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9
10 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
11 **COUNTY OF SAN DIEGO**

12 ELISEO DE LA TORRE, JOSE NORIEGA,
13 NICASIO ANDRADE, and MARIO CASTRO,
individually and on behalf of all similarly-
situated employees,

14 Plaintiffs,

15 v.

16 and

17
18 UNIQUE BUILDING GROUP, INC., and DOES 1
19 through 100, inclusive,

20 Defendants.

Case No.: 37-2023- 00011128-CU-OT-CTL

Assigned for All Purposes to:
Hon. Matthew C. Braner
Dept. C-60

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

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

Date: November 8, 2024
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1 **I. INTRODUCTION**

2 Plaintiffs and Class Representatives Eliseo De La Torre, Jose Noriega, Nicasio Andrade,
3 and Mario Castro seek final approval of a non-reversionary class action settlement resolving
4 wage and hour claims on behalf of 777 individuals employed Defendant Unique Building
5 Group, Inc. (“UBG” or “Defendant”) as non-exempt employees during the period of March 16,
6 2019 through March 15, 2024. The proposed \$700,000 total settlement provides about
7 \$338,587.21 in cash payments to the Class, with an average award of about \$436, plus
8 additional amounts payable under PAGA. The remaining balance will cover modest service
9 awards to Plaintiffs, settlement administration costs, civil penalties to the state, and
10 reasonable attorney’s fees and costs. The parties and their counsel finalized the settlement
11 after extensive and difficult arms-length negotiations overseen by an experienced and
12 highly-regarded mediator. The Court conditionally certified the Class and preliminarily
13 approved the settlement on May 24, 2024. Since then, the Court-approved notice form was
14 mailed to the Class Members on June 24, 2024, and they have reacted very favorably to
15 the settlement. As of the date of this motion, only one class member opted out of the
16 settlement, and there are no objections.

17 Further, Class Counsel secured an excellent settlement with Defendant after
18 some two years of investigation, litigation, and settlement negotiation and
19 administration, all without any compensation for services rendered or costs expended.
20 The class notice duly informed the class members that Class Counsel would request
21 attorney’s fees not to exceed 33.33% of the Gross Settlement Amount, or \$233,333.33,
22 along with reimbursement of no more than \$17,500 for actual costs incurred litigating
23 this matter. As of the filing of this motion, *not one Class Member objected* to the
24 proposed fee award. Consistent with the Settlement and notice, Plaintiffs now
25 respectfully request the Court award Class Counsel's fees in the amount of \$233,333.33
26 and costs in the amount of \$15,569.46, as described in the Declaration of Brandon
27 Brouillette (“Brouillette Decl.”) filed herewith. The requested attorney’s fees are well
28 within the range of reasonableness, especially considering the complex and risky nature

1 of this litigation, the contingent risk assumed, and the nearly two year delay in payment
2 and, when subjected to a lodestar crosscheck, results in a modest 1.55 upward
3 enhancement from the base lodestar.

4 Accordingly, on behalf of themselves and the Settlement Class, Plaintiffs
5 respectfully request the Court grant this motion, give full and final approval to the
6 settlement, grant Class Counsel's request for attorney's fees and costs, and enter judgment
7 accordingly

8 **II. BACKGROUND/LITIGATION HISTORY**

9 The details of the procedural and factual background of this matter were outlined in
10 the Plaintiffs' Motion for Preliminary Approval of Class Action Settlement (filed on or
11 about May 2, 2024). To re-familiarize the Court with this litigation, Defendant Unique
12 Building Group, Inc. is a subcontractor that specializes in large-scale framing and building
13 envelope solutions, working with general contractors to install framing and drywall, cladding
14 solutions and panel systems, and rainscreen systems on larger commercial developments.
15 Defendant is a non-signatory to the carpenters' union, meaning it hires non-union workers for
16 general labor duties, including the four named Plaintiffs. During the proposed class period, the
17 named Plaintiffs worked throughout California in various job positions, including taper, hanger,
18 framer, and drywaller. [Brouillette Decl., ¶ 2.]

19 On March 16, 2023, Plaintiffs filed their class action complaint against UBG in San Diego
20 Superior Court. On March 20, Plaintiff De La Torre submitted his PAGA notice to the LWDA and
21 Defendant. Thereafter, Plaintiffs filed an amended complaint adding a PAGA claim. Plaintiffs'
22 First Amended Complaint include claims for unpaid minimum wages, unpaid overtime wages,
23 failure to provide meal breaks, failure to provide rest breaks, failure to furnish accurate wage
24 statements, failure to timely pay all wages due upon separation of employment, failure to reimburse
25 business expenses, unfair competition, and a PAGA claim. [Brouillette Decl., ¶ 3.]

26 UBG has at all times denied Plaintiffs' allegations and maintained its meal break and
27 payroll policies and procedures comply with California law, that it provided its employees with
28 required meal and rest breaks, that it properly tracked employee time and paid Plaintiffs and all

1 other employees all wages due at the correct hourly and overtime rates. Additionally, UBG
2 strongly contends the case cannot be maintained as any kind of class or representative action,
3 arguing that to the extent class members missed meal breaks, that such breaks were non-
4 compliant, or that any unpaid “off the clock” work occurred, it was intermittent and infrequent
5 and evidence of such violations would be purely anecdotal, and therefore individualized issues
6 predominate and trial would be unmanageable. [Brouillette Decl., ¶ 4.]

