a Class Member who worked a greater number of weeks for Defendant will receive a larger share of the Settlement than a Class Member who worked for a shorter amount of time during the class period. (*Id.*)

After analyzing the claims in this matter, Class Counsel has concluded that the value of this Settlement is fair, adequate, and reasonable. (Leviant Decl., ¶ 18.) The Gross Settlement Amount of **$790,000.00** is about 93% of the **$849,289.29** estimate of *risk-adjusted* recovery (excluding interest) at this stage in the litigation. (*Id.*) This assessment is based on a carefully constructed model of the current fair value of the case, using estimated risks, average wage rates, numbers of employees, and the amount of time covered by the class period, resulting in the following exposure projections:

- A reasonably estimated exposure for unpaid off-the-clock wages was calculated, with the assistance of an expert, to be approximately **$266,394.00**, based on an estimate of five (5) minutes of off-the-clock work for half of all shifts for every Class Member. However, with the high-risk factor discounts for certification and liability proof, the value of that claim is estimated by Plaintiff's counsel to be approximately **$43,623.04**, assuming certification probability of 40% and merits success at 40%. The off-the-clock time resulted from allegations of off-the-clock loading of equipment and occasional time clock delays. Here, a $43,623.04 exposure has a value of about 16% of its maximum, given a likelihood of success on both certification and the merits, which is an approximation of the chain probability of certification multiplied by merits chances: $0.4 \times 0.4 = 0.16$. This theory of recovery has a high degree of risk because it depends on Class Member estimates of the frequency and duration and is testimony dependent.

- A reasonably estimated exposure for unpaid off-the-clock wages due to regular rate errors was calculated, with the assistance of an expert, to be approximately **$201,932.00**. However, with the risk factor discounts for certification and liability proof, the value of that claim is estimated by Plaintiff's counsel to be approximately **$60,579.60**, assuming certification probability of 75% and merits success at 40%. The unpaid overtime depends upon the classification of additional compensation as non-discretionary. This theory of recovery has a moderate degree of risk because it depends on the classification of the "ebon" payment as non-discretionary compensation, which is highly disputed.

- A reasonably calculated exposure for meal break violations over the class period was calculated at **$460,259.50**, with chances of certification and liability risks (50% and 40%, respectively), resulting in a risk-adjusted exposure of **$92,051.90**. This exposure is based upon facial violations. Employee choice is a serious issue in the context of a meal period claim. So long as an employee has the opportunity to take a lawful meal period, an employee can choose to take it late, cut it short, or skip it.

- A reasonably estimated exposure for rest break violations over the class period was calculated at **$931,527.40**, but with chances of certification and proof of liability (20% and 20%, respectively), resulting in a risk-adjusted exposure of **$37,261.10**. This claim is based entirely on class member testimonials that rest breaks were sometimes missed due to work demands. Plaintiffs estimated the exposure assuming 100% of the Class missed one rest break per pay period, while understanding that this theory carries the potential for high risk given that employees were often allowed to determine when to take rest breaks and worked in small teams at job sites.

- A reasonably calculated exposure for unreimbursed expenses was estimated to be **$160,912.50**, but with chances of certification and proof of liability (60% and 50%, respectively), resulting in a risk-adjusted exposure of **$48,273.75**. The allegation is that employees used cell phones to document completed work (which would not have impacted all employees if true) and employees felt obligated to purchase steel-toed boots for safety reasons.

- The risk-adjusted penalty recovery for wage statement penalties were estimated to be approximately **$86,400.00**, on a maximum exposure of **$384,000.00** (with certification and merits success chances of 75% and 30%, respectively, based on all theories of unpaid wages, adjusted for the additional risk of needing to prove other elements in addition to the underlying wage claim). The value of this claim was just dealt a severe blow by the recent California Supreme Court decision of *Naranjo v. Spectrum Security Services, Inc.* (May 6, 2024), which significantly strengthened the good faith defense to Section 226 penalties.

- The risk-adjusted penalty recovery for Labor Code § 203 penalties was estimated to be approximately **$149,139.90**, on a maximum exposure of **$662,844.00** (with certification and merits success chances of 75% and 30%, respectively, based on all theories of unpaid wages, adjusted for the additional risk of needing to prove other elements in addition to the underlying wage claim). The need to show a knowing and intentional violation constitutes an additional risk factor.

- Performing risk-adjusted valuations for all claims yields a total value in the range of **$516,329.29**, excluding PAGA.[4]

- For the PAGA Period, the number of PAGA Pay Periods at issue is estimated to be **11,105** for the approximately **192** Aggrieved Employees. Using the most straightforward formulation of applying the "catch-all" $100 penalty specified in Labor Code § 2699(f)(2) to each PAGA Pay Period, the total penalty exposure is approximately **$1,110,500.00**. In addition, with assistance from Plaintiff's data consultant, and after a thorough review of evidence casting serious doubt on the viability of many of the theories of penalty recover, counsel separately estimated the plausible potential PAGA exposure to be, on a penalty-by-penalty basis, to be approximately Plausible PAGA penalties exposure was calculated to be **$3,329,600.00**. But, assuming issues with proof and cooperation of aggrieved employees, along with the Court's power to reduce penalties, the realistic exposure was calculated to be **$332,960.00**.

