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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

CRISTINA MIRANDA and MARIBEL TORRES LOPEZ, as individuals and on behalf of all others similarly situated, Plaintiffs, vs. K & P JANITORIAL SERVICES, a California corporation; and DOES 1 through 100, Defendants.	Case No. 23STCV19824 [*Assigned for all purposes to the Honorable David S. Cunningham III, Dept. 11*] **PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT** Date: February 3, 2025 Time: 11:00 a.m. Dept.: 11 Complaint Filed: August 18, 2023 Trial Date: None Set

PLEASE TAKE NOTICE that pursuant to Rule 3.769 of the California Rules of Court, on February 3, 2025 at 11:00 a.m., or as soon thereafter as the matter may be heard in Department 11 of the above-entitled Court, located at 312 North Spring Street, Los Angeles, California 90012, Plaintiffs Cristina Miranda and Maribel Torres Lopez ("Plaintiffs"), individually and on behalf of a class of similarly situated individuals, will and hereby do move this Court for:

1. Preliminary approval of the proposed class settlement of this lawsuit;
2. Pursuant to Section 382 of the California Code of Civil Procedure, provisional certification of the following Settlement Class, defined as follows:

    > All current and former non-exempt employees who worked for Defendant K&P Janitorial Services in California from August 1, 2022 until April 9, 2024 (the "Class Period").

3. Preliminary appointment of Plaintiffs Cristina Miranda and Maribel Torres Lopez as Class Representatives;
4. Preliminary appointment of Paul K. Haines, Sean M. Blakely, and Joel M. Gordon of Haines Law Group, APC as Class Counsel;
5. The scheduling of a hearing to consider whether the Settlement should be finally approved and to permit Class Representative Enhancement Payments to Plaintiffs, civil penalties payable to the Labor & Workforce Development Agency ("LWDA"), settlement administration costs, and attorneys' fees and costs to Class Counsel;
6. Appointment of ILYM Group, Inc. as the third-party Settlement Administrator for mailing notices; and
7. Approval of the proposed Class Notice and an order that it be disseminated to the proposed Settlement Class as provided in the Stipulation of Settlement.

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This Motion is based on this Notice of Motion; the attached Memorandum of Points and Authorities; the declarations of Paul K. Haines, Sean M. Blakely, Joel M. Gordon, Plaintiffs Cristina Miranda and Maribel Torres Lopez, Anthony Rodgers of ILYM Group, Inc., and the exhibits attached thereto; the Settlement Agreement; the pleadings and other papers filed in this action; and on any further oral or documentary evidence or argument presented at the time of hearing.

Dated: October 3, 2024

Respectfully submitted,
HAINES LAW GROUP, APC

By: Sean Blakely

Paul K. Haines
Sean M. Blakely
Attorneys for Plaintiffs

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiffs Cristina Miranda and Maribel Torres Lopez ("Plaintiffs") seek preliminary approval of a class and representative action settlement ("Settlement") with Defendant K&P Janitorial Services ("K&P") (collectively with Plaintiffs, the "Parties"). In this action, Plaintiffs' primary allegations are that K&P failed to: (1) pay all wages owed due to its allegedly unlawful timekeeping policies/practices, (2) pay all overtime wages due to its alleged regular rate miscalculations, (3) provide all required meal periods, (4) authorize and permit all required rest periods, and (5) reimburse all necessary business expenditures. Based on these alleged wage and hour violations, Plaintiffs also brought derivative claims for alleged waiting time penalties, K&P's alleged failure to issue accurate and compliant wage statements, and for civil penalties under the Private Attorneys General Act ("PAGA"). [1]

Plaintiffs respectfully request that this Court preliminarily approve this non-reversionary, common-fund class action settlement,[2] in which K&P has agreed to pay a Gross Settlement Amount of $244,241 to the following Settlement Class:

> All current and former non-exempt employees who worked for Defendant K&P Janitorial Services in California from August 1, 2022 until April 9, 2024 (the "Class Period").

If the Settlement is approved, K&P will pay a non-reversionary Gross Settlement Amount of $244,241.00. After deducting payments previously made by K&P for alleged unpaid wages and meal period premiums, settlement administration costs, Plaintiffs' requested Class Representative Enhancement Payments, the amount designated as PAGA civil penalties, and requested attorneys' fees and costs, the Net Settlement Amount ("NSA") of approximately

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[1] Plaintiffs' operative First Amended Class and Representative Action Complaint ("FAC") pleads the following causes of action: (1) minimum wage violations; (2) failure to pay all overtime wages; (3) meal period violations; (4) rest period violations; (5) wage statement violation; (6) waiting time penalties; (7) failure to reimburse all necessary business expenditures; (8) unfair competition; and (9) civil penalties under the PAGA.

[2] The Stipulation of Settlement ("Settlement") is attached to the Declaration of Sean M. Blakely as **Exhibit A**. ("Blakely Decl."). The proposed Class Notice and Notice of Estimated Settlement Payment are attached to the Settlement as Exhibits 1 and 2, respectively, to the Settlement Agreement.

$63,586.33 will be distributed to all Settlement Class members who do not opt out of the Settlement based on the proportionate number of workweeks worked by each Settlement Class Member during the Class Period.

Significantly, Settlement Class members do not need to file a claim to reap the financial benefits of the Settlement, as all Settlement Class members will automatically receive a Settlement Payment unless they affirmatively opt-out. There are approximately 130 Settlement Class members, and the average award to participating Settlement Class members is projected to be approximately $489.13.

The proposed Settlement is within the range of possible approval in light of the significant legal and factual obstacles that Plaintiffs faced, the risks and costs of further litigation, and the tangible monetary benefits to be received by Plaintiffs and the Settlement Class. For the reasons discussed herein, Plaintiffs respectfully request that this Court grant preliminary approval of the Settlement.

II. SUMMARY OF THE LITIGATION

A. FACTUAL AND PROCEDURAL BACKGROUND

K&P is a provider of janitorial and building maintenance services for commercial office buildings throughout Los Angeles. *See* Declaration of Sean M. Blakely ("Blakely Decl."), ¶ 8 Plaintiff Miranda worked for K&P as a non-exempt "janitor" from approximately January 2019, until approximately December 22, 2022. *See* Declaration of Cristina Miranda ("Miranda Decl."), ¶ 2. Plaintiff Torres Lopez worked for K&P as a non-exempt "janitor" from approximately June 11, 2018, until approximately December 22, 2022. *See* Declaration of Maribel Torres Lopez ("Torres Lopez Decl."), ¶ 2.