7 Once the matter was at issue, the Parties initiated discovery and later, after engaging in
8 meet and confer discussions regarding discovery, potential law and motion, and the merits of
9 the case, ultimately agreed to attempt mediation. They then engaged in significant informal
10 discovery to facilitate an exchange of information necessary to engage in a meaningful
11 mediation. In December 2023, the Parties participated in mediation with Louis Marlin, Esq., a
12 respected wage and hour class action mediator and, after a full day of mediation, reached the
13 proposed settlement. [Brouillette Decl., ¶¶ 5-6.] This Court preliminarily approved the
14 settlement on May 24, 2024. Class Notices were mailed to the class members on June 24,
15 2024, with a 60-day window, to August 23, 2024, to opt out or object. [Declaration of Taylor
16 Mitzner (“Mitzner Decl.”), ¶¶ 6, 9-11.]

17 **III. THE PROPOSED SETTLEMENT TERMS**

18 Under the settlement, UBG will pay \$700,000.00 into a common fund, the Gross
19 Settlement Amount (“GSA”). Reasonable attorney’s fees of up to 33.33% of the GSA, or
20 \$233,333.33, actual litigation costs of up to \$17,500 (only \$15,569.46 is requested), modest
21 enhancement awards of up to \$10,000 each for Plaintiffs, settlement administration costs of
22 \$12,500, and \$60,000 for alleged civil penalties under PAGA,¹ all will be paid from the GSA.
23 The remainder of approximately \$338,597.21 will be allocated among the Participating Class
24 Members based on their total weeks worked during the Class Period. No portion of the GSA
25 will revert to UBG. [Brouillette Decl., ¶ 7.]

26
27 ¹ Consistent with PAGA, \$45,000 of that amount will go the LWDA for the State’s share of the
28 civil penalties, and the remaining \$15,000 will be distributed pro rata to the Aggrieved
Employees.

1 **A. Certification of the Settlement Class**

2 The Court conditionally certified a settlement class defined to include all individuals who
3 worked for Defendant as a non-exempt employee in California during the Class Period, which runs
4 from March 16, 2019 through March 15, 2024. The Settlement Administrator ultimately mailed
5 class notices to 777 individuals identified as members of the Class. [Mitzner Decl., ¶ 6.]
6 Nothing has changed to require reconsideration of the Court’s certification of the Settlement
7 Class.

8 **B. The Benefit Conferred on the Settlement Class**

9 As noted, the settlement obligates UBG to pay \$700,000 to resolve the Settlement Class’s
10 claims, inclusive of attorney’s fees and costs. At least \$338.597 from the GSA will be distributed
11 to the Participating Class Members. This is a cash settlement that does not require Participating
12 Class Members to submit a claim form to receive their settlement share. Participating Class
13 Members will receive their settlement checks automatically via First Class U.S. Mail. Twenty
14 percent of each settlement share will be allocated to wages and the remaining eighty percent will be
15 allocated to expenses, penalties and interest. UBG will pay any and all applicable employer-side
16 payroll taxes separately and in addition to the GSA. Subject to the Court’s approval, any amounts
17 not claimed (because a class member does not cash his or her settlement check) will be forwarded
18 to the California State Controller’s Unclaimed Property Fund. [Brouillette Decl., ¶ 8.]

19 Each Participating Class Member will receive a share of the Net Settlement Amount
20 based on his or her position held and total weeks worked for UBG during the Class Period while
21 employed as a non-exempt employee. Thus, each Class Member’s Individual Settlement Payment
22 will be calculated using criteria typically used in determining appropriate amounts of alleged
23 unpaid wages, unpaid premium wages for missed meal breaks, unreimbursed expenses, and
24 potential statutory penalties under applicable law. These methods are intended to ensure each Class
25 Member receives a portion of the available settlement funds corresponding to the relative value of
26 his or her potential claims. The proposed allocation provides a reasonable way to compensate Class
27 Members based on the amount of time they worked for UBG, and the number of instances they
28 missed a break, were not provided compensation in lieu of such missed breaks, or lost wages due to

1 rounding. [Brouillette Decl., ¶ 9.]

2 The average award to the Participating Class Members will be approximately \$436
3 with a maximum award of over \$2,900, while the average PAGA award will be about \$44.
4 [Mitzner Decl., ¶¶ 14-15.]

5 **C. Settlement Administration**

6 Phoenix Settlement Administrators, as the Court-approved Settlement Administrator,
7 mailed the Notice Packet to the Class members after making all reasonable effort to
8 ascertain the best mailing address, including running each address through the National
9 Change of Address database and "skip-tracing" any Notice Packets returned as
10 undeliverable. [Mitzner Decl., ¶¶ 3-8.] The Class Notice, previously approved by the
11 Court, duly informed Class Members of the settlement terms, including the estimated
12 relief each Class Member will receive, the amounts to be requested for attorney's fees and
13 the class representative enhancement awards, and the right to opt out of or object to the
14 settlement. [Mitzner Decl., ¶ 6, Exh. A.] Phoenix mailed 777 Notice Packets on June 24,
15 2024. [Mitzner Decl., ¶ 6.] As of the filing of this motion, zero Notice Packets were
16 deemed undeliverable, for a 100% success rate. [Mitzner Decl., ¶¶ 7-8.] The response
17 window for opting out, objecting to the settlement, or submitting a dispute, expired on
18 August 23, 2024. [Mitzner Decl., ¶¶ 9-11.] As of the filing of this motion, Phoenix
19 received only one request for exclusion, zero objections to the settlement, and no disputes
20 have been submitted regarding the information used to calculate class member settlement
21 shares. [Mitzner Decl., ¶¶ 9-11.]

