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SUPERIOR COURT OF CALIFORNIA

COUNTY OF MONTEREY

LEONARDO ORTEGA, on behalf of himself and all similarly aggrieved employees, Plaintiff, v. BALESTERI CONSTRUCTION, INC.; and DOES 1 through 50, inclusive, Defendants.	Case No. 23CV003755 **PLAINTIFF'S NOTICE OF MOTION AND MOTION FOR FINAL APPROVAL OF SETTLEMENT; AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT** Date: October 24, 2025 Time: 8:30 a.m. Dept: 15

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on October 24, 2025, at 8:30 a.m., or as soon thereafter as the matter may be heard, before the Honorable Thomas W. Wills, judge presiding, in Department 15 of the above referenced Court located at 1200 Aguajito Road, Monterey, California 93940, Plaintiff Leonardo Ortega ("Plaintiff") will and hereby does move this Court for an Order granting final approval of the proposed settlement ("Settlement") between Plaintiff and Defendant Balesteri Construction, Inc. ("Defendant"). Plaintiff will further move the Court for an Order:

1. Certifying a Class for settlement purposes;

2. Approving the Settlement in the Gross Settlement Amount of $82,500.00 as fair and reasonable and finding that Class Members were given notice of the settlement and advised of their right to participate in the settlement, object to the settlement, or exclude themselves from the settlement, or dispute the workweeks in a reasonable manner;

3. Appointing Fitzpatrick & Swanston as Class Counsel for settlement purposes;

4. Approving payment of $25,000.00 in attorney's fees, which is ~30.3% of the Gross Settlement Amount, and costs of $3,329.26 to Class Counsel for litigating this action;

5. Appointing Plaintiff as the Class Representative for settlement purposes and approving a payment of $2,500.00 for his service as the Class Representative;

6. Approving the net payment to the California Labor Workforce Development Agency in the amount of $2,500.00;

7. Approving the Settlement Administration Costs of $5,000.00;

8. Directing that the clerk of the Court enter the Court's order as a final judgment; and

9. Without affecting the finality of the final judgment, reserving continuing jurisdiction over the Parties for the purposes of implementing, enforcing and/or administering the Settlement or enforcing the terms of the judgment.

This Motion will be based upon this Notice, the Memorandum of Points and Authorities, the Declarations of B. James Fitzpatrick, Alison L. Baker, and Leonardo Ortega, upon the oral arguments of counsel (should there be any), and on the complete records and file herein.

Dated: October 2, 2025

FITZPATRICK & SWANSTON

By: *   /s/ B. James Fitzpatrick*
B. James Fitzpatrick
Attorneys for Plaintiff,
Leonardo Ortega on behalf of himself
and all similarly aggrieved employees

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

State Cases

Federal Cases

Statutes, Codes & Regulations

Other Authorities

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff Leonardo Ortega ("Plaintiff") moves this Court for final approval of a proposed wage-and-hour class action and PAGA representative action settlement ("Settlement") with Defendant Balesteri Construction, Inc. ("Defendant"). The proposed Settlement satisfies all the criteria for settlement approval under California law. A presumption of fairness exists as (1) the Settlement was reached through arm's length mediation facilitated by experienced, neutral mediator, Elizabeth Leitzinger, Esq. of Fenton & Keller, after extensive investigation and informal discovery allowed Class Counsel and the Court to act intelligently, (2) Class Counsel possesses vast experience in similar wage-and-hour litigation, and (3) at this point there have been zero objections to the Settlement and zero requests for exclusion. The proposed Settlement meets the requisite criteria for settlement approval under California law.

Upon the Court's approval of the Settlement, each Settlement Class Member is eligible to receive an average net benefit of approximately $701.12. **The exclusion, objection, and dispute submission deadline expired on May 29, 2025, and there were zero requests for exclusion, zero notices of objection, and zero disputes for Workweeks to the Settlement.** (Declaration of Kevin Lee of Phoenix Settlement Administrators ["Admin Decl."], ¶¶ 6-9.) Based on the lack of any requests for exclusion, any objections, or any disputes, the proposed Settlement reflects a fair, reasonable, adequate agreement that would be in the best interests of the Settlement Class Members and Aggrieved Employees.

