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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ORANGE

ISABEL RODRIGUEZ and DANIEL TOVAR,
on behalf of themselves all employees similarly
situated,

Plaintiffs,

v.

ROY MILLER PAINTING, INC., a California
Corporation; and DOES 1 through 50, inclusive,

Defendants.

Case No.: 30-2023-01314830-CU-OE-CXC

[Assigned for all purposes to Hon. Melissa R.
McCormick, Dept. CX104]

**CLASS AND PAGA REPRESENTATIVE
ACTION**

**PLAINTIFFS' NOTICE OF MOTION AND
MOTION FOR FINAL APPROVAL OF
CLASS AND PAGA REPRESENTATIVE
ACTION SETTLEMENT; MEMORANDUM
OF POINTS AND AUTHORITIES IN
SUPPORT THEREOF**

Date: February 20, 2025
Time: 2 p.m.
Courtroom: Dept. CX104
Judge: Hon. Melissa R. McCormick

Action Filed: March 20, 2023
Trial: Not Set

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

2 PLEASE TAKE NOTICE that on February 20, 2025, at 2p.m., or as soon thereafter as the matter
3 may be heard, in Department CX104 of the above-captioned Court, located at 751 W. Santa Ana
4 Boulevard, Santa Ana, California 92701, Plaintiffs ISABEL RODRIGUEZ and DANIEL TOVAR
5 (“Plaintiffs”) will and hereby do move this Court for an order:

6 1. Granting class certification of the Class, solely for settlement purposes pursuant to
7 Code of Civil Procedure § 382;

8 2. Finally approving the JOINT STIPULATION OF CLASS AND PAGA
9 REPRESENTATIVE ACTION SETTLEMENT AND FIRST AMENDMENT TO JOINT
10 STIPULATION OF CLASS AND PAGA REPRESENTATIVE ACTION SETTLEMENT
11 (“Settlement” or “Agreement”);

12 3. Appointing counsel for Plaintiffs, Tunyan Law, APC, as Class Counsel;

13 4. Appointing Plaintiffs as the Class Representatives;

14 5. Approving ILYM GROUP, Inc. as the third-party administrator;

15 6. Ruling that Settlement Class Members who did not timely submit requests for
16 exclusion from the settlement as set forth in the Agreement have released their claims against
17 Defendant and the other releasees as set forth in the Agreement;

18 7. Awarding the sums requested in the Motion;

19 8. Entering a Final Judgment; and,

20 9. Without affecting the finality of the final judgment, reserving continuing
21 jurisdiction over the parties for the purposes of implementing, enforcing and/or administering
22 the settlement as set forth in the Agreement or enforcing the terms of the Final Judgment.

23 Good cause exists to grant this Motion because:

24 1. The Class meets all of the requirements for class certification for settlement
25 purposes under Code of Civil Procedure § 382;

26 2. The Settlement Agreement is a fair, adequate, and reasonable compromise of the
27 disputed wage and hour claims asserted by Plaintiffs;

28 3. Plaintiffs and Class Counsel are adequate to represent the Class;

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1 **I. INTRODUCTION**

2 Pursuant to California Rules of Court, Rules 3.769(d) and (e), Plaintiffs ISABEL RODRIGUEZ
3 and DANIEL TOVAR (“Plaintiffs”) respectfully request that this Court finally approve the proposed
4 class action settlement set forth in the JOINT STIPULATION OF CLASS AND PAGA
5 REPRESENTATIVE ACTION SETTLEMENT and FIRST AMENDMENT TO JOINT
6 STIPULATION OF CLASS AND PAGA REPRESENTATIVE ACTION SETTLEMENT
7 (“Settlement” or “Agreement”) with Defendant ROY MILLER PAINTING, INC. (“Defendant”).

8 Defendant provides painting and protective and decorative coating services in the State of
9 California for over 40 years. Plaintiffs were employed by Defendant and alleged various wage and hour
10 violations, which Defendant denies. After informal discovery, the exchange of documents, and an arm’s-
11 length mediation session with an experienced mediator, Eve H. Wagner, Esq., Plaintiffs and Defendant
12 (collectively referred to herein as the “Parties”) reached a proposed class action settlement with a gross
13 settlement amount (“GSA”) of **\$181,000.00** in compromise of disputed claims asserted on behalf of the
14 below-defined Class consisting of **148** members. Plaintiffs believe that this settlement is a fair, adequate,
15 and reasonable compromise of the disputed claims for alleged unpaid wage and hour violations and
16 penalties asserted in this case.

17 Plaintiffs now submit this Motion for Final Approval of Class and PAGA Representative Action
18 Settlement, along with the Settlement (attached to the Declaration of Lilit Tunyan [“Tunyan Decl.”],
19 **Exhibit 1** thereto).

20 **II. THE NOTICE PROCESS WAS SUCCESSFULLY COMPLETED AFTER**
21 **PRELIMINARY APPROVAL**

22 Plaintiff and Defendant have fulfilled the class notice procedures set forth in the Settlement. The
23 Settlement Administrator, ILYM Group, Inc. (“ILYM Group”), sent individual notices, objection forms
24 and exclusion forms (“Notice Packets”) to 148 Class Members on October 16, 2024. (Declaration of
25 Nick Castro [“Castro Decl.”], ¶¶ 5-7.) Of the Notices that were mailed, 28 were returned after mailing.
26 (Castro Decl., ¶ 8.) Skip tracing found new addresses for 14 Class Members. 14 Notices were remailed
27 with updated addresses. (Castro Decl., ¶¶ 8-9.) Ultimately, 14 Notice Packets are considered
28 undeliverable. (Castro Decl., ¶ 10.) No Class Members requested to be excluded from the Settlement,

and no Class Members disputed workweeks in writing. (Castro Decl., ¶¶ 11, 13.) One Class Member submitted an objection in writing. (Castro Decl., ¶ 12.) Plaintiffs believe the objection should be overruled and address the submitted one objection in a separate response to objection filed concurrently with this motion.

PAYMENTS: For **148** Settlement Class Members, the average gross payment per Class Member is **\$1,222.97**. The Net Settlement Amount (including both Class and PAGA Settlement payments) is estimated to be at least **\$73,587.71**, resulting in an average net payment per Class Member of at least **\$497.21** (including PAGA Settlement payments). (Castro Decl., ¶ 14.) The highest individual net payment (including class and PAGA Settlement payments) is estimated to be **\$1,766.14** (Castro Decl., ¶ 14.) For the Court’s convenience, below is a summary of the key provisions of the Settlement.