On August 18, 2023, Plaintiffs filed this class action asserting causes of action for: (1) failure to pay all minimum wages; (2) failure to pay all overtime wages; (3) meal period violations; (4) rest period violations; (5) failure to reimburse all necessary business expenditures; (6) wage statement violations; (7) waiting time penalties; and (8) unfair competition in violation of California Business & Professions Code § 17200 *et seq*. Blakely Decl., ¶ 9 On August 18, 2023, Plaintiffs sent their PAGA notification letter to the Labor & Workforce Development

Agency ("LWDA"). *Id*.; **Exhibit B**. On October 23, 2023, Plaintiffs filed the operative First Amended Class and Representative Complaint ("FAC") adding a cause of action for civil penalties under the Private Attorneys' General Act of 2004, Labor Code Section 2698, *et seq*. ("PAGA"). *Id*.

B. PLAINTIFFS' CLAIMS AND K&P'S DEFENSES

1. Arbitration Agreements

As an initial matter, K&P asserts that Plaintiffs and nearly all Settlement Class members signed valid and enforceable arbitration agreements with class action waivers. Blakely Decl., ¶ 14. Setting aside any arguments as to the merits of Plaintiffs' claims, K&P contends that absent settlement, a class-wide recovery for <u>all</u> Settlement Class members was not possible and that only PAGA civil penalties could potentially be recovered on behalf of a subset of Settlement Class members. *Id.* As such, K&P contends that absent its agreement to not raise the arbitration agreements as an affirmative defense any recovery to Settlement Class members would be limited to only the employee's potential 25% share of PAGA civil penalties. *Id.*

2. Unpaid Wages Due to Unlawful Timekeeping Policies/Practices

Plaintiffs allege that K&P utilized a timekeeping system that systematically underpaid wages to Settlement Class members. Blakely Decl., ¶ 15. Specifically, Plaintiffs allege that K&P required its employees to clock in and out through an application on their personal cellular phones that recorded hours worked to the minute; however, K&P only compensated employees for their scheduled hours of work, rather than for all hours on the clock. *Id*.

K&P argues that its timekeeping policies/practices complied with California law and that K&P compensated Settlement Class members for all hours worked throughout the Class Period. Blakely Decl., ¶ 15. K&P contends that it utilized an even-handed timekeeping system that, on balance, resulted in employees being paid for all hours actually worked. *Id*. K&P also argues that it changed its timekeeping policies/practices in August 2023, and began to compensate employees to the minute, thereby cutting off its potential liability for this claim. *Id*. K&P further asserts that after the filing of this lawsuit, it made retroactive payments to Settlement Class members for any unpaid time as a result of its timekeeping policies/practices. *Id*. Finally, K&P argues that Plaintiffs would be unable to certify this claim since its timekeeping policies/practices are facially neutral and individualized inquiries would be necessary as to whether employees were in fact underpaid for each workday in question (including whether they were actually working when they were clocked in), resulting in an unmanageable series of mini-trials. *Id*.

3. **Regular Rate Miscalculations**

Plaintiffs allege that K&P failed to pay all overtime wages owed to Plaintiffs and Settlement Class members by failing to include the value of all non-discretionary remuneration into the "regular rate" of pay when calculating overtime compensation. Blakely Decl., ¶ 16. Specifically, Plaintiffs contend that K&P paid Settlement Class members non-discretionary incentive pay, including "Laundry" bonuses, but failed to include these payments when calculating the regular rate of pay for overtime purposes. *Id.*

However, K&P contends that it properly included all forms of remuneration when calculating the regular rate of pay and, therefore, paid all overtime wages to Settlement Class members. Blakely Decl., ¶ 16. K&P also argues that the incentive payments at issue were discretionary bonuses and therefore excludable from the "regular rate." Blakely Decl., ¶ 16; *see also* 29 C.F.R. § 778.208 (discretionary bonuses excludable from regular rate). K&P further argues that only a small number of employees received "Laundry" renumeration throughout the Class Period, creating substantive differences among Settlement Class members with respect to the incentives received, making class certification unlikely. Blakely Decl., ¶ 16.

4. **Meal Period Claims**

Plaintiffs allege that K&P routinely failed to provide timely, duty-free, and uninterrupted 30-minute meal periods commencing before the end of the fifth hour of work. Blakely Decl., ¶ 17.

K&P counters it has maintained compliant written meal period policies throughout the Class Period and has always provided compliant meal periods in line with those policies. Blakely Decl., ¶ 17. K&P contends that under *Brinker*, it is only required to "provide" the opportunity to take meal periods, not "ensure" meal periods are taken. Blakely Decl., ¶ 17; *see Brinker Restaurant Corp. v. Superior Court*, 53 Cal.4th 1004, 1038 (2012) (rejecting "ensure" standard and holding employers only have to "provide" employees the opportunity to take meal periods). Therefore, K&P maintains that any short, missed, or late first meal periods were the result of lawful employee waiver or choice, thereby precluding liability. Blakely Decl., ¶ 17. K&P further argues that after the filing of this lawsuit, it conducted an internal audit of employee meal periods and retroactively paid meal period premiums to Settlement Class members for facial meal period violations. *Id.* Lastly, K&P argues that individualized inquiries will be required to determine why each meal period was taken late or short or missed by each employee, and whether there was a valid waiver, thereby making class certification of this claim unlikely. *Id.*, ¶ 17.

5. **Rest Period Claims**

Plaintiffs allege that due to persistent understaffing at each work site, K&P failed to authorize and permit all legally compliant off-duty rest periods. Blakely Decl., ¶ 18. Specifically, Plaintiffs allege they and other non-exempt employees were often required to work through their rest periods, as a result of the work demands imposed by K&P. *Id.*

K&P counters that it maintained compliant written rest period policies throughout the Class Period and has always authorized and permitted employees a 10-minute rest period for each four (4) hours worked, or major fraction thereof, as required under the Wage Order, and that any failure to take rest periods was a result of employee choice, rather than any K&P's policy and/or practice. Blakely Decl., ¶ 18. K&P also argues that Plaintiffs' rest period claim is not amenable to class treatment, since individual inquiries would be required to determine which Settlement Class members failed to take rest periods, how many rest periods they failed to take, and the reasons why each employee failed to take rest period(s) on a particular shift. *Id*. These manageability concerns are especially present with respect to rest period claims, K&P argues, given that rest periods are not recorded. *Id*.