22 **D. Release of Claims**

23 All Participating Class Members will be deemed to release UBG from all claims
24 alleged in the operative complaint, or that could have been brought based on the allegations in
25 the operative complaint, including PAGA claims, from March 16, 2019 through March 15,
26 2024. The release is limited to the claims that were actually pleaded or could have been
27 pleaded based on the alleged facts in the operative complaint. [Brouillette Decl., ¶ 10.]

28 /////

1 **E. PAGA Claims and Notice to the LWDA**

2 The Parties allocated \$60,000 to payment of civil penalties under PAGA for such
3 claims against UBG, and Plaintiffs submit that amount is fair, reasonable and adequate,
4 advances PAGA's underlying purposes, and should be approved by the Court. As required by
5 Labor Code section 2699(l)(2), Plaintiffs gave notice of the settlement and preliminary
6 approval hearing to the LWDA via its online portal. [Brouillette Decl., ¶ 11; Exh. 1.)

7 **IV. ARGUMENT**

8 **A. Standards For Approval**

9 The law favors settlement, particularly in class actions where substantial resources
10 can be conserved by avoiding the time, cost, and rigors of formal litigation. H. Newberg
11 & A. Conte, 4 Newberg on Class Actions (4th ed. 2002), § 11.41; Class Plaintiffs v. City
12 of Seattle (9th Cir. 1992) 955 F.2d 1268, 1276, cert. denied, 506 U.S. 953; Van
13 Bronkhorst v. Safeco Corp. (9th Cir. 1976) 529 F.2d 943,950; Potter v. Pacific Coast
14 Lumber Co. (1951) 37 Cal.2d 592, 602. Nevertheless, to make certain the rights of absent
15 parties are not unjustly compromised, the settlement of a class action requires court
16 approval. Cal. Rule of Court 3.769; Dunk v. Ford Motor Co. (1996) 48 Cal.App.4th 1794,
17 1801; Wershba v. Apple Computer (2001) 91 Cal.App.4th 224, 245. The purpose of that
18 judicial review is to protect against fraud or collusion, and to ensure fairness to absent
19 class members. Dunk, 48 Cal.App.4th at 1800-01; Newberg, at §§ 11.22, *et seq.* Review is
20 accomplished through a two-step process intended to determine whether, under the
21 totality of circumstances, the settlement is fair, reasonable and adequate. Dunk, 48
22 Cal.App.4th at 1801; Wershba, 91 Cal.App.4th at 245.

23 On a motion for final approval, the trial court is charged with determining whether,
24 in light of the total circumstances of the action and the response of the class members to
25 the proposed settlement, the settlement is fair, reasonable, and adequate. Dunk, 48
26 Cal.App.4th at 1801-02; Wershba, 91 Cal.App.4th at 244-45. The court has broad
27 discretion in making that determination and may consider a number of relevant factors,
28 including: the strength of plaintiff's case; the likelihood of potential recovery; the risk,

1 expense and likely duration of further litigation; the amount offered in settlement; the
2 extent of discovery and stage of the proceedings; the experience and opinion of counsel;
3 and the reaction of class members to the settlement. Id. In light of the strong judicial
4 policy favoring the settlement of class actions, courts generally apply a presumption of
5 fairness to a proposed class action settlement when: (1) the settlement is reached through
6 arm's-length bargaining; (2) investigation and discovery are sufficient to allow counsel
7 and the court to act intelligently; (3) counsel is experienced in similar litigation; and (4)
8 the percentage of objectors is small. Dunk, 48 Cal.App.4th at 1802; Wershba, 91
9 Cal.App.4th at 245.

10 **B. The Proposed Settlement Merits Final Approval**

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

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

18 The settlement is not the result of fraud or collusion. Rather, the proposed settlement
19 was reached following arm's-length negotiations presided over by Louis Marlin, Esq., a
20 highly respected and well-known mediator with extensive experience mediating wage and
21 hour class actions. [Brouillette Decl., ¶ 6.] Moreover, Plaintiffs and their counsel were well-
22 informed about the facts and the law, and counsel Zachary M. Crosner, Jamie K. Serb, and
23 Brandon Brouillette have years of litigation experience, including litigating wage and hour class
24 actions. Plaintiffs' counsel are well-qualified to evaluate the risks and benefits of pursuing
25 further litigation or settling the matter. [Brouillette Decl., ¶¶ 27-37.] Defendant likewise was
26 represented by highly-qualified and experienced defense counsel. Both sides advocated
27 vigorously for their clients and nothing was "left on the table."

28 *////*

1 **2. The Class Reacted Favorably to the Settlement**

2 The settlement was well-received by the class. As of the filing of this motion, no
3 objections have been filed, and only one Class Members has requested exclusion out of 777
4 settlement class members. [Mitzner Decl., ¶¶ 9-10.] As many courts recognize, class member
5 reaction to the settlement is one of the most important factors to consider in determining if final
6 approval should be granted. Mandujano v. Basic Vegetable Prods., Inc., 541 F.2d 832, 837 (9th
7 Cir. 1976); see also In re: American Bank Note Holographics, 127 F.Supp.2d 418, 425
8 (S.D.N.Y. 2001) (“It is well-settled that the reaction of the class to the settlement is perhaps the
9 most significant factor to be weighed in considering its adequacy”) (internal quotation marks
10 omitted).