III. THE MAJOR TERMS OF SETTLEMENT

The provisions of the proposed Settlement include the following:

- Defendant agrees not to oppose certification of a Class for purposes of Settlement only (Settlement, ¶ 17);
- **Settlement Amount:** Defendant will pay a maximum of **\$181,000.00**, referred to as the Gross Settlement Amount (or GSA herein), resulting in an estimated average **gross** payment per Class Member of approximately **\$1,222.97** (Settlement, ¶ 23(b));
- **Class Size:** **148** individuals during Class Period. (Tunyan Decl., ¶ 16.)
- **PAGA Group Size:** **107** individuals during PAGA Period (Tunyan Decl., ¶ 17);
- **Escalator Clause:** Defendant represented that the number of workweeks worked in the Class Period for those Class Members was estimated to be nine thousand fifty (9,050). The parties stipulate to a 10% escalation of the estimated workweeks without an increase to the Gross Settlement Amount. If the number of actual workweeks during the Class Period exceeds 10% of the estimated workweeks (i.e. exceeds 9,955 workweeks), Defendant can either have the Class Period end on the date that the workweeks exceed 9,955 or increase the Gross Settlement Amount by a pro-rata dollar value equal to the number of workweeks in excess of 9,955 workweeks. For example, if there is a 1% increase over 10%, then Defendant could choose to increase the Gross Settlement Amount increases by 1% (the “Escalator Clause”).

(Settlement, ¶ 23(c).) *The escalator clause was not triggered.*

- **Kullar/Munoz Analysis:** Plaintiffs address the claims analysis herein, at Part V.B.3, and in more detail the Declaration of Tunyan, at Paragraph 18;
- **No Reversion:** The Settlement is a *non-reversionary* settlement (Settlement, ¶ 23(d));
- **Certification:** Plaintiffs address certification requisites herein, at Part V.A., and in the Declaration of Tunyan, at Paragraphs 34-40;
- **No Claim Form:** No claim form is required (Settlement, ¶ 23(e));
- **Class Release:** The Settlement will release specified wage-and-hour claims for Class Members (those Class Members who do not opt out of the Settlement) (Settlement, ¶ 34);
- **PAGA Release:** PAGA Employees will release the Released PAGA Claims, regardless of whether they opt out of the class portion of the Settlement (Settlement, ¶ 35);
- **Release Effective Date:** The Release is not active until Defendant tenders the GSA to the Settlement Administrator (Settlement, ¶¶ 34, 35);
- **Net Settlement Amount Available to the Class:** After deducting Class Counsel's attorneys' fees and costs, service payment to Plaintiffs, administration costs, and the payment to the LWDA, the remainder will be used to pay Settlement Class Payments to Class Members who do not opt out and PAGA Settlement Payments to PAGA Employees. For the Settlement Class Payments, each Class Member will receive a share based on the number of workweeks each Class Member worked for Defendant within the Class Period. The Net Settlement Amount which also includes PAGA Settlement Payments to PAGA Employees is estimated to be at least **\$73,587.71**, resulting in an average **net** payment per Class Member of at least **\$497.21**, before any tax withholdings. (Settlement, ¶ 24(f));
- **Tax Allocation:** The amounts distributed to Class Members will be characterized as 20% alleged unpaid wages, 40% as unpaid penalties and 40% as unpaid interest, and PAGA Settlement Payments will be allocated as 100% penalties. (Settlement, ¶ 24(j));
- **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 GSM (Settlement, ¶ 24(g));

- 1 • **Settlement Administrator:** The notice portion of the Settlement and distribution of funds
2 will be administered by a third-party Administrator, ILYM GROUP, Inc., and the Parties
3 estimated that the costs of administration should not reasonably exceed \$15,000.00. ILYM
4 GROUP, Inc.'s low bid for settlement administration services in the amount of **\$6,500.00**
5 was selected as the lowest bid from a competitive bidding process. (Settlement, ¶ 24(p));
- 6 • **PAGA Allocation:** From the GSA, **\$15,000.00** will be allocated to settle claims brought
7 pursuant to the California Private Attorneys General Act, Labor Code § 2699 *et seq.*
8 (“PAGA”), and seventy-five percent (75%), or **\$11,250.00** will be paid to the California
9 Labor & Workforce Development Agency. (Settlement, ¶ 9.)
- 10 • **Notice to LWDA:** Notice was provided prior to the filing of this Motion. Evidence is
11 attached to Tunyan Declaration.
- 12 • **Enhancement/Service Award to Plaintiffs:** Defendant will not oppose the application for
13 Class Representatives Service Payments of \$5,000.00 to each Plaintiff for service as a Class
14 Representative, total of **\$10,000.00** to both Plaintiffs, to be paid from the GSA (Settlement,
15 ¶ 24(m));
- 16 • **Fees and Costs:** Defendant will not oppose Class Counsel’s application for fees not to
17 exceed 33 1/3% of the GSA (**\$60,333.33**), and actual costs, in an amount not to exceed
18 **\$22,000**, to be paid out of the GSA (Settlement, ¶ 24(l)).
- 19 • **Check Void Period:** Settlement checks will be valid for 180 days (Settlement, ¶ 31);
- 20 • **Uncashed Checks:** Any settlement checks that are mailed to the Class Members and
21 remain uncashed after 180 days of the date of issuance will be cancelled, and the moneys
22 will be directed to the California State Controller’s Office for Unclaimed Property in the
23 name of each Class Member who failed to cash their Settlement Payment (Settlement, ¶¶
24 32-33);
- 25 • **Judgment Notice:** Judgment will be posted on the Settlement Administrator’s website
26 after entry for 180 days (Settlement, ¶ 27);
- 27 • **Confidentiality Provisions:** Plaintiffs and Class Counsel agree to keep settlement terms
28 confidential prior to preliminary approval of the Settlement (Settlement ¶ 55).

(Tunyan Decl., ¶¶ 10-11 and Exhibit 1 thereto.)

IV. FACTUAL AND PROCEDURAL BACKGROUND

A. Plaintiffs' Claims

On March 20, 2023, Plaintiffs filed a putative Class Action alleging the following labelled causes of action: (1) failure to pay all wages (Lab. Code §§ 204, 510, 1194, 1998); (2) failure to provide meal periods (Lab. Code §§ 226.7, 512 and Wage Order); (3) failure to provide rest periods (Lab. Code §§ 226.7 and Wage Order); (3); (4) failure to maintain and provide accurate itemized wage statements (Lab. Code §§ 226(a) and 1174); (5) failure to indemnify necessary business expenses (Lab. Code § 2802); (6) failure to timely pay all wages and final wages (Lab. Code §§ 201, 202, 203, 204 and 210); (7) Unfair Business Practices in violation of Bus. & Prof. Code § 17200 et seq. On May 25, 2023, Plaintiffs filed their First Amended Complaint adding the eighth case of action for civil penalties under the Labor Code Private Attorneys General Act of 2004 [Lab. Code § 2699, et seq.] (“PAGA”). (The “Action.”) In the Complaint, Plaintiffs sought to represent all persons that worked for Defendant in California as an hourly-paid, non-exempt employee at any time during the period beginning four years before the filing of the initial complaint. (Tunyan Decl., ¶ 3.)

Plaintiffs satisfied the administrative exhaustion requirement that is a prerequisite to filing a claim for Civil Penalties under the Labor Code Private Attorneys General Act of 2004 [Lab. Code § 2699, et seq.] (“PAGA”). (Tunyan Decl., ¶ 4.)