6. **Failure to Reimburse Necessary Business Expenditures**

Plaintiffs allege that K&P failed to reimburse Plaintiffs and other non-exempt employees for all reasonable and necessary work expenditures, including, but not limited to use of the employee's personal cellular phones. Blakely Decl., ¶ 19. Specifically, Plaintiffs allege K&P required employees to use their personal cellular phones to clock in and out of shifts and meal periods starting in 2020 but failed to reimburse employees for use of their personal cellular in violation of Labor Code § 2802(a) ("An employer shall indemnify his or her employee for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties") *Id.*; *see also Cochran v. Schwan's Home Service, Inc.*, 228 Cal.App.4th 1137 (2014) (holding employer must reimburse use of personal cell phone, even where employee already has "unlimited" plan).

However, K&P argues that employees were not required to use their cellular phones in the discharge of their work duties. Blakely Decl., ¶ 19. K&P further contends that this claim would require individual inquiries into whether Settlement Class members actually used their personal cellular phones for work purposes, how much expense they incurred, whether they submitted a request for reimbursement, and the reasonableness of that expense, thus precluding class certification. *Id.*; *see also*, e.g., *Gattuso v. Harte-Hanks Shoppers, Inc.*, 42 Cal.4th 554, 568 (2007) ("In calculating the reimbursement amount due under section 2802, the employer may consider not only the actual expenses that the employee incurred, but also whether each of those expenses was 'necessary,' which in turn depends on the reasonableness of the employee's choices"). Lastly, K&P argues that it began to reimburse Settlement Class members for the use of their cell phones during the Class Period, thereby cutting off its liability for this claim. Blakely Decl., ¶ 19.

7. **Wage Statement Violations**

As a result of the unpaid wages and unpaid meal and rest period premium wages described above, Plaintiffs allege that K&P is liable for wage statement penalties. Blakely Decl., ¶ 20. K&P argues any alleged wage statement violations were not "knowing and intentional," and Plaintiffs cannot show that they or other employees "suffer[ed] injury" due to the alleged wage statement violations, as required by Labor Code § 226(e) for the imposition of penalties. *Id*. K&P further contends its wage statements always accurately reflected hours worked and amounts paid as well as all other required information, precluding liability for wage statement penalties under *Maldonado v. Epsilon Plastics, Inc.*, 22 Cal.App.5th 1308, 1336-37 (2018) (agreeing with employer's "commonsense position that the pay stubs were accurate in that they correctly reflected the hours worked and the pay received…The purpose of section 226 is to *document* the *paid wages* to ensure the employee is fully informed regarding the calculation of those wages") (Italics in original). Blakely Decl., ¶ 20.

8. **Waiting Time Penalties**

As a further result of the unpaid wages and unpaid meal and rest period premium wages described above, Plaintiffs alleges that K&P failed to comply with its final pay obligations set forth in Labor Code §§ 201-203. Blakely Decl., ¶ 21. K&P argues that it possesses strong, good-faith defenses to Plaintiffs' underlying claims, thus precluding recovery of waiting time penalties, which are only available for the "willful" failure to pay wages. *Id.*; see *also* 8 Cal. Code Regs. § 13520 ("[A] good faith dispute that any wages are due will preclude imposition of waiting time penalties under Section 203 . . . A 'good faith' dispute that any wages are due occurs when an employer presents a defense, based in law or fact which, if successful, would preclude any recovery on the part of the employee"). K&P further asserts that Plaintiffs' waiting time penalty exposure was grossly inflated as not every former employee experienced the alleged Labor Code violations. Blakely Decl., ¶ 21.

9. **PAGA Civil Penalties**

As a result of the foregoing Labor Code violations, Plaintiffs allege that K&P is liable for civil penalties under the PAGA. Blakely Decl., ¶ 22. Since Plaintiffs' PAGA claim is derivative of Plaintiffs' underlying wage claims, K&P asserts that the PAGA claim would fail with those claims. *Id.; See Price v. Starbucks Corp.*, 192 Cal.App.4th 1136, 1147 (2011) ("Because the underlying causes of action fail, the derivative UCL and PAGA claims also fail"). K&P further maintains that given its good-faith defenses, the Court would substantially reduce any PAGA penalties if it were to find K&P liable for any of Plaintiffs' claims. Blakely Decl., ¶ 22; Lab. Code § 2699(e)(2) (authorizing reduction in PAGA penalties in court's discretion); *Thurman v. Bayshore Transit Mgmt., Inc.*, 203 Cal.App.4th 1112, 1135 (2012) (affirming reduction of PAGA penalties); *Fleming v. Covidien, Inc.*, No. ED-CV-10-1487-RGK (OPx), 2011 WL 7563047 at *4 (C.D. Cal. 2011) (reducing PAGA penalties by over 82%); *Carrington v. Starbucks Corp.*, 30 Cal.App.5th 504, 529 (2018) (affirming PAGA penalty of just $5 per pay period where employer made “good faith attempts” to comply with the law).

C. DISCOVERY AND MEDIATION

In connection with mediation, K&P provided Plaintiffs with a 25% sampling of timekeeping and payroll records for putative class members employed during the Class Period. Blakely Decl., ¶ 10. K&P also produced relevant policy documents, including its written meal and rest period policies, timekeeping policies, and overtime policies; and the number of current and former employees employed during the Class Period, as well as the aggregate number of workweeks worked by all putative class members. *Id.* This discovery allowed the Parties to assess the merits and value of Plaintiffs’ claims, the chances of certification of Plaintiffs’ claims, and K&P’s potential defenses. *Id.*

On February 8, 2024, the Parties attended a full-day mediation with Kevin T. Barnes, Esq., an experienced wage and hour class action mediator. Blakely Decl., ¶ 11. During mediation, the Parties vigorously debated their legal positions, the likelihood of certification of Plaintiffs’ claims, and the legal bases for the claims and defenses. *Id.* At the conclusion of mediation, the Parties reached a settlement. *Id.* During the months that followed, the Parties negotiated and finalized the terms of the Settlement and executed the long-form Settlement Agreement now before the Court. *Id.*, Exh. A.