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

(*See*, Leviant Decl., ¶ 18.)

This result here is fully supportable as reasonable. (*Id*. at ¶ 19). First, it is important to recognize the wilfulness finding required for Labor Code §§ 203 and 226 is challenging to establish. (*Id*.) Second, rest break and meal period claims have been challenging to certify for many years, even after *Brinker*. (*Id*.) Arbitration agreements present a very high risk to all class claims. (*Id*.) The Judicial Council's Class Certification in California: SECOND INTERIM REPORT FROM THE STUDY OF CALIFORNIA CLASS ACTION LITIGATION - FEBRUARY 2010 ("Second Interim Report"), at page 5, states that "less than a quarter of disposed cases in the study sample were certified, either through a litigated motion for certification ***or*** as part of a classwide settlement agreement." *See*, Second Interim Report, at 5 (emphasis added).[5] (*Id*.) That "***or***" is significant. (*Id*.) The certification rates identified in the study of less that 25% includes ***both*** contested certifications and settlement certifications, which are the majority of certifications. (*Id*.) In other words, one must assume in any wage and hour class action prior to certification that a contested certification motion will have a success rate of well under 25%, and probably closer to 10% as a starting point for risk evaluation. (*Id*.) The facts of each case have significant bearing on these percentages. (*Id*.) But it cannot be disputed that certification is an exceptionally difficult procedural hurdle to successfully overcome. (*Id*.) Thus, it is not unreasonable to start from the proposition that a pre-certification settlement that is 10% to 15% of the maximum plausible exposure is a valid starting point for valuation. (*Id*.) If roughly 10% of class actions are certified on a contested basis, then, on average, 90% of the time a class will not be certified and the result for the class is *zero* dollars. (*Id*.)

Here, the estimated certification probabilities are ***above*** the average rate at which cases were certified in California over the study years, based upon data available through the California Courts websites. (*Id*.) Since well *under* 20% of all cases filed as proposed class actions are ultimately certified by way of a *contested* motion, the recovery falls within the expected outcome under the likelihood of success metric. (*Id*.) It would also be appropriate to evaluate the result by examining only the premium

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

wages at issue (approximately $1,860,112.90, *with no risk reduction*), excluding penalties and interest.[6] (*Id.*) This Settlement achieves the goals of the litigation.

b) The PAGA Allocation is Reasonable

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

Prior to the issuance of *Moniz v. Adecco USA, Inc.*, 72 Cal. App. 5th 56 (2021), the only sources of persuasive guidance as to how to assess the reasonableness of a PAGA allocation were found in federal court decisions. In their view, a PAGA allocation, even if a small portion of the total settlement, could be reasonable if the settlement of the wage and hour claims is robust and serves the deterrent purpose of PAGA. *O'Connor v. Uber Technologies, Inc.*, 201 F.Supp.3d 1110, 1135 (N.D. Cal. 2016) ("By providing fair compensation to the class members as employees and substantial monetary relief, a settlement not only vindicates the rights of class members as employees, but may have a deterrent effect upon the defendant employer and other employers, an objective of PAGA."). *Moniz* provided explicit confirmation that this was an appropriate yardstick by which to measure reasonableness of a PAGA settlement. *Moniz*, 72 Cal. App. 5th at 77. *Moniz*, in agreeing with federal courts that have considered how to evaluate a PAGA settlement, concluded that the class action factors are appropriately considered, along with a consideration of whether the settlement furthers "PAGA's purposes to remediate present labor law violations, deter future ones, and to maximize enforcement of state labor laws."

As to the first set of elements (the class-type analysis), it is embodied in Plaintiffs' discussion of

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

the adequacy of the settlement generally. Here, the expense, complexity and likely duration of future litigation was to some extent an unknown. However, what is certain is that to adequately establish the violations that would support a substantial penalty, tremendous time and expense would be invested.

The second element (the PAGA purposes element) is also satisfied here. As held by *Moniz*, PAGA's purposes include (1) remediation of present labor law violations, (2) deterrence of future violations, and (3) maximization of enforcement of state labor laws. Here, the allocation of a major portion of settlement funds to class members still advances the goal of labor law violation remediation. The allocation of a major portion of settlement funds to class members also deters future violations. This is a $790,000.00 settlement, which is a good result. Deterrence is fulfilled. Finally, allocation of a major portion of settlement funds to class members still advances the goal of enforcement of state labor law. This settlement is, by definition, a response to alleged violations of labor laws, balanced against risks.