B. Pre-Mediation Data Production and Analysis

The Parties have conducted informal discovery and investigation of the facts and law. Such discovery and investigation have included, inter alia, the exchange of data and discoverable information in preparation for the mediation session. (Tunyan Decl., ¶ 5.) The Parties have analyzed payroll and other data pertaining to Plaintiffs and the Class during the relevant Settlement Period, including but not limited to the numbers of former and current members of the Class, average workweeks, and average rate of hourly pay. (*Id.*) In addition, Defendant also provided documents reflecting their wage and hour policies and practices during the Settlement Period as well as confidential financial data for evaluation of Defendant’s financial condition. (*Id.*)

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

1 other information obtained during the exchange of discovery, Class Counsel were able to evaluate the
2 probability of class certification, success on the merits, and the reasonably obtainable maximum
3 monetary exposure for all claims. Class Counsel reviewed these records and prepared a damage analysis
4 prior to mediation. Class Counsel also investigated the applicable law regarding the claims and defenses
5 asserted in the litigation. (Tunyan Decl., at ¶ 6.)

6 C. Settlement

7 On November 18, 2023, the Parties mediated before a mediator, Eve H. Wagner, Esq., who is a
8 highly experienced and well-regarded mediator for wage and hour class action litigation. (Tunyan Decl.,
9 ¶ 7.) At the mediation, the Parties discussed at length the burdens and risks of continuing with the
10 litigation as well as the merits of the claims and defenses and Defendant's financial condition. (*Id.*) The
11 Parties were able to reach a settlement at the mediation. The Parties then signed a long form settlement
12 agreement ("Agreement"). (*Id.*)

13 Plaintiffs and Class Counsel are aware of the burdens of proof necessary to establish liability for
14 the claims asserted in the Action, both generally and in response to Defendant's defenses thereto.
15 (Tunyan Decl., ¶ 8.) Plaintiffs and Class Counsel have also taken into account Defendant's agreement to
16 enter into a Settlement that confers substantial relief upon the Class.

17 Based on the foregoing, Plaintiffs and Class Counsel have determined that the Settlement set
18 forth in this Agreement is a fair, adequate, and reasonable Settlement and is in the best interests of the
19 Class. (Tunyan Decl., ¶ 9.) Solely for the purpose of settling this case, the parties agree that the
20 requirements for establishing class action certification with respect to this class have been met and are
21 met. (*Id.*) If this Settlement is not approved by the Court for any reason, Defendant reserves its right to
22 contest class certification. (*Id.*) This Settlement, if approved by the Court, will result in the entry of the
23 Judgment and the release of all Released Class Claims for all Class Members, including all within the
24 class definition who have not elected to exclude themselves from the Class, and the release of all
25 Released PAGA Claims for all PAGA Employees. (*Id.*)

26 V. CLASS DEFINITION

27 The Class is defined as follows:

28 All current and former non-exempt employees employed by Defendant who worked in

California at any time during the Class Period (the “Class Period” is March 20, 2019 through May 1, 2023). “Settlement Class Members” are those Class Members who do not submit a timely exclusion request to the Settlement Administrator. (Settlement, ¶¶ 3-4.)

The PAGA Employee is defined as follows:

All current and former non-exempt employees of Defendant who worked in California at any time during the PAGA Period (the “PAGA Period” is March 20, 2022 through May 1, 2023.) PAGA Employees cannot opt out of the settlement of the PAGA claim.

(Settlement, ¶¶ 10-11.)

VI. DISCUSSION

A. The Court Should Certify the Class Because It Meets All the Requirements for Certification for Settlement Purposes Under CCP § 382

Under Code of Civil Procedure § 382,¹ class certification is warranted so long as there is a numerous and ascertainable class with a well-defined community of interest among its members and that a “class action proceeding is superior to other means for a fair and efficient adjudication of the litigation.” *See, e.g., Sav-on Drug Stores, Inc. v. Superior Court*, 34 Cal.4th 319, 326, 332 (2004). Any doubts as to the appropriateness of class treatment must be resolved in favor of certification, subject to later modification. *Richmond v. Dart Indus. Inc.*, 29 Cal. 3d 462, 473-475 (1981). For purposes of this Settlement only, Defendant has agreed not to oppose conditional certification of the proposed class action. (Settlement ¶ 19.)

“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 v. Thrifty Oil Co.*, 23 Cal. 4th 429, 439-440 (2000). Indeed, the certification question simply asks whether the theory of recovery advanced by the Plaintiffs is likely to prove amenable to class treatment. *See, e.g., Jaimez v. Daiohs USA, Inc.*, 181 Cal. App. 4th 1286, 1298 (2010). In ruling on certification, a trial court’s task is to determine “whether ... the issues which may be jointly tried, when compared with those requiring separate adjudication, are so numerous or substantial that the maintenance of a class action would be advantageous to the judicial

¹ Code Civ. Proc. § 382, which is the statutory basis for the maintenance of class actions under California law, states in relevant part, “[W]hen the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all.”

process and to the litigants.” *Id.* Thus, “[t]he relevant comparison lies between the costs and benefits of adjudicating Plaintiffs’ claims in a class action and the costs and benefits of proceeding by numerous separate actions” *See, e.g., id.*

“[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). As the court noted in *Dunk*, although certification requirements are intended “to protect the interests of the non-representative class members,” that concern is “protected by the trial court’s fairness review of the settlement.” *Dunk*, 48 Cal. App. 4th at 1807 n.19.

Indeed, numerous courts have certified settlement classes. For example, the court in *In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d 285 (2d Cir. 1992), cert. dismissed, 506 U.S. 1088, 122 L. Ed. 497, 113 S. Ct 1070 (1993), addressed settlement before a class was certified. After a hearing, the “district court issued an order certifying the class and approving the settlement agreement.” *Id.* at 289; *see also Alaniz v. California Processors, Inc.*, 73 F.R.D. 269, 278 (N.D. Cal. 1976) (“the use of the tentative settlement class procedure was appropriate in this case”), *aff’d*, 572 F.2d 657 (9th Cir.), cert. denied, 439 U.S. 837 (1978). Certification of a settlement class is a regular feature of class action litigation and an approved procedure which ought to be followed in this case. *See Newberg on Class Actions* (3d ed. 1991) § 11.27, pp. 11-40 to 11-56; *Manual for Complex Litigation*, 2d (1993) § 30.45.

In view of these standards, **as discussed more thoroughly as part of the preliminary approval motion already granted by the Court**, the Class should be certified for purposes of settlement. Code Civ. Proc. § 382; Rules of Court, Rule 3.769(c).

B. The Court Should Finally Approve the Settlement Because It Is a Fair, Adequate, and Reasonable Compromise of Disputed Wage Claims in View of Defendant’s Potential Liability Exposure and the Risks of Continued Litigation

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.*

1 *Superior Court*, 103 Cal.App.3d 573, 578-579 (1980). This approval process consists of preliminary
2 settlement approval, notice being given to class members, and a final fairness and approval hearing being
3 held at which class members may be heard with respect to the settlement. *Id.* For the reasons discussed
4 below, this Court should finally approve the Settlement, and enter the Judgment.