III. THE PROPOSED SETTLEMENT

A. ESSENTIAL TERMS OF THE SETTLEMENT

Under the Settlement, K&P will pay a non-reversionary Gross Settlement Amount (“GSA”) of $244,241.00. *See* Settlement, ¶ 3. No Settlement Class member will need to file a claim form as each Settlement Class member will automatically receive a Settlement Payment unless he or she affirmatively opts out. *Id.*, at ¶ 4. The monetary terms of the Settlement are summarized below:

• Gross Settlement Amount (“GSA”):	$244,241.00
• Minus Court-approved attorneys’ fees:	$81,413.67
• Minus Court-approved verified costs (up to):	$25,000.00
• Minus Court-approved Enhancement Payments:	$10,000.00
• Minus amount set aside as PAGA penalties:	$10,000.00
• Minus estimated Settlement Administration costs:	$10,000.00
• Minus previously paid unpaid wages and premiums	$44,241.00

Net Settlement Amount ("NSA"):	$63,586.33
• PLUS 25% of PAGA penalties ("PAGA Amount")	$2,500.00
TOTAL Amount Paid to Settlement Class:	**$110,327.33**

1. The Settlement Provides for Reasonable Monetary Payments

After deducting previously-made payments for unpaid wages and meal premiums, estimated settlement administration costs, the requested Enhancement Payments to Plaintiffs, the amount set aside as PAGA civil penalties, and requested attorneys' fees and costs, K&P will pay a Net Settlement Amount ("NSA") of at least $63,586.33 to all Settlement Class members who do not timely opt out. *See* Settlement, ¶ 4. The NSA shall be distributed to all participating Settlement Class members as follows: the NSA will be distributed to all participating Settlement Class members based on the proportionate number of workweeks each participating Settlement Class member worked during the Class Period. *See* Settlement, ¶ 4(B)(i). In addition to the NSA, each Settlement Class member who was employed by K&P at any time during from August 18, 2022 through April 9, 2024 (the "PAGA Period") (including those who submit a valid and timely Request for Exclusion from the class action settlement) shall receive a portion of the Two Thousand Five Hundred Dollars and Zero Cents ($2,500.00) of the GSA that has been designated as the "PAGA Amount" proportionate to the number of workweeks worked during the PAGA Period. *Id*., at ¶ 4(B)(ii).

According to K&P, there are approximately 130 Settlement Class members. Blakely Decl., at ¶ 13. Thus, the average Settlement Payment from the NSA is estimated to be $489.13. *Id.* Further, there are approximately 130 Aggrieved Employees who worked during the PAGA Period. *Id*. Therefore, the average payment from the PAGA Amount is estimated to be approximately $19.23. *Id.*

Settlement Class members will have sixty (60) calendar days from the mailing to opt-out or object, thereby providing ample time to review the Class Notice without unduly delaying the Settlement. Settlement, ¶¶ 9(C)-(D). Settlement Class members who do not opt out will be bound by the Settlement and will be bound by its terms and will release all claims against K&P included within the Settlement. *Id*., ¶ 2(A).

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2. **Attorneys' Fees and Costs, Enhancement Payments, and PAGA Payment**

Plaintiffs will apply for Class Representative Enhancement Payments at final approval in the amount of $5,000 for each Plaintiff for her service to the Settlement Class. Blakely Decl., ¶ 26; s*ee also* Settlement, ¶ 6. "[I]ncentive awards are fairly typical in class action cases…and are intended to compensate class representatives for work done on behalf of the class [and] to make up for financial or reputational risk undertaken in bringing the action." *In re Cellphone Fee Termination Cases*, 186 Cal.App.4th 1380, 1393-94 (2010). As will be fully briefed at the time of final approval, Plaintiffs' requested Enhancement Payments are intended to recognize the time and effort Plaintiffs expended on behalf of the Settlement Class, including providing substantial factual information and documents to Class Counsel, discussing the claims and theories at issue in the litigation, actively participating in the prosecution of their claims, as well as the significant risks Plaintiffs undertook by agreeing to serve as named plaintiffs in this case, and the fact that Plaintiffs agreed to a general release of all claims subject to a waiver of Civil Code § 1542. *See* Settlement, ¶ 2(C), 6; Blakely Decl., ¶ 26; *see also* Miranda Decl., ¶¶ 4-5; Torres Lopez Decl., ¶¶ 4-5.

At final approval, Plaintiffs' counsel will request an attorneys' fees award of one-third of the GSA, and up to $25,000 in verified costs. Blakely Decl., ¶ 25; *see also* Settlement, ¶ 5. Plaintiffs submit the requested fee is fair compensation for undertaking complex, risky, expensive, and time-consuming litigation on a contingent basis. Plaintiffs' counsel has expended significant time conducting pre-filing investigation, legal research, analyzing Plaintiffs' claims, analyzing employee timekeeping and payroll records and other data and documents, engaging in informal discovery, developing a comprehensive damages model, preparing for and attending mediation, negotiating and preparing the long-form Stipulation of Settlement, preparing this Motion, and otherwise litigating this case. Blakely Decl., ¶ 25. Counsel anticipates incurring additional fees in appearing at the hearing on this Motion, supervising the Notice process, and preparing the Final Approval motion and appearing at the Final Approval Hearing. *Id*.

California courts recognize an appropriate method for awarding attorneys' fees in class actions is to award a percentage of the "common fund" created as a result of a settlement. *See e.g., Laffitte v. Robert Half Int'l, Inc.,* 1 Cal.5th 480, 506 (2016) (holding "the percentage of fund method survives in California class action cases"). Class Counsel's request for fees of one-third of the GSA is well within the range of reasonableness, and indeed is considered the typical rate for common fund settlements. Historically, courts have awarded percentage fees in the range of 20% to 50%, depending on the circumstances of the case. *See* 4 Newberg on Class Actions § 14.6 (4th Ed. 2013).

Class Counsel submit their request for attorneys' fees is reasonable when viewed as an overall percentage of the Settlement and in light of the substantial risks and significant work undertaken, the results obtained, and the efficiency with which the litigation has been conducted. Should the Court grant preliminary approval, Class Counsel will seek an award of attorneys' fees and verified costs upon seeking final approval.