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

Finally, the PAGA allocation is fair. Out of the $80,000.00, the LWDA is receiving $60,000.00 allocated as PAGA penalties. The Class is receiving, net, an estimated $399,167.67 for the releases of *all* other claims. While the proportion is tipped in favor of employees, the allocation satisfies California's wage and hour policies.

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

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

5. The Proposed Enhancement Awards to Plaintiffs Warrants Approval.

The proposed enhancement of $7,500.00 to each Plaintiff is intended to recognize substantial initiative and significant efforts on behalf of the Class. Courts routinely approve incentive awards to compensate named plaintiffs for the services they provide and the risks they incur during class action litigation, often in much higher amounts than that sought here. Factors considered when awarding an incentive include the actions the plaintiff has taken to protect the class, the degree to which the class has benefitted, the amount of time and effort the plaintiff expended in the litigation, the risk to the class representative in commencing suit (financial and otherwise), the notoriety and personal difficulties encountered, the duration of the litigation, and the personal benefit (or lack thereof) enjoyed by the plaintiff as a result of the litigation. *Clark v. Am. Residential Servs. LLC*, 175 Cal. App. 4th 785, 804 (2009). Here, Plaintiffs contributed time to the prosecution of this matter, including providing information to counsel; assisted with the settlement process (with included conferring with counsel during the preparation of Plaintiffs' mediation brief); and, regularly conferred with counsel regarding the case whenever questions arose. (Villatoro Decl., ¶¶ 5-20; Hernandez Decl., ¶¶ 5-20; Leviant Decl., ¶ 32.) The enhancement also recognizes risks Plaintiffs took to be personally liable for costs regardless of the success of the litigation, as well as the personal risk of facing intrusive discovery and potential disclosure to future employers that Plaintiffs sued an employer, making future employment less certain.

6. The Proposed Award of Attorneys' Fees and Costs Is Also Fair, Adequate, and Reasonable and Merits Preliminary Approval.

The California Supreme Court removed any lingering doubt about the use of the percentage of the fund method to award attorney's fees in California Courts. *Laffitte v. Robert Half Intern. Inc*., 1 Cal. 5th 480, 503 (2016).[7] Thus, this Court may and, pursuant to *Laffitte*, *should* award fees to Plaintiffs'

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

counsel based upon the percentage of the fund methodology.

Setting *Laffitte* aside, whether the once-again-confirmed percentage of the fund method or the lodestar method is used, the outcome is roughly the same: "'[F]ee awards in class actions average around one-third of the recovery' regardless of 'whether the percentage method or the lodestar method is used.'" *Amaro v. Anaheim Arena Mgmt., LLC*, 69 Cal. App. 5th 521 (2021). This is also consistent with counsels' experience in class cases. Here, Plaintiff's attorneys intend to request attorneys' fees of up to $263,333.33 (one-third of the GSA), and costs capped at $22,500.00 (which includes payment for mediations, filing fees, service of process fees, and other standard expenses). (Leviant Decl., ¶ 31.) Given the efforts and risks involved in this case, as well as the results achieved, these amounts are within the range of reasonableness and warrant *preliminary approval*.

7. The Proposed Payment to the Administrator Is Fair and Reasonable

Phoenix, which has been selected due to its most reasonable bid for all required services, with all due regard for its reputation and known quality of work, states that administration can be performed for a flat rate of **$8,250.00**. (Lawrence Decl., ¶ 17; Leviant Decl., ¶ 33). In counsel's experience, based on similar wage-and-hour actions, an estimated cost of **$8,250.00** is a fair and reasonable amount for administration fees, is below the Parties' estimate of $10,000.00 in costs for administration, and should be preliminarily approved. (Leviant Decl., ¶ 33.) Phoenix also confirmed it capabilities and security protocols in the accompanying declaration. (Lawrence Decl., ¶¶ 7; 11-12).

VI. THE COURT SHOULD SCHEDULE A FINAL APPROVAL HEARING

Plaintiffs request that the fairness hearing in this case be scheduled for about 145 calendar days after issuance of the Court's Order granting preliminary approval. Under the Settlement, Defendant will have 15 calendar days after preliminary approval to provide the data to Phoenix, which will then have 14 calendar days to mail out the class notice. Class Members have sixty (60) calendar days after mailing of the notice to submit exclusions or objections (with a 14-day extension available for re-mailed notices). Therefore, Plaintiffs propose a final approval hearing scheduled for the first available hearing date that is about 145 days after preliminary approval is granted.

VII. CONCLUSION

For all the foregoing reasons, because the Class meets the requirements for certification, because the Settlement bears all requisite indicia of fairness, reasonableness, and adequacy, and because the proposed notice procedure and forms comport with Rule 3.766 and due process, this Court should grant this Motion for Preliminary Approval and schedule a Final Approval Hearing.

Respectfully submitted,

Dated: April 30, 2025

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