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

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

11 To evaluate a settlement, the trial court must receive “basic information about the nature and
12 magnitude of the claims in question and the basis for concluding that the consideration being paid for the
13 release of those claims represents a reasonable compromise.” *Kullar v. Foot Locker Retail, Inc.*, 168 Cal.
14 App. 4th 116, 133 (2008). However, the record need *not* contain an explicit statement of the maximum
15 theoretical amount that the class could recover:

16 Greenwell misunderstands *Kullar*, apparently interpreting it to require the record in all
17 cases to contain evidence in the form of an explicit statement of the maximum amount
18 the Plaintiffs class could recover if it prevailed on all its claims—a number which
19 appears nowhere in the record of this case. But *Kullar* does not, as Greenwell claims,
require any such explicit statement of value; it requires a record which allows “an
understanding of the amount that is in controversy and the realistic range of outcomes
of the litigation.”

20 *Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles*, 186 Cal. App. 4th 399, 409 (2010).

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

24 A settlement is presumptively fair where it is reached through arms’ length bargaining, based on
25 sufficient discovery and investigation to allow counsel and the court to act intelligently, counsel is
26 experienced in similar litigation, and the percentage of objectors is small. *Dunk*, 48 Cal.App.4th at 1802;
27 *In re Microsoft I-V Cases*, 135 Cal. App. 4th 706, 723 (2006); *7-Eleven Owners for Fair Franchising v.*
28 *Southland Corp.*, 85 Cal. App. 4th 1135, 1146 (2000). In deciding whether to approve a settlement, a

1 trial court has broad powers to determine whether it is fair under the circumstances of the case. *See, e.g.,*
2 *Mallick v. Superior Court*, 89 Cal. App. 3d 434, 438 (1979). In exercising these powers, the overriding
3 concern is to ensure that a proposed settlement is “fair, adequate, and reasonable.” *Dunk*, at 1801,
4 quoting *Officers for Justice v. Civil Serv. Comm’n of San Francisco*, 688 F.2d 615, 625 (9th Cir. 1982).

5 Relevant factors in making this determination, include, but are not limited to:

6 [T]he complexity and likely duration of further litigation, the risk of maintaining class
7 action status through trial, the amount offered in settlement, the extent of discovery
8 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.

9 *Id.* These factors require balancing, are non-exhaustive, and, as such, trial courts should tailor the factors
10 considered to each case and give due regard to “what is otherwise a private consensual agreement
11 between the parties.” *Id.*

12 Here, the Settlement resulted from thorough, arms’ length negotiations between experienced
13 counsel with the assistance of a highly regarded mediator. (Tunyan Decl., ¶¶ 8-9,16.) With respect to the
14 claims at issue in this case, Plaintiffs obtained data from Defendant and then carefully reviewed that
15 information. Counsel for Plaintiffs also examined relevant policies in detail about their work experiences
16 and Defendant’s practices and Defendant’s financial data.

17 Based on the totality of that review, Plaintiffs estimated the potential exposure and then estimated
18 risk factors to adjust the reasonable expected outcome. The investigation and discovery that Plaintiffs’
19 counsel conducted were sufficient to provide them with enough information to intelligently evaluate the
20 estimated exposure in this action for purposes of negotiating the Settlement in view of the risks discussed
21 below and are also sufficient to allow this Court to do the same. *See, e.g., Wershba v. Apple Computer,*
22 *Inc.*, 91 Cal. App. 4th 224, 245 (2001).

23 Finally, there is only one objection received from a Class Member which should be overruled
24 based on the arguments provided in Plaintiffs’ response to objection concurrently filed with this motion.

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

28 A settlement is not judged against what might have been recovered had a Plaintiffs prevailed at

1 trial and does not have to provide 100% of damages sought to be fair and reasonable. “In the context of a
2 settlement agreement, the test is not the maximum amount Plaintiffs might have obtained at trial on the
3 complaint, but rather whether the settlement is reasonable under all of the circumstances.” *Wershba*, 91
4 Cal.App.4th at 250. Accordingly, because settlements involve compromise, even one that provides for
5 substantially narrower relief than would likely be obtained if the suit were successfully litigated can be
6 reasonable given that “the public interest may indeed be served by a voluntary settlement in which each
7 side gives ground in the interest of avoiding litigation.” *Id.*, quoting *Air Line Stewards & Stewardesses*
8 *Ass’n, Local 550 v. American Airlines, Inc.*, 455 F.2d 101, 109 (7th Cir. 1972).

9 With respect to the claims asserted on behalf of the Class in this case, there are serious risks that
10 support the reduced compromise amount. These risks include, but are not limited to: (i) the risk that
11 Plaintiffs would be unable to establish liability for unpaid straight time or overtime wages, *see Duran v.*
12 *US Bank Nat’l Ass’n*, 59 Cal. 4th 1, 39 & n. 33 (2014) (“*Duran*”), citing *Dilts v. Penske Logistics, LLC*
13 2014 WL 205039 (S.D. Cal. 2014); (ii) the risk that Defendant’s meal and rest period policies might not
14 ultimately support class certification or a class-wide liability finding, *see Duran*, 59 Cal. 4th at 14, n. 28
15 (citing Court of Appeal decisions favorable on class certification issue without expressing opinion as to
16 ultimate viability of proposition); (iii) the risk that uncertainties pertaining to the ultimate legality of
17 Defendant’s policies and practices could preclude class-wide awards of statutory penalties under Labor
18 Code §§ 203 and 226(e); (iv) the risk that individual differences between Class Members could be
19 construed as pertaining to liability and not solely to damages, *see Duran*, 59 Cal. 4th at 19; (v) the risk
20 that any civil penalties award under the PAGA could be reduced by the Court in its discretion, *see Labor*
21 *Code § 2699(e)(1)*; (vi) the risk that class treatment could be deemed improper as to one or more claims,
22 except for settlement purposes; (vii) the risk that lengthy appellate litigation could ensue, and (viii) the
23 risk that due to Defendant’s cashflow issues Defendant will not be able to cover class certification and
24 trial costs and fund settlement (Tunyan Decl., ¶ 15.) These risks are non-exhaustive.

25 In light of the uncertainties of protracted litigation, the settlement amount reflects a fair and
26 reasonable recovery for the Class Members. (Tunyan Decl. ¶¶ 12-19.) The settlement amount is, of
27 course, a compromise figure. (Tunyan Decl. ¶ 16.) By necessity it took into account risks related to
28 liability, damages, and the defenses asserted by Defendant and Defendant’s financial condition. (*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 **148** members of the Class, the average **gross** recovery including PAGA individual payment is at least **\$1,222.97** per class member, and the estimated average **net** recovery for each Class Member including PAGA individual payment is approximately **\$497.21**. (*Id.*) Given that Defendant could challenge certification and liability, this is a significant sum to have achieved in settlement. 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, Plaintiffs have concluded that the value of this Settlement is fair, adequate, and reasonable. (Tunyan Decl., ¶ 17.) The Gross Settlement Amount of **\$181,000.00** is about 66.4% of the **\$272,735.01** estimate of *risk-adjusted* recovery (excluding interest) at this stage in the litigation. On that basis, it would be unwise to pass up this settlement opportunity. 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. (*Id.*) The maximum calculated reasonable exposure is **\$1,353,008.86**, including PAGA penalties. (*Id.*)

- A reasonably estimated exposure for unpaid wages for unlawful rounding was calculated, with the assistance of an expert, to be approximately **\$10,914.00**. However, with the risk factor discounts for certification and liability proof, the value of that claim is estimated by Plaintiffs' counsel to be approximately **\$6,111.84**, assuming certification probability of 80% and merits success at 70%.
- A reasonably estimated exposure for unpaid wages for the off-the clock work was calculated, with the assistance of an expert, to be approximately **\$168,763.00**. However, with the risk factor discounts for certification and liability proof, the value of that claim is estimated by Plaintiffs' counsel to be approximately **\$33,752.60**, assuming certification probability of 40% and merits success at 30%.
- A reasonably estimated exposure for rest break violations over the class period was calculated at **\$407,488.67** with chances of certification and proof of liability (50% and

40% respectively) for a risk-adjusted exposure of **\$81,497.73**.