Additionally, the parties have agreed to designate $10,000.00 of the GSA as PAGA civil penalties, of which $7,500.00 (75%) will be paid to the LWDA, with the remaining $2,500.00 (25%) for distribution to the Settlement Class, as the PAGA requires such penalties to be allocated per Labor Code § 2699(i). *See* Settlement, § 3(C)(6). Plaintiffs submit this allocation to the LWDA for PAGA civil penalties is appropriate. *See, e.g., Chu v. Wells Fargo Investments, LLC* Case No. C 05-4526 MHP, 2011 WL 672645 at *1 (N.D. Cal. 2011) (approving PAGA payment of $7,500 to LWDA out of $6.9 million common-fund settlement); *Lazarin v. Pro Unlimited, Inc.* Case No. C11-03609 HRL, 2013 WL 3541217 (N.D. Cal. 2013) (approving PAGA payment of $7,500 to LWDA out of $1.25 million common-fund settlement).

IV. ARGUMENT

A. PRELIMINARY APPROVAL IS WARRANTED

Rule of Court 3.769 conditions settlement of a class action on court approval, which is generally evaluated under the federal standards under Fed. R. Civ. Proc. Rule 23. *Reed v. United Teachers Los Angeles*, 208 Cal.App.4th 322, 337 (2012) (Rule of Court 3.769 requires court to determine "the settlement is fair, reasonable and adequate to all concerned"); *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998) (Rule 23(e) requires court to determine "whether a proposed settlement is fundamentally fair, adequate, and reasonable"). Settlement is the preferred means of dispute resolution, particularly in complex class action litigation. *In re Syncor ERISA Litig.*, 516 F.3d 1095, 1101 (9th Cir. 2008). The court's role in evaluating a settlement is limited to ensuring the agreement, as a whole, is fair and within the range of reasonableness. *Hanlon,* 150 F.3d at 1027. There is an initial presumption of fairness when, as here, a settlement was negotiated at arm's length by experienced class counsel, with the assistance of an experienced mediator. *Kullar v. Foot Locker Retail, Inc.*, 168 Cal.App.4th 116, 130 (2008).

1. <u>Standard for Preliminary Approval</u>

To make a fairness determination, a court should consider several factors, including: "the strength of Plaintiff's case, the risk, expense, complexity and likely duration of further litigation, the risk of maintaining class action status through trial, the amount offered in settlement, the extent of discovery completed and the stage of the proceedings, [and] the experience and views of counsel." *Dunk v. Ford Motor Co.*, 48 Cal.App.4th 1794, 1801 (1996). "The list of factors is not exclusive, and the Court is free to engage in a balancing and weighing of the factors depending on the circumstances of each case." *Wershba v. Apple Computer, Inc.*, 91 Cal.App.4th 224, 245 (2001). As discussed below, the proposed Settlement is fair, adequate, and reasonable in light of the overall balance of factors in this case.

a. <u>The Strength of Plaintiffs' Case</u>

Although they steadfastly maintain their claims are meritorious, Plaintiffs acknowledge there were substantial risks and uncertainty in proceeding with class certification and eventual trial on the merits. As described above, K&P presented multiple defenses to Plaintiffs' claims, both on the merits and with respect to class certification. While Plaintiffs were prepared to litigate their claims through class certification and ultimately trial, success was far from certain.

b. <u>Risk, Expense, Complexity, and Duration of Further Litigation</u>

Although the Parties engaged in significant informal discovery in advance of mediation, the Parties still had substantial formal discovery to complete in formal litigation had the matter not settled, which would have required the expenditure of substantial time and resources by all Parties. Blakely Decl., ¶ 24. Even if Plaintiffs overcame the arbitration agreements and obtained class certification, the Parties would incur considerable attorneys' fees and costs through a possible decertification motion, trial, and possible appeal. *Id*. The Settlement avoids those risks and the accompanying delay and expense, and thus, this factor supports preliminary approval. *Id.*

c. <u>Risk of Maintaining Class Action Status</u>

Due to the fact that Plaintiffs and the overwhelming majority of the Settlement Class were subject to arbitration agreements with class action waivers, it is likely that absent settlement, there would not be a certified class at the time of trial. Thus, this factor supports preliminary approval.

d. <u>Amount Offered in Settlement Given Realistic Value of Claims</u>

The Settlement provides a positive recovery for the Settlement Class in the face of hotly disputed claims. Plaintiffs conducted an analysis of underpaid wages due to K&P's alleged unlawful timekeeping policies/practices, potential meal and rest period premium payments owing, regular rate miscalculations, wage statement penalties, waiting time penalties, and PAGA civil penalties. A summary of the results of Plaintiffs' exposure analysis is discussed below:

<u>Unpaid Wages Due to Unlawful Timekeeping Policies/Practices</u>: $9,253

Plaintiffs allege that K&P utilized a timekeeping system that systematically underpaid wages due its allegedly unlawful timekeeping policies/practices. Blakely Decl., ¶ 15. Based on Plaintiffs' analysis of K&P's records, Plaintiffs estimate that K&P underpaid Settlement Class members by approximately 2,373 hours during the Class Period. *Id*. Based on the average hourly rate of pay of approximately $17.33, Plaintiffs calculated K&P's maximum exposure at approximately $41,124 (2,373 unpaid hours * $17.33 average hourly rate). *Id.*

However, as noted above, K&P contends that most of its employees during the Class Period signed valid arbitration agreements that would have limited their damages only to the employees' share of PAGA civil penalties. Blakely Decl., ¶ 14. K&P also argues that it ended any rounding practices during the Class Period, and retroactively made payments to Settlement Class members for any unpaid time during the Class Period, and that its timekeeping policies and/or practices complied with California law. Blakely Decl., ¶ 15. Furthermore, K&P contends that individualized inquiries would be necessary as to whether employees were in fact underpaid for each workday in question (including whether they were actually working when they were clocked in), resulting in an unmanageable series of mini-trials. *Id.* Based on these defenses, Plaintiffs discounted the maximum exposure by 70% to account for the risk of non-certification and potential inability to proceed on a classwide basis due to the arbitration agreements, and an additional 25% to account for K&P's defenses on the merits, to arrive at an estimated exposure of approximately $9,253. *Id.*

<u>Regular Rate Claims</u>: $1,275

Plaintiffs allege that K&P failed to properly calculate the regular rate of pay by not including the value of all non-discretionary "laundry" bonuses into the regular rate of pay. Blakely Decl., ¶ 16. Based a review of K&P's payroll records, Plaintiffs calculate the maximum overtime wages owed to Settlement Class members as a result of K&P's failure to incorporate bonuses into the regular rate of pay at approximately $5,000. *Id.*

However, as stated above, K&P contend that they properly included all forms of remuneration when calculating the regular rate of pay, and therefore, paid all overtime wages to Settlement Class members. Blakely Decl., ¶ 16. In light of these defenses, Plaintiffs discounted the maximum amount that the class could potentially recover by 70% for risk of non-certification and potential inability to proceed on a classwide basis due to the arbitration agreements, and discounted an additional 15% for risk of being unsuccessful on the merits or failure to recover the full amount sought, to arrive at an estimated total of approximately $1,275. *Id*.