Additionally, Plaintiff's request of attorney's fees in the amount of $25,000.00, reimbursement of costs in the amount of $3,329.26, an incentive award in the amount of $2,500.00 to Plaintiff, Settlement Administration costs in the amount of $5,000.00, and a net payment to the California Labor Workforce Development Agency ("LDWA") in the amount of $2,500.00 are also reasonable and thus should be approved by the Court. Accordingly, Plaintiff requests that the Court grant final approval of the Settlement. Plaintiff further moves this Court to certify the settlement class for approval purposes.

II. THE PAYMENTS TO THE SETTLEMENT CLASS & AGGRIEVED EMPLOYEES

The Settlement provides a Gross Settlement Amount of $82,500.00. The entire Gross Settlement Amount is non-reversionary, such that no monies will revert back to Defendant. Additionally, the Settlement provides substantial monetary payments to 63 class members ("Class Members") and 32 aggrieved employees ("Aggrieved Employees"). (Admin Decl. ¶¶ 10, 13.)

The Net Settlement Amount is estimated to be $44,170.68. *See* Admin. Decl. ¶ 11. The Net Settlement Amount is based on the following:

Gross Settlement Amount	**$82,500.00**
Less Class Counsel Fees	($25,000.00)
Less Class Counsel Costs	($3,329.26)
Less Enhancement Payment	($2,500.00)
Less LWDA Penalties	($2,500.00)
Less Settlement Administration Costs	($5,000.00)
Net Settlement Amount	**$44,170.74**

III. KEY TERMS OF THE SETTLEMENT

The Settlement is all-inclusive, and its key terms include:

1. Class: All current and former non-exempt employees of Defendant who were employed in the State of California at any time during the period commencing on November 16, 2019, and ending on November 16, 2023. (Settlement, ¶¶ 4, 8; Declaration of B. James Fitzpatrick, "Fitzpatrick Decl." ¶ 3.)

2. Aggrieved Employee: All current and former non-exempt employees of Defendant who were employed in the State of California at any time during the period commencing on October 24, 2022, and ending September 28, 2023. (Settlement, ¶¶ 23, 26; Fitzpatrick Decl. ¶ 4.)

3. Participating Class Members: a Class Member who does not opt out of the class action portion of the settlement by submitting a valid request for exclusion. (Settlement, ¶ 28.)

There are 63 Class Members who did not submit timely and valid Requests for

Exclusion and are therefore deemed Participating Class Members, representing 100% of the Class. Participating Class Members have worked a collective total of 3,646 workweeks during the Class Period. (Admin Decl. ¶ 10; Fitzpatrick Decl. ¶ 5-6.)

4. Individual Class Payments: a Participating Class Member's pro rata share of the Net Settlement Amount calculated based upon the number of workweeks employed during the Class Period. The Parties have agreed that twenty percent (20%) of each Individual Settlement Payment shall be classified as wages, and the remaining eighty percent (80%) shall be penalties and interest. (Settlement, ¶¶ 45.d.i and 45.d.iii.)

The highest Individual Settlement Payment to be paid is approximately $2,532.00, the lowest Individual Settlement Payment to be paid is approximately $24.23, while the average Individual Settlement Payment to be paid is approximately $701.12. (Admin Decl. ¶ 12; Fitzpatrick Decl. ¶ 8.)

5. Individual PAGA Payments: an Aggrieved Employee's pro rata share of the 25% of the PAGA Penalties calculated based upon the number of pay periods worked during the PAGA Period. The Parties have agreed that one hundred percent (100%) of the Individual PAGA Payment shall be classified as penalties. (Settlement, ¶ 45.d.viii.)

There are 32 PAGA Members who worked a total of 1,011 pay periods during the PAGA Period. The highest Individual PAGA Payment to be paid is approximately $29.67, and the average Individual PAGA Payment to be paid is approximately $19.53. (Admin Decl. ¶ 13; Fitzpatrick Decl. ¶ 9.)