- A reasonably estimated exposure for meal break violations over the class period was calculated at **\$168,763.00**, with chances of certification and liability risks (50% and 40% respectively) resulting in a risk-adjusted exposure of **\$33,752.60**.
- Risk-adjusted penalty recoveries for wage statement and Labor Code § 203 penalties with chances of certification and liability risks (50% and 20% respectively) were estimated to be approximately **\$7,666.67** and **\$6,783.64**, respectively, on maximum exposures of **\$76,666.67** and **\$67,836.43**, respectively.
- A reasonably estimated exposure for unreimbursed expenses over the class period was calculated at **\$80,265.00**, with chances of certification and liability risks (80% and 70% respectively) resulting in a risk-adjusted exposure of **\$44,948.40**.
- Performing risk-adjusted valuations for all claims yields a total value in the range of **\$205,121.32**, excluding PAGA.² (*Id.*)
- PAGA penalties were calculated as having a maximum realistic exposure of **\$338,071.43**, but a risk adjusted value of **\$67,614.29**, after factoring in risks of reduction in penalties pursuant to Court discretion and the high risk of the inability to prove violations for all aggrieved employees.

The concurrently filed Declaration of Lilit Tunyan sets forth claim valuation in additional detail. (*See*, Tunyan Decl., ¶ 17.)

This result here is fully supportable as reasonable. First, it is important to recognize the wilfulness finding required for Labor Code §§ 203 and 226 is challenging to establish. (Tunyan Decl., ¶ 18.) Second, rest break and meal period claims have been challenging to certify for many years, even after *Brinker*. (Tunyan Decl., ¶ 18.) Third, the certification rates in California are lower than conventional wisdom holds. *See*, H. Scott Leviant, *Second Interim Report on class actions in California*

² In a sense, it is nonsensical to assign specific percentages to future events, but it does provide a specific 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.

1 sheds new light on certification (February 19, 2010), www.thecomplexlitigator.com, available at
2 [http://www.thecomplexlitigator.com/post-data/2010/2/19/second-interim-report-on-class-actions-in-](http://www.thecomplexlitigator.com/post-data/2010/2/19/second-interim-report-on-class-actions-in-california-sheds-n.html)
3 [california-sheds-n.html](http://www.thecomplexlitigator.com/post-data/2010/2/19/second-interim-report-on-class-actions-in-california-sheds-n.html); see also, *Findings of the Study of California Class Action Litigation*, 2000-2006,
4 available at <http://www.courtinfo.ca.gov/reference/documents/class-action-lit-study.pdf> (finding, at page
5 5, and in Table 9, at page 15, that only 21.4% of all class actions were certified either as part of a
6 settlement *or* as part of a contested certification motion).

7 Here, the estimated certification probabilities are *above* the average rate at which cases were
8 certified in California over the study years, based upon data available through the California Courts
9 websites. (Tunyan Decl., ¶ 18.) In sum, well *under* 20% of all cases filed as proposed class actions are
10 ultimately certified by way of a *contested* motion. (*Id.*) The recovery is roughly 13% of the maximum
11 theoretical recovery (estimated to be approximately \$1,353,008.86, including PAGA), which falls within
12 the expected outcome under the likelihood of success metric. (*Id.*) It would also be appropriate to
13 evaluate the result by examining only the premium wages at issue (approximately \$790,169.33, with no
14 risk reduction), excluding penalties and interest. This Settlement achieves the goals of the litigation.

15 **4. The Proposed Method for Allocating Settlement Funds Is Fair, Adequate,**
16 **and Reasonable.**

17 The proposed method of allocating the Net Settlement to Class Members also is fair and
18 reasonable. As noted, the parties agreed to allocate the Settlement Fund between all Class Members
19 based on time worked by the Class Member during the Class Period, in relation to the total amount of
20 time worked by all participating Class Members collectively during the class period. This proposed
21 method is fair and reasonable because each Class Member's actual potential damages vary based on the
22 number of workweeks he or she actually worked (e.g., Lab. Code § 226.7 provides for an extra hour of
23 pay at the employee's regular rate of pay for each violation, resulting in a higher potential damage when
24 a higher number of incidents occur). A Class Member who worked a greater number of weeks for
25 Defendant will receive a larger payment under the Settlement than a Class Member who worked for a
26 shorter amount of time during the relevant period. (Tunyan Decl., ¶¶ 10, 16.)

1 **5. The Proposed Service Payments to Plaintiffs Are Fair, Adequate, and**
2 **Reasonable and Warrant Final Approval.**

3 The proposed enhancement payments to Plaintiffs are intended to recognize the substantial
4 initiative and significant efforts on behalf of the Class. Courts routinely approve incentive awards to
5 compensate named Plaintiffs for the services they provide and the risks they incur during class action
6 litigation, often in much higher amounts than that sought here. *See, e.g., Bell v. Farmers Ins. Exchange*,
7 115 Cal. App. 4th 715, 726 (2004) (upholding “service payments” to named Plaintiffs for their efforts in
8 bringing the case); *Van Vranken v. Atlantic Richfield Co.*, 901 F. Supp. 294 (N.D.Cal. 1995) (approving
9 a \$50,000 enhancement award). Plaintiffs contributed time to the prosecution of this matter, including
10 assistance prior to the mediation with discovery, information and substantial time conferring with
11 counsel over the course of this litigation and before it was filed. (Rodriguez Decl., ¶¶ 5-20; Tovar Decl.,
12 ¶¶ 5-20; Tunyan Decl., ¶ 35.) The enhancement also recognizes the considerable risks Plaintiffs
13 undertook on behalf of the Class to be personally liable for all costs incurred regardless of the success of
14 the litigation or class certification, as well as the personal risk of facing intrusive discovery and potential
15 disclosure to future employers that Plaintiffs sued a former employer, making future employment
16 prospects uncertain and general release of all claims beyond wage-and-hour claims released in this action
17 which other Class Members did not release. The accompanying declarations of Plaintiffs confirm their
18 involvement and support appointment as Class Representatives.