<u>Meal Period Violations</u>: $13,058

Plaintiffs allege that K&P failed to provide all compliant first-meal periods to its non-exempt employees. Blakely Decl., ¶ 17. Based on Plaintiffs' review, 16% of the 22,422 shifts over 6.0 hours were non-compliant. *Id*. Accordingly, Plaintiffs calculated K&P's maximum exposure at $62,180 (3,588 non-compliant first meal periods * $17.33 average meal period premium). *Id*.

However, as noted above, K&P argues that they maintained compliant meal period policies throughout the Class Period and under *Brinker* it is only required to provide employees the opportunity to take meal periods, not ensure that they are taken. Blakely Decl., ¶ 17; *see Brinker, supra*, 53 Cal.4th at 1034 (rejecting "ensure" standard). Furthermore, K&P argues that

Plaintiffs' meal period claim is not suited for class treatment, as individual inquiries would be needed as to which employees took non-compliant meal periods or missed meal periods, how many meal periods were non-compliant or missed, and why a particular employee did not a take compliant meal period on a particular shift. Blakely Decl., ¶ 17. Based on these defenses, Plaintiffs discounted the maximum amount by 70% for risk of non-certification and potential inability to proceed on a classwide basis due to the arbitration agreements, and an additional 30% or risk of losing on the merits or failing to recover the full amount sought, to arrive at an estimated exposure of approximately $13,058. *Id*.

<u>Rest Period Violations</u>: $120,271

Plaintiffs alleges that K&P failed to authorize and permit Plaintiffs and other non-exempt employees to take all their duty-free 10-minute rest periods. Blakely Decl., ¶ 18. Based on Plaintiffs' analysis and extrapolation of employee timekeeping records, Plaintiffs estimated there were approximately 35,590 shifts with a rest period violation during the Class Period. *Id*. Therefore, Plaintiffs estimated the maximum potential exposure for this claim at approximately $616,775 (35,590 rest period violations * $17.33 average premium). *Id*.

However, as discussed above, K&P argues that it always maintained and enforced lawful rest period policies and practices throughout the Class Period. Blakely Decl., ¶ 18. K&P also maintains that any failure to take rest periods was the result of employee choice, and that they are not required to police rest periods. *Id*. Finally, K&P argues that Plaintiffs' rest period claim is not amenable to class treatment as individualized inquiries would be required to determine which employees failed to take rest periods, and the reasons why each employee failed to take a rest period on a particular shift. *Id*. These considerations are particularly present with respect to rest periods, K&P argues, as rest periods are not, and need not be, recorded. *Id*. In light of these defenses, Plaintiffs assessed a 70% risk of non-certification and potential inability to proceed on a classwide basis due to the arbitration agreements, and discounted an additional 35% for risk of being unsuccessful on the merits or failure to recover the full amount sought, to arrive at a projected exposure of $120,271. *Id*.

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Failure to Reimburse Necessary Business Expenditures: $14,681

Plaintiffs alleges that K&P required Settlement Class members to use their personal cellular phones for work-related purposes but did not reimburse Settlement Class members for these expenses. Blakely Decl., ¶ 19. Plaintiffs estimated that Settlement Class members expended approximately $25.00 per pay period during the Class Period in reasonable work-related business expenses. *Id.* Therefore, Plaintiffs calculated K&P's maximum exposure for this claim at approximately $88,975 ($25.00 per pay period * 3,559 pay periods in Class Period). *Id.*

However, K&P argues that Settlement Class members were not required to use their cellular phones in the discharge of their work duties. Blakely Decl., ¶ 19. K&P also argues that this claim would require individual inquiries into whether Settlement Class members actually used their personal cellular phones for work purposes, how much expense they incurred, whether they submitted a request for reimbursement, and the reasonableness of that expense, thus precluding class certification. *Id.*; *see also*, e.g., *Gattuso v. Harte-Hanks Shoppers, Inc.*, 42 Cal.4th 554, 568 (2007) ("In calculating the reimbursement amount due under section 2802, the employer may consider not only the actual expenses that the employee incurred, but also whether each of those expenses was 'necessary,' which in turn depends on the reasonableness of the employee's choices"). In light of K&P's arguments and defenses, Plaintiffs discounted the maximum amount that the class could potentially recover by 70% for a risk of non-certification and potential inability to proceed on a classwide basis due to the arbitration agreements, and an additional 45% for risk of losing on the merits or failure to recover the full amount, to arrive at a projected exposure of $14,681. *Id*.

Wage Statement Penalties: $52,410

Plaintiffs allege that K&P is liable for wage statement penalties as a result of the unpaid wages. Blakely Decl., ¶ 20 Those penalties are calculated as $50 for each "initial" violation and $100 for each "subsequent" violation, with a maximum of $4,000 per employee. *See* Labor Code § 226(e). *Id*. Plaintiffs' analysis reflected that there were approximately 130 unique employees and approximately 3,559 pay periods worked during the liability period applicable to Plaintiffs' wage statement claim. *Id*. The maximum possible exposure for all Settlement Class members is calculated as $349,400 ([130 “initial” violations * $50] + [3,429 “subsequent” violations * $100]). *Id*. In light of K&P’s arguments that no violations occurred, that employees suffered no “injury,” that any alleged violations were not “knowing and intentional,” that the wage statements always accurately reflected hours worked and amounts paid to employees, and that not every employee would be entitled to the maximum penalties, as well as risks associated with Plaintiffs’ underlying claims discussed above, Plaintiffs discounted the maximum exposure by 70% for risk of non-certification and an additional 50% for a risk of being unsuccessful on the merits or of failing to recover the full amount sought, to arrive at an estimated realistic exposure of approximately $52,410. *Id*. Blakely Decl., ¶ 20.