11 **3. The Settlement Is Fair and Reasonable Considering the Benefits**
12 **Conferred, the Case Value, and Significant Litigation Risks**

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

20 Prior to settlement, the Parties engaged in formal and informal discovery to facilitate
21 settlement discussions. Thus, Plaintiffs reviewed documents and information regarding
22 Defendant’s payroll practices, a random sampling of pay stubs and time records from class
23 members, applicable compensation plans, meal and rest break policies, etc., and information
24 from Defendant regarding class size and breakdown, work weeks/pay periods, rates of pay, and
25 other information used to formulate a damages model. Plaintiffs then had that information
26 analyzed by a consulting expert to assist in determining potential violation rates and other data
27 used to formulate a damages model. Plaintiffs’ counsel are confident they obtained sufficient
28 information to understand the law and facts of this case and make an informed decision

1 regarding the proposed settlement and whether it is fair and reasonable. [Brouillette Decl., ¶¶
2 5, 12.]

3 Using that data, Plaintiffs ran various calculations and estimated UBG's likely
4 maximum exposure on the class claims at approximately \$10.5 million, including \$412,350 on
5 the unpaid wage claims, \$2,106,750 on the meal break claims, \$4,270,330 on the rest break
6 claims, \$409,600 on the expense reimbursement claim, \$572,000 on the wage statement
7 claims, and \$2,747,000 on the waiting time penalty claims. [Brouillette Decl., ¶ 13.]

8 Plaintiffs and their counsel substantially discounted the value of these claims, however, in
9 light of the multiple and considerable risks posed by proceeding with the litigation.

10 On the unpaid wage claims, Plaintiffs alleged Defendant rounded employee time records
11 throughout the class period to the nearest quarter hour, resulting in an overall loss of hours worked
12 and compensation to the Class Members during many pay periods. Plaintiffs further alleged
13 Defendant routinely kept employees on the job site working late, after they had clocked out, to
14 clean up and put tools away. As a result, Plaintiffs contend UBG did not pay the Class
15 Members for their actual hours worked. [Brouillette Decl., ¶ 14.]

16 In response, Defendant argued its time keeping and rounding policy is entirely neutral
17 in effect and did not deprive class members of compensable hours worked over time and,
18 accordingly, does not violate California law. See's Candy Shops, Inc. v. Super. Ct. (2012) 210
19 Cal. App. 4th 889, 901. Defendant also emphasized that its policies strictly prohibited any off
20 the clock work and, to the extent any such work occurred, it was aberrational, against
21 company policy, and done without the employer's knowledge. Thus, per UBG, the issue is not
22 suited for class certification since any number of individualized inquiries would be required to
23 determine if any such work occurred or if it was compensable. [Brouillette Decl., ¶ 15.]

24 On the meal and rest break claims, while UBG's written policies generally appeared
25 compliant, Plaintiffs' review of the time and payroll records suggested Defendant failed to keep
26 accurate meal period records, as employees would clock in to begin their shift and clock out at the
27 end of their shift, but would not clock in and out for meal breaks. Instead, Plaintiffs allege meal
28 break times were auto-deducted to show meals were taken in a compliant fashion even when they

1 weren't. Per Plaintiffs, however, meal breaks were routinely cut short or taken late due to work
2 requirements and mandates to meet progress deadlines on each job site. For the same reasons,
3 Plaintiffs contend they were not provided with the required amount of rest breaks and received at
4 most one rest break per shift. [Brouillette Decl., ¶ 16.]

5 In response, UBG emphasized its written policies are compliant, and that it provided
6 many class members with the opportunity to take all required meal and rest breaks and thus
7 met its obligations under the law. UBG further argued its records accurately reflect that
8 employees took timely and compliant meal breaks. UBG also noted that, in light of its
9 compliant policies, whether a class member missed a meal period, received a late meal period,
10 or missed a rest break would have been aberrational and against company policy. Thus, per
11 Defendant, these issues are not amenable to class or representative treatment since their
12 resolution would require individualized inquiries as to why a break was missed or non-
13 compliant. [Brouillette Decl., ¶ 17.]

14 On the expense reimbursement claim, Plaintiffs claimed that they and the Class
15 Members regularly had to use their personal phones while on the clock and for work purposes
16 to, inter alia, communicate with supervisors, take pictures of their work, and so on. Per
17 Plaintiffs, UBG did not pay any reimbursement for use of personal phones. UBG on the other
18 hand argued that any use of personal mobile devices was unnecessary to perform the job and
19 therefore was purely for personal convenience. If so, then the expense was neither reasonable
20 nor necessary, and therefore no reimbursement was required. Labor Code § 2802. [Brouillette
21 Decl., ¶ 18.]

22 On the claims under Labor Code section 226, for inaccurate wage statements, Plaintiffs
23 alleged derivative wage statement violations based on the alleged underpaid overtime and
24 meal/rest break violations, and further alleged derivative Labor Code 203 violations for
25 failure to timely pay all wages due on separation of employment. Being derivative, these
26 claims accordingly are subject to the same risks and uncertainties applicable to the primary
27 claims, plus additional risks posed by the need to take into account the discretionary nature of
28 such awards and the "good faith" and other defenses available to Defendant. Amaral v. Cintas

1 Corp. No. 2 (2008) 163 Cal.App.4th 1157, 1203-4 (employer did not willfully fail to pay
2 wages under Labor Code § 203 even though class prevailed on underlying claim for failure to
3 pay living wages). Thus, while these claims largely are derivative of the unpaid wage claims,
4 they also are subject to additional defenses. [Brouillette Decl., ¶ 19.]