19 **6. The Proposed Award of Attorneys’ Fees and Costs Is Also Fair, Adequate,**
20 **and Reasonable and Merits Approval.**

21 *a) Plaintiffs’ Counsel Should be Awarded Fees Based on a Percentage of*
22 *the Fund Recovered, Consistent with the Common Fund Method*

23 The request for attorneys’ fees as a percentage of the settlement fund is supported by the
24 “common fund theory,” where “one who expends attorneys’ fees in winning a suit which creates a fund
25 from which others derive benefits, may require those passive beneficiaries to bear a fair share of the
26 litigation costs.” *Serrano v. Priest*, 20 Cal. 3d 25, 35 (1977). The lodestar may be cross-checked against
27 the percentage-of-recovery. *See In re Consumer Privacy Cases*, 175 Cal. App. 4th 545, 556-58 (2009).

28 The purpose of the common fund approach is to “spread litigation costs proportionally among all

1 the beneficiaries so that the active beneficiary does not bear the entire burden alone.” *Vincent v. Hughes*
2 *Air West, Inc.*, 557 F.2d 759, 769 (9th Cir. 1977). Thus, the common fund doctrine has been applied
3 “consistently in California when an action brought by one party creates a fund in which other persons are
4 entitled to share.” *City and County of San Francisco v. Sweet*, 12 Cal. 4th 105, 110 (1995); *see Quinn v.*
5 *State of California*, 15 Cal. 3d 162, 167 (1975) (“[O]ne who expends attorneys’ fees in winning a suit
6 which creates a fund from which others derive benefits may require those passive beneficiaries to bear a
7 fair share of the litigation costs.”).

8 The California Supreme Court removed any lingering doubt about the use of the percentage of
9 the fund method to award attorney’s fees in California Courts:

10 We join the overwhelming majority of federal and state courts in holding that when
11 class action litigation establishes a monetary fund for the benefit of the class members,
12 and the trial court in its equitable powers awards class counsel a fee out of that fund, the
13 court may determine the amount of a reasonable fee by choosing an appropriate
14 percentage of the fund created. The recognized advantages of the percentage method—
15 including relative ease of calculation, alignment of incentives between counsel and the
16 class, a better approximation of market conditions in a contingency case, and the
17 encouragement it provides counsel to seek an early settlement and avoid unnecessarily
18 prolonging the litigation (See pt. I, *ante*; *Lealao, supra*, 82 Cal.App.4th at pp. 48–49, 97
19 Cal.Rptr.2d 797; *Rawlings v. Prudential–Bache Properties, Inc., supra*, 9 F.3d at p.
20 516)—convince us the percentage method is a valuable tool that should not be denied
21 our trial courts.

22 *Laffitte v. Robert Half Intern. Inc.*, 1 Cal. 5th 480, 503 (2016).³ Thus, this Court may and, as strongly
23 encouraged by the California Supreme Court, *should* award attorney’s fees to Plaintiffs’ counsel based
24 upon the percentage of the fund methodology.

25 “Empirical studies show that, regardless whether the percentage method or the lodestar method is
26 used, fee awards in class actions average around one-third of the recovery.” *Chavez v. Netflix, Inc.*, 162
27 Cal. App. 4th 43, 47 n. 11 (2008). This is also consistent with Plaintiff’s counsels’ experience in these
28 types of cases. Here, Plaintiffs’ attorneys request attorneys’ fees of up to \$60,333.33 (one-third of the
GSA), and costs of \$19,328.96 (below the cap or \$22,000), which includes payment for mediation, filing
fees, and other standard expenses. (Tunyan Decl., ¶¶ 31–34.) Given the efforts and risks involved in this

³ 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.

case, as well as the results achieved, these amounts are within the range of reasonableness and warrant final approval.

a) *Class Counsel Is Entitled to Attorneys' Fees and Costs under the California Labor Code and California's Private Attorney General Statute*

Class Counsel is entitled to recover fees under Labor Code § 1194, which provides, in part:

[A]ny employee receiving less than the legal minimum wage or the legal overtime compensation applicable to the employee is entitled to recover in a civil action the unpaid balance of the full amount of this minimum wage or overtime compensation, including interest thereon, reasonable attorney's fees, and costs of suit.

Lab. Code § 1194. As this litigation culminated in a Settlement that provides for a recovery of unpaid wages, including unpaid minimum and overtimes wages, Plaintiff is entitled to recover reasonable attorneys' fees and costs under the Labor Code.

Class Counsel is also entitled to a fee under California's private attorney general statute, Code of Civil Procedure § 1021.5. "The award of attorney's fees is proper under section 1021.5 if '(1) plaintiffs' action 'has resulted in the enforcement of an important right affecting the public interest,' (2) 'a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons' and (3) 'the necessity and financial burden of private enforcement are such as to make the award appropriate.'" *Press v. Lucky Stores*, 34 Cal. 3d 311, 317-318 (1983). The objective of the statute is "to encourage suits enforcing public policies by providing substantial attorneys' fees to successful litigants in such cases." *Graham v. DaimlerChrysler Corp.*, 34 Cal. 4th 553, 565 (2004).

The Action resulted in the enforcement of an important right affecting the public interest, as Plaintiff sought to enforce Class Members' rights to recover statutory wages arising from Defendants' failure to pay all wages and failure to provide meal and rest breaks. *See Murphy v. Kenneth Cole Productions, Inc.*, 40 Cal. 4th 1094, 1113 (2007) (noting that "health and safety concerns" are what motivated the Industrial Wage Commission to adopt mandatory meal and rest periods).

The Action also conferred a significant benefit on a class of persons who worked for Defendant during the Class Period and were, according to allegations, not properly compensated for all hours worked and were not provided meal and rest periods or compensation therefor.

Finally, the necessity and financial burden of private enforcement render an award appropriate.

Without the incentive of an attorneys' fee award, Plaintiff could not have afforded to hire counsel to pursue this case, as the cost of litigating this matter far outweighed Plaintiff's potential recovery. See *Ryan v. California Interscholastic Federation*, 94 Cal. App. 4th 1033, 1044 (2001) ("As to the necessity and financial burden of private enforcement, an award is appropriate where the cost of the legal victory transcends the claimants' personal interest; in other words, where the burden of pursuing the litigation is out of proportion to the plaintiff's individual stake in the matter.").

b) *A Lodestar Cross Check Confirms that Class Counsel's Requested Attorneys' Fees Are Reasonable*

Plaintiffs' fee application is also reasonable based on Class Counsel's lodestar. Under the lodestar method, the court considers a compilation of the time spent and a reasonable hourly compensation of each attorney to evaluate the reasonableness of the fee requested. *Ramos v. Countrywide Home Loans, Inc.*, 82 Cal. App. 4th 615, 622 (2000). The moving party meets its burden in this regard by submitting "declarations evidencing the reasonable hourly rate for their services and establishing the number of hours spent working on the case" as "California case law permits fee awards in the absence of detailed time sheets." *Wershba*, 91 Cal. App. 4th at 254-55; *Dunk*, 48 Cal. App. 4th at 1810; *Nightengale v. Hyundai Motors America*, 31 Cal. App. 4th 99, 103 (1994). The hours spent and the reasonable hourly compensation are computed to arrive at a "lodestar" figure which may then be augmented or diminished by the court taking into account various "multiplier" factors. See *Ramos*, 82 Cal. App. 4th at 622 (citing *Serrano*, 20 Cal. 3d at 48-49).