<u>Waiting Time Penalties</u>: $22,958

Based on data produced by K&P, there are approximately 46 Settlement Class members who separated their employment from K&P at any time after August 1, 2022 and are therefore eligible for waiting time penalties. Blakely Decl., ¶ 21. Plaintiffs estimated an average waiting time penalty of approximately $4,159 ($17.33/hr. * 8 hrs. * 30 days), and calculated K&P’s maximum waiting time penalty exposure at approximately $191,314 (46 former employees * $4,159 average waiting time penalty). *Id.* However, K&P asserts that it has strong, good-faith defenses to Plaintiffs’ underlying claims and thus, even if Plaintiffs were able to recover on their underlying claims, she would not be able to recover waiting time penalties. *Id.* Moreover, Plaintiffs would need to overcome K&P’s defenses, both as to class certification and as to the merits, to their underlying claims. *Id*. Based on these defenses, Plaintiffs discounted K&P’s maximum exposure by 70% for risk of non-certification and potential inability to proceed on a classwide basis due to the arbitration agreements, and by an additional 60% for risk of being unsuccessful on the merits or failure to recover the full amount sought, to arrive at an estimated total of approximately $22,958. *Id*.

<u>PAGA Civil Penalties</u>: $37,370

Plaintiffs estimated a maximum PAGA exposure of $355,900 (3,559 pay periods during PAGA Period * $100 “initial” violation rate). Blakely Decl., ¶ 22; *Amaral v. Cintas Corp.,* 163 Cal.App.4th 1157, 1209 (finding “initial” violation rate applies until employer is notified that it is violating a Labor Code provision). However, these penalties derive from Plaintiffs' underlying claims, each of which K&P vigorously disputes. Blakely Decl., ¶ 22. The PAGA also grants trial courts discretion to reduce PAGA civil penalties (Lab. Code § 2699(e)(2)), and K&P argued the Court would reduce penalties significantly given its good-faith defenses. *Id*. Thus, Plaintiffs discounted the maximum figure by 65% for risk of losing on the merits and/or not recovering a PAGA penalty for each and every pay period, and by an additional 70% for risk of the Court reducing penalties, for an estimated exposure of approximately $37,370. *Id.*; *see also Fleming*, 2011 WL 7563047 at *4 (reducing PAGA civil penalties by over 82%); *Carrington*, 30 Cal.App.5th at 529 (affirming PAGA civil penalty of just $5 per pay period).

Using these figures, Plaintiffs estimated the realistic total recovery for the Settlement Class would be approximately $271,276. Blakely Decl., ¶ 23. Thus, the proposed $244,241 GSA represents approximately 90% of Plaintiffs' reasonably forecasted recovery. *Id.* Preliminary approval is appropriate since the Settlement will provide significant monetary relief to the Settlement Class, which is consistent with what Plaintiffs' counsel believes could have been recovered had the case proceeded through trial.

e. <u>The Experience and Views of Counsel.</u>

"Parties represented by competent counsel are better positioned than courts to produce a settlement that fairly reflects each party's expected outcome in litigation." *In re Pac. Enter. Sec. Litig.*, 47 F.3d 373, 378 (9th Cir. 1995). Here, Plaintiffs are represented by competent counsel with extensive experience litigating wage and hour class actions from both the plaintiff and defense side and have been appointed class counsel in numerous cases with similar claims. Blakely Decl., ¶¶ 2-6; Declaration of Paul K. Haines ("Haines Decl."), ¶¶ 2-8; Declaration of Joel M. Gordon ("Gordon Decl."), ¶¶ 2-4.

2. <u>The Preliminary Approval Standard Is Met</u>

The Court can grant preliminary approval of the settlement and direct that notice be given if the proposed settlement: (1) falls within the range of possible approval; (2) appears to be the product of serious, informed, and non-collusive negotiations; and (3) has no obvious deficiencies. *See* 4 *Newberg on Class Actions*, § 11:24-25 (4th Ed. 2013).

a. The Settlement Is Within the Range of Possible Approval

The Settlement reflects approximately 90% of the estimated recovery the Settlement Class could realistically expect in light of the significant litigation risks, and will provide tangible, monetary compensation for hotly disputed wage claims. Indeed, the percentage of the liability exposure recovered in this case far exceeds percentages routinely approved by courts. *See, e.g., Glass v. UBS Finan. Servs.*, Case No. C-06-4068 MMC, 2007 WL 221862, *4 (N.D. Cal. 2007) (approving settlement representing 25% to 35% of potential damages); *Dunleavy v. Nadler* (9th Cir. 2000) 213 F.3d 454, 459 (approving settlement representing about one-sixth of potential recovery); *Nat'l Rural Telecomm. Coop. v. DirecTV, Inc.* (C.D. Cal. 2004) 221 F.R.D. 523, 527 ("it is well-settled law that a proposed settlement may be acceptable even though it amounts to only a fraction of the potential recovery that might be available to the Settlement Class members at trial"). Plaintiffs submit the Settlement is well within the range of possible approval, such that notice should be provided to the Settlement Class. The Court will have the opportunity to again assess the reasonableness of the Settlement after the Settlement Class members have had the opportunity to opt-out or object.

b. The Settlement Resulted from Serious, Informed Negotiations

The Settlement is a result of extensive informal discovery, a full-day mediation, and months of negotiations. Thus, it is entitled to a presumption of fairness. *Kullar*, 168 Cal.App.4th at 130. Plaintiffs carefully vetted the claims at issue and conducted detailed data analyses to arrive at estimated potential damages. Blakely Decl., ¶¶ 15-23. The Parties then worked collaboratively in the following months to finalize the Settlement. *Id.*, ¶ 11. This factor thus supports preliminary approval.

c. The Settlement Is Devoid of Obvious Deficiencies

The Settlement contains no obvious deficiencies. The Settlement will provide tangible monetary relief to Settlement Class members. The amounts proposed for attorneys' fees, costs, settlement administration costs, LWDA payment, and Enhancement Payments are all reasonable. Because the Settlement is devoid of obvious deficiencies, this factor supports preliminary approval.