6. Gross Settlement Amount: means $82,500.00, which is the total amount Defendant agrees to pay under the Settlement, excluding Defendant's share of payroll taxes, excluding the Confidential Individual Settlement, and subject to the escalator provision in this Settlement. The Gross Settlement Amount will be used to pay Individual Class Payments, Individual PAGA Payments, the LWDA PAGA Payment, Class Counsel Fees Payment, Class Counsel Litigation Costs, Class Representative Service Payment, and the Administration Expenses Payment. (Settlement, ¶¶ 16, 45.d.; ; Fitzpatrick Decl. ¶ 11.)

7. Attorney's Fees and Litigation Costs: the fees and out-of-pocket costs reasonably incurred by Class Counsel. Subject to Court approval, Defendant will not object to Class Counsel's application for attorney's fees not to exceed ~30.3% of the Gross Settlement Amount, which is $25,000.00, and reimbursement of actual litigation costs. (Settlement, ¶¶ 6, 7, 45.d.vi.; Fitzpatrick Decl. ¶ 12-1.3)

8. **Service Award**: Defendant agrees not to oppose or impede any application or motion by Plaintiff for Service Award of up to Two Thousand Five Hundred Dollars ($2,500.00). (Settlement, ¶¶ 10, 45.d.viii.; Fitzpatrick Decl. ¶ 14.)

9. **Settlement Administration Costs**: the costs incurred by the Settlement Administrator, Phoenix Settlement Administrators. The settlement administration costs total $5,000.00. Any portion of the Settlement Administration Costs not used or approved by the Court shall be added to the Net Settlement Amount. (Settlement, ¶¶ 32, 45.d.v.; Fitzpatrick Decl. ¶ 18.)

10. **Net Settlement Amount**: the Gross Settlement Amount, less the following payments in the amounts approved by the Court: Individual PAGA Payments, the LWDA PAGA Payment, Class Representative Service Payment, Class Counsel Fees Payment, Class Counsel Costs Payment, and the Administration Expenses Payment. The remainder is to be paid to Participating Class Members as Individual Class Payments. (Settlement, ¶¶ 20, 45.d.; Fitzpatrick Decl. ¶ 19.)

IV. CLASS MEMBERS WERE PROVIDED PROPER NOTICE OF THE SETTLEMENT

The notice procedures required by the Preliminary Approval Order have been followed and satisfy all due process rights of Class Members. The Preliminary Approval Order contemplated that the Notice of Proposed Class Action Settlement (the "Notice"), as approved in the Preliminary Approval Order, be sent to all Class Members by first-class mail, as specified in the Settlement Agreement. The Preliminary Approval Order contemplated, further, that Phoenix Settlement Administrators would serve as the Settlement Administrator.

As clearly stated in the Administrator's Declaration, notice was provided to Class Members, as required by the Preliminary Approval Order. On April 15, 2025, the Settlement

Administrator received the Class List from Defendants' Counsel that included 63 Class Members. See Admin Decl. ¶ 3. On or about April 29, 2025, each of the persons identified on the mailing list were sent the Notice via first class mail. See id. at ¶ 5. As of the date of this filing, there are zero Notices that remain undeliverable. See id. at ¶ 6.

The provision of sending the notice to Class Members as described above meets the requirements for the "best notice practicable" in this case as necessary to protect the due process rights of Class Members. See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985) (provision of "best notice practicable" with description of the litigation and explanation of opt-out rights satisfies due process); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 174-75 (1974) (individual notice must be sent to class members who can be identified through reasonable means); *Mullane v. Central Hanover Bank & Trust Co*., 339 U.S. 306, 314 (1950) (best practicable notice is that which is "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections"). Here, the Class Members were provided with a mailing regarding the settlement that explained the settlement and allowed Class Members to seek information, ask questions, and object, if so desired. As such, proper notice has been given to the Class Members. Thus, the Court may proceed to determine the fairness and adequacy of the settlement and enter its Order granting final approval, secure in the knowledge that all absent Class Members have been given the opportunity to participate fully in the claims, exclusion, and the approval process.