Here, Class Counsel's billed lodestar exceeds **\$87,110.00** which is based on approximately **159.2 billed** hours (not including final estimated hours) at the attorneys' customary hourly rates. (Tunyan Decl., ¶¶ 31-34.) The actual lodestar is estimated to be **\$87,110.00**. (Tunyan Decl., ¶ 33.) Thus, the request for **\$60,333.33** in attorneys' fees represents a **negative** lodestar multiplier of 1.44, when compared to the recorded actual lodestar and a **negative** lodestar multiplier of 1.49, when compared to future lodestar of counsel, totaling **\$89,860.00**, is reasonable under the lodestar method.

(1) Class Counsel's Hours Are Reasonable

In determining whether the number of hours expended on the litigation was reasonable, the court must determine that "the time spent was reasonably necessary and that [] counsel made 'a good faith

1 effort to exclude from the fee request hours that are excessive, redundant, or otherwise unnecessary.”
2 *Jordan v. Multnomah County*, 815 F.2d 1258, 1263 n.8 (9th Cir. 1987). The court “should defer to the
3 winning lawyer’s professional judgment as to how much time he was required to spend on the case.”
4 *Moreno v. City of Sacramento*, 534 F.3d 1106, 1112 (9th Cir. 2008) (noting that “[l]awyers are not likely
5 to spend unnecessary time on contingency fee cases in the hope of inflating their fees. The payoff is too
6 uncertain, as to both the result and the amount of the fee.”).

7 Here, Class Counsel expended a prudent amount of time litigating the case to achieve the
8 excellent result on behalf of the class. (Tunyan Decl. ¶ 31.)

9 (2) Class Counsel’s Hourly Rates Are Reasonable

10 The reasonable hourly rate is that prevailing in the community for similar work. *PLCM Group,*
11 *Inc. v. Drexler*, 22 Cal. 4th 1084, 1095 (2000). “[I]n assessing a reasonable hourly rate, the trial court is
12 allowed to consider the attorneys’ skill as reflected in the quality of work, as well as the attorneys’
13 reputation and status.” *MBNA American Bank, N.A. v. Gorman*, 147 Cal. App. 4th 1, 3 (2006). The trial
14 court may also “find hourly rates reasonable based on evidence of other courts approving similar rates.”
15 *Parkinson v. Hyundai Motor America*, 796 F.Supp.2d 1160, 1172 (C.D. Cal. 2010).

16 Class Counsel are experienced litigators who specialize in employment law, with a substantial
17 wage and hour class action practice. (Tunyan Decl. ¶¶ 20-26.) A number of courts have approved Class
18 Counsel’s hourly rates which are consistent with my practice area, legal market. (Tunyan Decl. ¶ 26.)
19 Given the skill and experience of Class Counsel, and the excellent result achieved, Class Counsel’s
20 hourly rates are reasonable.

21 d) Class Counsel’s Costs Are Reasonable

22 The Settlement Agreement provides for reimbursement of costs not to exceed \$22,000.00. To
23 date, Tunyan Law, APC has already incurred actual costs in the amount of at least \$19,328.96 which
24 include future final approval motion filing and final report filing fees. (Tunyan Decl., ¶ 34.) These costs
25 were reasonably incurred in prosecuting the Action on behalf of the Class Members and should be
26 approved by the Court. Accordingly, Class Counsel respectfully requests the Court approve costs in the
27 amount of **\$19,328.96**. (Tunyan Decl., ¶ 34.)
28

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

2 In deciding whether to approve a proposed settlement, a trial court must determine if the
3 proposed settlement is fair under the circumstances of the case. *Mallick*, 89 Cal.App.3d at 438. In
4 exercising this power, the overriding concern is to ensure that a proposed settlement is “fair, adequate,
5 and reasonable.” *Dunk*, 48 Cal.App.4th at 1801 (internal quotations omitted). ILYM Group, Inc., which
6 has been selected due to its competitive bid, estimates that administration can be performed for \$6,500.
7 In counsel’s experience, based on similar wage-and-hour actions, an estimated cost of \$ 6,500 is a fair
8 and reasonable amount for administration fees and should be finally approved. (Tunyan Decl., ¶ 36.)

9 **8. The PAGA Allocation is Reasonable**

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

15 Prior to the issuance of *Moniz v. Adecco USA, Inc.*, 72 Cal. App. 5th 56 (2021), the only sources
16 of persuasive guidance as to how to assess the reasonableness of a PAGA allocation were found in
17 federal court decisions addressing that question. In their view, a PAGA allocation, even if a small
18 portion of the total settlement, could be reasonable if the settlement of the underlying wage and hour
19 claims is robust and serves the deterrent purpose of the PAGA statute. *O’Connor v. Uber Technologies,*
20 *Inc.*, 201 F.Supp.3d 1110, 1135 (N.D. Cal. 2016) (“By providing fair compensation to the class members
21 as employees and substantial monetary relief, a settlement not only vindicates the rights of class
22 members as employees, but may have a deterrent effect upon the defendant employer and other
23 employers, an objective of PAGA.”); *see also Visceral v. Mistras Group*, 2016 WL 5907869 *9 (N.D.
24 Cal. 2016) (“Applying O’Connor’s sliding scale approach, settlement of the PAGA claim may be
25 substantially reduced below its standalone settlement value without sacrificing its statutory purposes
26 because the non PAGA settlement is relatively substantial.”)

27 *Moniz* then provided explicit confirmation that this was an appropriate yardstick by which to
28 measure reasonableness of a PAGA settlement. *Moniz* said:

[W]hile PAGA does not require the trial court to act as a fiduciary for aggrieved employees, adoption of a standard of review for settlements that prevents “ ‘ ‘ ‘fraud, collusion or unfairness’ ” (Dunk, supra, 48 Cal.App.4th at pp. 1800–1801, 56 Cal.Rptr.2d 483), and protects the interests of the public and the LWDA in the enforcement of state labor laws is warranted. Because many of the factors used to evaluate class action settlements bear on a settlement’s fairness—including the strength of the plaintiff’s case, the risk, the stage of the proceeding, the complexity and likely duration of further litigation, and the settlement amount—these factors can be useful in evaluating the fairness of a PAGA settlement.