B. THE COURT SHOULD CERTIFY THE PROPOSED CLASS

The Settlement Class satisfies the criteria for certification because: (1) it is sufficiently numerous; (2) common questions of law and fact predominate; (3) Plaintiffs' claims are typical; and (4) Plaintiffs and their counsel will adequately represent them. Cal. Code Civ. Proc. § 382.

1. The Proposed Class Is Ascertainable and Numerous

A class is "ascertainable" where members "may be readily identified without unreasonable expense or time by reference to…[business] records." *Sevidal v. Target*, 189 Cal.App.4th 905, 919 (2010). Here, the Settlement Class includes all current and former non-exempt employees who worked for K&P in California during the Class Period. Therefore, Settlement Class members can be identified from K&P's personnel and employment records. Based on information provided by K&P, the Settlement Class consists of approximately 130 current and former non-exempt employees. *See* Blakely Decl., ¶ 13. It would therefore be impracticable to bring all Settlement Class members before the Court, or for each Settlement Class member to bring an individual lawsuit. The proposed Settlement Class therefore satisfies numerosity. *See, e.g., Bowles v. Sup. Ct.*, 44 Cal.2d 574 (1955) (holding a class representing 10 beneficiaries of a trust sufficiently numerous).

2. Common Issues of Law and Fact Predominate for Settlement Purposes

The focus on certification is what types of questions, "common or individual," are likely to arise. *Sav-On Drug Store, Inc. v. Sup. Ct.*, 34 Cal.4th 319, 327 (2004). Plaintiffs' claims are predicated primarily on K&P's alleged unlawful timekeeping policies/practices and unlawful meal and rest period policies/practices. These claims are commonly held proper for class certification. *See, e.g., Benton v. Telecom Network Specialists, Inc.*, 220 Cal.App.4th 701 (2013) (certifying meal and rest period claims).

3. The Claims of the Named Plaintiffs Are Typical

Typicality is satisfied where a class representative's claims are typical of those of the class. *B.W.I. Custom Kitchen v. Owens-Illinois, Inc.,* 191 Cal.App.3d 1341, 1347 (1987). Here, Plaintiffs' claims are typical of the Settlement Class. First, Plaintiffs worked in California for K&P as non-exempt employees during the Class Period, and Plaintiffs were subject to K&P's

wage and hour policies/practices at issue in this case. *See* Miranda Decl., ¶ 2; Torres Lopez Decl., ¶ 2. Second, Plaintiffs were injured by the same challenged policies/practices that allegedly injured the Settlement Class as a whole. For example, Plaintiffs assert that they were deprived of all wages and contend that they were deprived of all legally-compliant meal and rest periods. Plaintiffs further assert that they did not receive accurate and compliant wage statements and did not receive all wages at the time of separation of employment. *See* Miranda and Torrez Lopez Decls., ¶¶ 2-3. Because Plaintiffs have suffered the same injuries as the other members of the Settlement Class, the typicality requirement is satisfied.

4. Plaintiffs and Their Counsel Will Adequately Represent the Class

The adequacy requirement examines conflicts of interest between named parties and the class(es) they seek to represent. *See Capital People First v. State Dept. of Developmental Services* 155 Cal.App.4th 676, 697 (2007). Plaintiffs and their counsel will adequately represent the Settlement Class, as there are no conflicts between Plaintiffs and the proposed Settlement Class, and Plaintiffs possess claims that are in line with those of the Settlement Class. *See McGhee v. Bank of America*, 60 Cal.App.3d 442, 450-51 (1976) (adequacy satisfied where there was no indication that Class Counsel were not qualified and the named plaintiff had no interests antagonistic to those of the proposed class). Class Counsel also have extensive experience in wage and hour class action litigation. *See* Blakely Decl., ¶¶ 2-6; Haines Decl., ¶¶ 2-8; Gordon Decl., ¶¶ 2-4.

C. THE COURT SHOULD ORDER DISTRIBUTION OF THE NOTICE

This Court should order distribution of the Notice by U.S. Mail, using last known mailing addresses provided by K&P. *See* Settlement, § 9. This is the "best notice practicable" under the circumstances because it provides "individual notice to all members who can be identified through reasonable effort." *Eisen v. Carlisle & Jacquelin,* 417 U.S. 156, 173 (1974). Plaintiffs propose the settlement be administered by ILYM Group, Inc. ("ILYM"), an experienced settlement administrator. *See* Declaration of Anthony Rodgers ("Rogers Decl.") and attached exhibits. Settlement Class members' addresses will be ascertainable through K&P's records, which K&P will provide to ILYM within ten (10) business days after entry of an order preliminarily approving this Settlement. *See* Settlement, ¶ 9(A). Within ten (10) business days of receipt of the Settlement Class members' addresses, ILYM will run the addresses through the National Change of Address ("NCOA") database (which provides updated addresses for any individual who has moved in the previous four years and has notified the U.S. Postal Service of a forwarding address) and mail the Class Notice to all Settlement Class members. *See Id*., at ¶ 9(B). To the extent that any notices are returned as undeliverable, IYLM will perform a "skip trace" to track any Settlement Class member's current mailing address. *Id*., at ¶ 9(F).

The proposed Notice satisfies Cal. Rule of Court 3.766(d) because it advises Settlement Class members of the basic contentions and denials of the parties, the key terms of the Settlement, the 60-day deadline to opt-out or object, the recovery formula, and advises they will be bound by the Settlement if they do not opt-out. *See* Blakely Decl., Exhs. 1-2 to Exh. A. The Notice also notifies Settlement Class members of the final fairness hearing and provides Class Counsel's contact information. *Id.* The Notice satisfies Rule 3.766 as the most reliable and cost-effective method of reaching Settlement Class members.

D. <u>THE COURT SHOULD SET A FINAL APPROVAL HEARING</u>

Finally, this Court should set a hearing for Final Approval of the Settlement on a date appropriately scheduled to follow the deadline by which Settlement Class members must file objections to the Settlement or opt-out. *See* California Rule of Court 3.769.

V. <u>CONCLUSION</u>

For the foregoing reasons, Plaintiffs respectfully request that the Court preliminarily approve the proposed Settlement, provisionally certify the proposed Settlement Class, and enter the Proposed Order submitted concurrently herewith.

Dated: October 2, 2024

Respectfully submitted,
HAINES LAW GROUP, APC

By: ______________________

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