5 As far as potential PAGA liability, the allegedly aggrieved employees theoretically are
6 entitled to penalties totaling about \$5 million should Plaintiffs prevail on all claims and establish
7 violations of the multiple Labor Code sections for each and every pay period at issue, and secure
8 the maximum allowable penalties. [Brouillette Decl., ¶ 20.] As with the class claims, Plaintiffs
9 discounted the potential PAGA penalties based on UBG's various defenses on the merits and
10 also accounted for the Court's wide discretion to reduce such penalties, or to decline to award
11 penalties at all. Labor Code § 2699(e)(2); Carrington v. Starbucks Corp. (2018) 30 Cal.App.5th
12 504 (trial court awarded penalties of \$5 per pay period after a bench trial, which decision was
13 upheld on appeal); In re Taco Bell Wage and Hour Actions (E.D. Cal. Apr. 8, 2016) 2016 U.S.
14 Dist. LEXIS 48557 (PAGA penalties denied after trial). Accordingly, the Parties allocated
15 \$60,000 to PAGA penalties, and Plaintiffs submit this amount is reasonable under the
16 circumstances and in line with comparable settlements in other wage and hour class actions in
17 California. *E.g.*, Van Kempen v. Matheson Tri-Gas, Inc. (N.D. Cal. Aug. 25, 2017) 2017 U.S.
18 Dist. LEXIS 137182 (granting final approval of \$5,000 PAGA penalty from \$370,000
19 settlement, or 1.4 percent of total settlement); Slavkov v. First Water Heater Partners I (N.D.
20 Cal. July 25, 2017) 2017 U.S. Dist. LEXIS 116303 (finding a \$7,500 PAGA payment reasonable
21 when measured against the overall settlement of \$345,000 and the possible weaknesses in
22 Plaintiffs' case, or 2.2 percent of total settlement). Additionally, the LWDA has been informed
23 of the terms of the PAGA portion of the settlement, and will be able to weigh in as necessary.
24 Jennings v. Open Door Mktg. Inc. (N.D. Cal. Oct. 3, 2018) 2018 U.S. Dist. LEXIS 171356, at
25 *27 (approving settlement with PAGA penalties of 0.6% where "[p]laintiffs [have] submitted
26 the settlement agreement to the LWDA, and the LWDA has not objected to the settlement.

27 The settlement obviates the significant risk that this Court may find any kind of class
28 or representative resolution unachievable or deny certification of all or some of Plaintiffs'

1 claims. Furthermore, even if Plaintiffs obtained certification of all or some of the claims,
2 continued litigation would be lengthy and expensive as the Parties pursued merits discovery, a
3 probable motion to decertify, as well as trial and possible appeals, and would substantially
4 delay any recovery by the class with no assurance of recovering significantly more than the
5 proposed settlement. While Plaintiffs are confident in the merits of these claims, legitimate
6 controversies exist regarding each one of them. Plaintiffs also recognize proving the amount
7 of wages and penalties due each Class Member would be an expensive, time-consuming, and
8 uncertain proposition. [Brouillette Decl., ¶ 21.]

9 Plaintiffs and their counsel discounted the value of the class claims consistent with the
10 risks discussed above, and carefully weighed the likelihood of the class receiving substantially
11 greater benefit if the litigation continued. Plaintiffs and counsel concluded – in light of these
12 very real and substantial risks – settlement on the proposed terms and without prolonged and
13 costly litigation was in the best interests of the class. The overall \$700,000 recovery
14 represents a significant percentage of Defendant’s potential exposure. Given these risks, a
15 total recovery for the class of \$700,000, which will result in average award of about \$436 per
16 class member, is a significant result well within the range of reasonableness considering all
17 potential outcomes, and it will provide direct monetary awards to all Class Members in short
18 order. [Brouillette Decl., ¶ 22.]

19 Importantly, the mere fact that a settlement does not provide the same recovery as
20 might be achieved at trial is not a proper indicator of whether the settlement is fair,
21 reasonable, and adequate. Wershba, 91 Cal.App.4th at 246, 250 (“Compromise is inherent and
22 necessary in the settlement process...even if the relief afforded by the proposed settlement is
23 substantially narrower than it would be if the suits were to be successfully litigated, this is no
24 bar to a class settlement because the public interest may indeed be served by a voluntary
25 settlement in which each side gives ground in the interest of avoiding litigation”); Lane v.
26 Facebook, Inc. (9th Cir. 2012) 696 F.3d 811, 819 (“[T]he question whether a settlement is
27 fundamentally fair . . . is different from the question whether the settlement is perfect in the
28 estimation of the reviewing court”); 7-Eleven Owners for Fair Franchising v. Southland Corp.

(2000) 85 Cal.App.4th 1135, 1150 (“The fact that a proposed settlement may amount to only a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved”); White v. Experian Information Solutions, Inc. (C.D. Cal. 2011) 803 F.Supp.2d 1086, 1098 (rejecting contention settlement was not fair and reasonable even though it represented 99% discount off the maximum value of the claims). Importantly as well, the proposed settlement is non-reversionary and will provide timely benefits to the Class Members without a claims process. White, 803 F.Supp.2d at 1098; c.f., Federal Judicial Center, Managing Class Action Litigation: A Pocket Guide for Judges (3d ed. 2010) at 20, available at <http://www.fjc.gov/sites/default/files/2012/ClassGd3.pdf> (reversionary provisions and/or cumbersome claims process may indicate lack of fairness). Plaintiffs and their counsel submit the settlement is within the “range of reasonableness,” and is fair and adequate for the Class.

VI. SETTLEMENT ADMINISTRATION COSTS

The settlement provides for a payment to Phoenix from the GSA for its services as the Settlement Administrator. As set forth in the Declaration of Taylor Mitzner, Phoenix has performed and will continue to perform its required duties through final distribution of the settlement funds, and incurred \$12,500.00 in fees and expenses. [Mitzner Decl., ¶ 17.] Accordingly, Plaintiffs respectfully request the Court approve payment of \$12,500 to Phoenix from the GSA. [Brouillette Decl., ¶ 23.]