Given PAGA’s purpose to protect the public interest, we also agree with the LWDA and federal district courts that have found it appropriate to review a PAGA settlement to ascertain whether a settlement is fair in view of PAGA’s purposes and policies. (*O’Connor v. Uber Technologies, Inc.* (N.D. Cal. 2016) 201 F.Supp.3d 1110, 1132–1134; *Jordan v. NCI Group, Inc.* (Jan. 5, 2018, No. EDCV 16-1701-JVS) 2018 WL 1409590, at *1–*2, 2018 U.S. Dist. Lexis 25297, at *3–*4; *Chamberlain v. Baker Hughes, a GE Co., LLC*, supra, 2020 WL 4350207 at *3–*4, 2020 U.S. Dist. Lexis 134582 at *10–*11; see *Consumer Advocacy Group, Inc. v. Kintetsu Enterprises of America* (2006) 141 Cal.App.4th 46, 59, 61–62, 45 Cal.Rptr.3d 647 [where the Legislature required court approval of private settlements of Proposition 65 actions brought to vindicate the public interest, court must evaluate the resulting consent decree to determine if it is “just” and “serves the public interest”].) We therefore hold that a trial court should evaluate a PAGA settlement to determine whether it is fair, reasonable, and adequate in view of PAGA’s purposes to remediate present labor law violations, deter future ones, and to maximize enforcement of state labor laws. (See *Williams*, supra, 3 Cal.5th at p. 546, 220 Cal.Rptr.3d 472, 398 P.3d 69 [PAGA “sought to remediate present violations and deter future ones”]; *Arias*, supra, 46 Cal.4th at p. 980, 95 Cal.Rptr.3d 588, 209 P.3d 923 [the declared purpose of PAGA was to augment state enforcement efforts to achieve maximum compliance with labor laws].) The trial court below used this standard.

Moniz, 72 Cal. App. 5th at 77. *Moniz*, in agreeing with the 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 Plaintiff’s discussion of the adequacy of the settlement generally. To assess the fairness, adequacy, and reasonableness of a class action settlement, the court should also consider the expense, complexity and likely duration of further litigation. *Dunk*, 48 Cal. App. 4th at 1801. 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 foundational violations that would support a substantial penalty award, tremendous time and expense would be invested. To adequately establish that aggrieved employees experience the alleged violations, and at what frequency, most of the aggrieved employees would need to be interviewed in a systematic

1 fashion and their testimony cataloged in way sufficiently meaningful to permit the submission of
2 summary evidence at trial, such as via survey. *First*, the burdensome nature of such a process would be
3 expensive and time-consuming. *Second*, the individuals already interviewed confirmed substantial risk
4 that the Court would either substantially reduce any penalty ultimately awarded *or* conclude that the
5 conduct was insufficient to support a penalty award. *Third*, it would be essentially impossible to
6 formulate an objectively reliable means of summarizing testimonial experiences, other than by an
7 extraordinarily detailed survey. And formulating such a survey would have been important, since
8 frequency of violations would need to be established before any penalties could be recovered. At least as
9 to claims such as meal period and rest break violations, the decisions of aggrieved employees are a major
10 factor in assessing liability. Direct testimony would have been required from as many of the 107
11 aggrieved employees as could be obtained, which would be, at best, very difficult.

12 The second element (the PAGA purposes element) is also satisfied here. As held by *Moniz*,
13 PAGA's purposes include (1) remediation of present labor law violations, (2) deterrence of future
14 violations, and (3) maximization of enforcement of state labor laws. Here the allocation of a major
15 portion of settlement funds to class members still advances the goal of labor law violation remediation.
16 Class members benefit from payments intended to offset the harm of alleged violations of wage and hour
17 requirements. The allocation of a major portion of settlement funds to class members also deters future
18 violations, since, from the perspective of an employer, where settlement funds go is less significant than
19 the fact that settlement funds are issuing at all. Finally, allocation of a major portion of settlement funds
20 to class members still advances the goal of enforcement of state labor law. This settlement is, by
21 definition, a response to alleged violations of state labor laws, balanced against the competing factors of
22 uncertainty of proof and other risks.

23 In addition, there is no evidence that a court or a commissioner had informed Defendant that its
24 conduct violated the Labor Code. *Amaral v. Cintas Corp.*, 163 Cal. App. 4th 1157, 1209 (2008); *Willis v.*
25 *Xerox Bus. Servs., LLC*, 2013 WL 6053831, *7-8 (E.D. Cal. 2013) ("Under California law, courts have
26 held that employers are not subject to heightened penalties for subsequent violations until and unless a
27 court or commissioner notified the employer that it is in violation of the Labor Code.") And in *Cotter*,
28 the court found a significant reduction of the PAGA claim would be appropriate because "[t]his does not

1 appear to be a case where a company has deliberately sought to evade the law.” *Cotter v. Lyft, Inc.*, 176
2 F. Supp. 3d at 941. Here, Defendant can state a strong case that, as the Court concluded in *Cotter*, its
3 efforts to devise compliant operational policies do not indicate an organization that has deliberately
4 sought to evade the law. This is a very significant risk factor.

5 Finally, the PAGA allocation is fair. The LWDA is receiving **\$11,250**. PAGA Employees are
6 receiving \$3,750 and Class Members are receiving, net, an estimated **\$73,587.71** for the releases for
7 eight theories of recovery (including the \$3,750 as the aggrieved employees’ share of the PAGA
8 Allocation). An allocation to the LWDA equal to 15.3% of the Net Settlement Amount is not unfair and
9 satisfies the policies underlying California’s wage and hour laws.

10 **VII. CONCLUSION**

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

15 Respectfully submitted,

16 Dated: January 22, 2025

TUNYAN LAW, APC

17
18 By: _____



Lilit Tunyan
Artur Tunyan

19
20 Attorneys for Plaintiffs Isabel Rodriguez and Daniel Tovar

1 **PROOF OF SERVICE**

2 STATE OF CALIFORNIA)
3) ss
4 COUNTY OF LOS ANGELES)

5 I am employed in the county of Los Angeles, State of California. I am over the age of
6 18 and not a party to the within action; my business address is 535 N. Brand Blvd., Suite 285,
7 Glendale, California 91203.

8 On the date indicated below, I served the document described as: **PLAINTIFFS' NOTICE OF**
9 **MOTION AND MOTION FOR FINAL APPROVAL OF CLASS AND PAGA**
10 **REPRESENTATIVE ACTION SETTLEMENT; MEMORANDUM OF POINTS AND**
11 **AUTHORITIES IN SUPPORT THEREOF** on the interested parties in this action by sending a
12 true copy thereof to interested parties as follows and as stated on the attached service list:

13 Greg S. Labate
14 glabate@sheppardmullin.com
15 Molly Brooks
16 MBrooks@sheppardmullin.com
17 Lauren J. Blaes
18 lblaes@sheppardmullin.com
19 Seana Pierce
20 SPierce@sheppardmullin.com

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22 650 Town Center Drive, 10th Floor
23 Costa Mesa, California 92626-1993
24 Telephone: 714-513-5100
25 Facsimile: 714-513-5130

26 ***Attorneys for Defendant Roy Miller Painting, Inc.***

27 [✓] **BY E-MAIL:** I hereby certify that this document was served from Glendale,
28 California, by e-mail delivery on the parties listed herein at their most recent known e-
mail address or e-mail of record in this action.

[✓] **BY ELECTRONIC SERVICE:** Based on an agreement of the parties to accept electronic
service, I caused the documents to be sent to the persons at the electronic service addresses
listed above via electronic mail. I did not receive an error message.

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

Executed on January 22, 2025 at Glendale, California.

Lilit Tunyan

Name



Signature