VII. PLAINTIFFS’ ENHANCEMENT AWARDS

Pursuant to the terms of the settlement, Plaintiffs seek modest incentive awards of \$10,000 each for their service in bringing these claims on behalf of the Class. These requests are reasonable given the risks they undertook on behalf of the Class Members. By contacting and retaining counsel to pursue these claims, Plaintiffs helped make this settlement possible for the absent Class Members, while shouldering the risk of being liable for Defendant’s litigation costs. Plaintiffs also exposed themselves to unwanted notoriety related to filing a public lawsuit (discoverable even through a simple google search) for the benefit of other employees, placing themselves at risk of discrimination by future prospective employers. As

1 set forth in more detail in their respective declarations filed at preliminary approval, among
2 taking many other actions assisting in the successful litigation of this case, Plaintiffs provided
3 substantial factual information and documents to counsel, attended numerous meetings/phone
4 conferences with counsel to discuss the case, and kept abreast of all significant developments.
5 [Declaration of Eliseo De La Torre ¶¶ 2-9; Declaration of Nicasio Andrade, ¶¶ 2-9; Declaration
6 of Mario Castro, ¶¶ 2-9; Declaration of Jose Noriega, ¶¶ 2-9; Brouillette Decl., ¶ 24.] Finally,
7 there are no class member objections submitted with respect to the amounts Plaintiff proposes
8 to receive. [Mitzner Decl., ¶ 12.] Accordingly, the requested enhancement payment to
9 Plaintiffs are appropriate and justified as part of the settlement. Staton v. Boeing (9th Cir.
10 2003) 327 F.3d 938, 977 (collecting cases awarding class representatives service and incentive
11 payments ranging from \$2,000 to \$25,000).

12 **VII. ATTORNEY'S FEES AND COSTS**

13 **A. The Attorney's Fees Requested Are Fair and Reasonable and Should** 14 **Be Approved**

15 This Court has discretion over the amount of attorneys' fees awarded and court
16 approval is required for Class Counsel's fees. Cal. Rule of Court 3.769; Levy v. Toyota
17 Motor Sales, U.S.A. (1992) 4 Cal.App.4th 807, 813; Lealao v. Beneficial Cal., Inc. (2000)
18 82 Cal.App.4th 19. In defining a reasonable fee, the Court should attempt to mimic the
19 marketplace for cases involving significant contingent risk, such as this one. Deposit
20 Guaranty Nat'l Bank, Jackson, Miss. v. Roper (1980) 445 U.S. 326, 338, rehg. den. 446
21 U.S. 947; Lealao, 82 Cal.App.4th at 49-50 (court should attempt "to award the fee that
22 informed private bargaining, if it were truly possible, might have reached" in determining
23 a reasonable fee, and a fee award should approximate a "range of fees freely negotiated in
24 comparable litigation"). Here, Class Counsel's request for attorney's fees and costs is
25 reasonable and justified by the work performed, the benefits obtained, and the contingent
26 risk assumed.

27 As addressed in detail above, at the time the parties reached the tentative
28 settlement success for Plaintiffs and the putative class was far from certain. Plaintiffs

1 faced a real risk that some or all the claims would not be certified for class treatment, as
2 Defendant had strong arguments that its compensation policies were legal and properly
3 compensated the class members. Even if Plaintiffs certified some or all of the claims and
4 ultimately prevailed on the merits, it undoubtedly would have taken several years to
5 realize any recovery while they pursued class certification, trial, and an almost certain
6 appeal. [Brouillette Decl., ¶¶ 14-20.]

7 Nonetheless, Plaintiffs succeeded and expeditiously obtained the relief they set out
8 to obtain, and the settlement provides substantial cash payments to Class Members, with
9 an average award of about \$436, and with a maximum award of over \$2,900. Importantly
10 as well, the Class Members have been overwhelmingly supportive of the Settlement – as
11 of the filing of this motion, there are no objections to the settlement and a single opt out.
12 [Mitzner Decl., ¶¶ 9-10.]

13 **B. The Requested Fee Award Is Reasonable and Appropriate**

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

23 As part of the Settlement, Defendant agreed not to object to an award of no more
24 than 33.33% of the GSA for attorney's fees, or \$233,333.33, and up to \$17,500 in
25 reimbursement for litigation costs and expenses (only \$15,569.46 is requested). Such a
26 fee is commensurate with what the market would provide for similar services and the
27 Court therefore can most certainly enforce the agreement. As California's Court of Appeal
28 has instructed:

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

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

Here, the parties did not negotiate the inclusion of attorney's fees until after extensive arms-length bargaining regarding relief to the Class was completed. [Brouillette Decl., ¶ 25.] The requested fee and cost award was a product of these arms-length negotiations and fairly reflects the marketplace value of the services rendered by Class Counsel in this case. As a result, the fee agreed to by the parties should be approved.

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

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

The recognized advantages of the percentage method-including relative ease of calculation, alignment of incentives between counsel and the class, a better approximation of market conditions in a contingency case, and the encouragement it provides counsel to seek an early settlement and avoid unnecessarily prolonging the litigation convince us the percentage method is a valuable tool that should not be denied our trial courts.

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

Indeed, both California and federal courts have long recognized an appropriate method for determining the award of attorney's fees is based on a percentage of the total value of benefits afforded to class members by the settlement. Serrano v. Priest (1977) 20 Cal.3d 25, 34; Boeing Co. v. Van Gernert (1980) 444 U.S. 472, 478; Vincent v. Hughes

1 Air West, Inc. (9th Cir. 1977) 557 F.2d 759, 769. Awarding a fee based on a percentage
2 of the common fund recovered operates to "spread litigation costs proportionately among
3 all the beneficiaries so that the active beneficiary does not bear the entire burden alone."
4 Vincent, 557 F.2d at 769.

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

13 Here, Class Counsel seek a fee award for their successful prosecution and
14 resolution of this action of no more than 33.33% of the total amount recovered by the
15 Class via the lawsuit, or \$233,333.33. The percentage requested is justified for the
16 reasons set forth further below, and comports with fee awards calculated on a percentage-
17 of-the-benefit basis. Indeed, review of class action settlements shows that courts have
18 historically awarded fees in the range of 20 to 50 percent, depending upon the
19 circumstances of the case. In re Warner Communications Sec. Litig. (S.D.N.Y. 1985) 618
20 F.Supp. 735, 749-50 (concluding that percentage fees in common fund cases range from
21 20 to 50 percent); Newberg, Newberg on Class Actions (3d ed.) § 14.03, pp. 13-14
22 ("Usually 50% of the fund is the upper limit on a reasonable fee award from a common
23 fund in order to assure that the fees do not consume a disproportionate part of the
24 recovery obtained for the class, although somewhat larger percentages are not
25 unprecedented.").

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

27 To ensure the fairness of an attorney's fee award, courts frequently conduct a
28 lodestar cross check of counsel's fees. "A lodestar cross-check thus provides a mechanism

1 for bringing an objective measure of the work performed into the calculation of a
2 reasonable attorney fee." Laffitte, 1 Cal.5th at 504. Here, Class Counsel spent 193.2 hours
3 of time on this matter, resulting in a modest and very reasonable lodestar of \$150,690.

4 As is fully detailed in the Brouillette Declaration, Class Counsel's efforts included:

5 (1) extensive pre-lawsuit investigation of the claims of Plaintiffs and the putative class,
6 including legal research, research into similar claims and claims against other employers in
7 the same industry, and attempts to locate and contact other UBG employees; (2) drafting a
8 PAGA notice letter; (3) drafting the initial complaint and related documents; (4) case
9 management, including communications with defense counsel, meeting and
10 conferring/preparing case management statements, etc.; (5) drafting a first amended
11 complaint; (6) propounding initial written discovery, (7) lengthy discussions with defense
12 counsel regarding settlement/mediation and informal discovery needed for meaningful
13 settlement discussions; (8) engaging in substantial informal discovery, including propounding
14 informal discovery "requests" and reviewing documents and other information produced; (9)
15 drafting a mediation brief and accompanying damages model after review and analysis of
16 Defendant's informal discovery production; (10) attending an all-day mediation; (11)
17 negotiating and drafting the settlement agreement and related documents; (12) drafting an
18 amended complaint to effectuate the settlement; (13) drafting the motion for preliminary
19 approval, and attending the hearing; (14) opposing a class member's motion to intervene; (15)
20 administration of the settlement, including communications with the Settlement Administrator
21 and settlement class members; (16) drafting the motion for final approval and motion for
22 attorney's fees, and attending the final approval hearing; and (17) extensive communications
23 with the Plaintiffs regarding case status, case investigation and document review, mediation,
24 and settlement terms. Additionally, Class Counsel will incur additional time following final
25 approval to, inter alia, respond to class member inquiries, work with the Settlement
26 Administrator on the distribution of settlement funds, and on the compliance hearing.

27 [Brouillette Decl., ¶ 26, Exh. 2.]

28 In pursuing this matter, Class Counsel¹⁸ incurred total attorney's fees of \$____,

1 based on ____ attorney hours. The lodestar is based on an eminently reasonable number of
2 hours worked to litigate this matter to a successful conclusion, and the requested attorney
3 hourly rates are reasonable and comport with hourly rates charged by other attorneys with
4 similar experience in this practice area in California. [Brouillette Decl., ¶¶ 26-46.] On a
5 lodestar basis, the fee request of \$233,333.33 results in a very reasonable 1.55 modifier
6 over the base lodestar, which is entirely in line with California precedent. Brouillette
7 Decl., ¶¶ 27-45.] Indeed, California courts routinely approve multipliers in the in the 2-4
8 range to compensate for the time and risk of class action cases. Chavez v. Netflix, Inc.
9 (2008) 162 Cal.App.4th 43, 66 (affirming attorneys' fee award including an upward
10 multiplier of 2.5); Wershba, 91 Cal.App.4th at 255 ("Multipliers can range from 2 to 4 or
11 even higher."); City of Oakland Oakland Raiders (1988) 203 Cal.App.3d 78, 85 (affirming
12 a multiplier of 2.34).) Class Counsel submits that the requested 1.55 multiplier effectively
13 operates to show that the percentage fee request is reasonable considering the challenges
14 presented in this contingency fee matter, and appropriately compensates Class Counsel for
15 the contingent risk assumed and delay in payment during the approximately two plus
16 years counsel will have been representing Plaintiffs. Thus, the multiplier results in a fee
17 constituting a fair return on the contingency.

18 **E. The Award is Supported By 1) the Results Achieved; 2) the Risk, 3) the Skill**
19 **Required, 4) the Contingent Nature of the Fee and 5) Awards in Similar**
20 **Cases**

21 What has now emerged in most fee award decisions is the recognition that fee
22 determinations in both common fund and statutory fee situations are incapable of
23 mathematical precision because of the intangible factors that must be resolved in the
24 court's discretion based on the circumstances of each particular case. Conte, § 207, p. 44.
25 In determining an appropriate fee in a common fund case, a Court must decide, based on
26 the unique posture of each case, what percentage of the common fund would most
27 reasonably compensate Class Counsel given the nature of the litigation and the
28 performance of counsel. Paul, Johnson, Alston & Hunt v. Graulity (9th Cir. 1989 886 F.2d

268, 272) (the benchmark percentage fee may be adjusted to account for the circumstances involved in a case).

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

1. The Results Achieved.

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

2. Class Counsel Bore Considerable Risk.

At the time of filing the complaint, Class Counsel recognized that they would have to expend a substantial amount of time and advance significant costs to prosecute a statewide class action suit with no guarantee of compensation or reimbursement, in the hope of prevailing against a sophisticated company represented by first-rate attorneys. Despite their belief in the validity of Plaintiffs' claims, they also knew they faced

1 substantial risks of class certification and the ability to prove class-wide and individual
2 damages. In light of the highly uncertain nature of this suit, Class Counsel also bore the
3 risk that UBG would dig in and attempt to bury their small firms in work. Given the
4 small size of Class Counsel's firm, not receiving any compensation for several years
5 while simultaneously advancing litigation costs posed considerable risk and difficulty.
6 [Brouillette Decl., ¶¶ 47-48.]

7 **3. The Skill Required and the Quality of Work.**

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

16 **4. The Contingent Nature of the Fee and Risk Assumed**

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

26 Counsel retained on a contingency fee basis, whether in private matters or in
27 class action litigation, is entitled to a premium beyond their standard, hourly, non-
28 contingent fee schedule to compensate for both the contingent risk assumed and the

1 delay in payment. The simple fact is that despite the most vigorous and competent of
2 efforts, success is never guaranteed. McKittrick v. Gardner (4th Cir. 1967) 378 F.2d
3 872, 875. Indeed, if counsel is not adequately compensated for the risks inherent in
4 difficult class actions, competent attorneys will be discouraged from prosecuting
5 similar cases. Ketchum v. Moses (2001) 24 Cal.4th 1122, 1132-33; Cazares v. Saenz
6 (1989) 208 Cal.App.3d 279, 287.

7 Here, the contingent fee practices of Plaintiffs' counsel simply do not
8 accommodate the investment of unnecessary time in a case, and the adverse resolution of
9 any one of several difficult issues present in this matter could have doomed the entire
10 effort. As discussed, the attorney's fees in this case were not only contingent but fairly
11 risky, and there was always a palpable chance Plaintiffs' counsel would receive nothing
12 for any number of reasons. [Brouillette Decl., ¶¶ 47-48.] Accordingly, the contingent
13 nature of the fee and the financial burdens on Class Counsel and Plaintiffs also support
14 the fee requested.

15 **5. Awards in Other Cases**

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

20 **F. Class Counsel's Costs and Expenses are Reasonable**

21 Plaintiffs' counsel also request reimbursement of actual out-of-pocket expenses
22 incurred to prosecute this action. These expenses were incidental and necessary to the
23 effective representation of the employees, and Plaintiffs' counsel is permitted to recover
24 litigation costs and expenses under the common fund doctrine and the Settlement Agreement.
25 Serrano, 20 Cal.3d at 35 (common fund doctrine permits recovery of fees and costs from the
26 fund); Rider v. County of San Diego (1992) 11 Cal.App.4th 1410, 1424 n.6 (costs are
27 recoverable from the common fund "[o]f necessity, and for precisely the same reasons
28 discussed above with respect to the recovery of attorneys' fees by ... [Plaintiffs'] attorneys").

1 Plaintiffs' counsel also is entitled to recover "those out-of-pocket expenses that would
2 normally be charged to a fee-paying client." Harris v. Marhoefer (9th Cir. 1994) 24 F.3d 16,
3 19.

4 As explained in the Brouillette Declaration, Class Counsel incurred a total of
5 \$15,569.46 in expenses incurred in connection with this litigation. These expenses
6 include the amounts paid for court filing fees, service of process, expert fees, postage,
7 and mediation fees, all of which are costs normally billed to and paid by the client.
8 These costs were reasonably incurred in the prosecution of this matter and it is
9 respectfully requested that the Court authorized they be reimbursed in full.

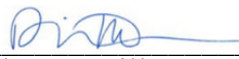
10 [Brouillette Decl., ¶¶ 49-50.]

11 **VII. CONCLUSION**

12 For all the foregoing reasons, Plaintiffs Eliseo De La Torre, Jose Noriega, Nicasio
13 Andrade, and Mario Castro respectfully request that the Court grant this motion and grant final
14 approval of the proposed class action settlement and approve the payment of PAGA penalties
15 to the State. Plaintiffs further request the Court approve payment of the Settlement
16 Administrator's fees and expenses, approve the requested class representative enhancement
17 payment, approve the award of attorney's fees and costs as requested, and enter judgment in
18 this action. Finally, Plaintiffs request the Court set a non-appearance case review regarding
19 settlement compliance for November 7, 2025, or a later date convenient for the Court.

20 Dated: October 16, 2024

CROSNER LEGAL, PC

21
22 By: 

23 Brandon Brouillette, Esq.

24 Jamie Serb, Esq.

25 Zachary Crosner, Esq.

26 Attorneys for Plaintiffs Eliseo De La Torre, Jose Noriega,
27 Nicasio Andrade, and Mario Castro
28