V. <u>THE SETTLEMENT MERITS FINAL APPROVAL</u>

To prevent fraud, collusion, or unfairness to the class, approval of the settlement requires the court to find the settlement fair and reasonable. (See *Dunk v. Ford Motor Co*. (1996) 48 Cal.App.4th 1794, 1800-01.) This Court has wide discretion in determining whether the proposed settlement is fair and reasonable. (See *Mallick v. Super. Ct.* (1979) 89 Cal.App.3d 434, 438 Fairness and reasonableness are presumed, as here, when: (1) the settlement is reached through arm's-length bargaining; (2) investigation is sufficient to allow counsel and the court to act intelligently; (3) counsel is experienced in similar litigation; and

(4) the percentage of objectors is small. (*Dunk*, 48 Cal.App.4th at p. 1800.)

In evaluating a settlement, the trial court considers the following factors: 1) the strength of plaintiff's case; 2) the risk, expense, complexity, and likely duration of further litigation; 3) the risk of maintaining class action status through trial; 4) the amount offered in settlement; 5) the extent of discovery completed and the stage of the proceedings; 6) the experience and views of counsel; 7) the presence of a governmental participant; and 8) the reaction of the class members to the proposed settlement. (*Kullar v. Foot Locker Retail, Inc*., (2008) 168 Cal.App.4th 116, 128.)

To approve a class action settlement, the court must satisfy itself that the class settlement is within the "ballpark" of reasonableness. (Id. at p. 133.) The record need not contain an explicit statement of the maximum theoretical recovery. (*Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles* (2010) 186 Cal.App.4th 399, 408-9 [holding that *Kullar* does not require "an explicit statement of the maximum amount the plaintiff class could recover if it prevailed on all its claims", but instead, only an "understanding of the amount that is in controversy and the realistic range of outcomes of the litigation."]).

As discussed below, Class Counsel has provided information exceeding the threshold required to provide this Court with materials and information necessary to determine that the proposed Settlement is fair, adequate, and reasonable.

A. The Settlement Reflects a Reasonable Compromise

In this case, the total settlement amount represents a significant percentage of the maximum realistic damages that may have been awarded to the class if they had prevailed at trial. The Settlement, of course, reflects a compromise. The amount of settlement benefits considers all the litigation risks related to obtaining class certification, proving Defendant's liability, and proving class members' damages. Considering all the defenses asserted by Defendant, which posed substantial litigation risks, a compromise effectively awarding class members a significant percentage of the maximum value of their claims is eminently fair and reasonable.

Notably, the assigned certification probabilities far exceed the rate of certification in contested motions in California over the past five years, based upon data available through the California Courts website. See *Findings of the Study of California Class Action Litigation*, 2000-2006, available at http:// www.courts.ca.gov/documents/class-action-Iit-study.pdf (finding that only 21.4% of all class actions were certified either as part of a settlement or as part of a contested certification motion). In other words, well under 20% of all class actions are certified by way of contested motion.

Although Defendant ultimately must pay less under the settlement than it would have had to pay if Plaintiff had achieved a judgment after trial, an ideal settlement requiring a defendant to pay the full amount of its potential damages is rarely achieved. As the Ninth Circuit has observed, "the very essence of a settlement is compromise, 'a yielding of absolutes and an abandoning of highest hopes.'" (*Officers for Justice v. Civil Service Commission of City and County of San Francisco* (9th Cir. 1982) 688 F.2d 615, 624.) Thus, a proposed settlement "is not to be judged against a hypothetical or speculative measure of what might have been achieved by the negotiators." (Id. at p. 625.) A court's "intrusion upon what is otherwise a private consensual agreement negotiated between the parties to a lawsuit must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned." (Id.)

B. The Settlement was Reached after Arms-Length Negotiations Following Discovery

The Settlement was reached following extensive negotiations following a full-day mediation session with experienced employment mediator Elizabeth Leitzinger, Esq. of Fenton & Keller. The settlement negotiations were at arm's length and, although conducted in a professional manner. The Parties went into the mediation willing to explore the potential for a settlement of the dispute, but each side was also prepared to litigate his or its position through trial and appeal if a settlement had not been reached.

Prior to reaching this Settlement, Class Counsel conducted informal discovery and investigation into the claims alleged by Plaintiff, including, among other things, reviewing and analyzing Defendant's time and pay records and preparing a damage analysis. In conjunction with their extensive factual investigation, Class Counsel investigated the applicable law regarding the claims and defenses asserted in the litigation. Thus, Plaintiff and his counsel were able to act intelligently and effectively in negotiating the proposed Settlement. (*See* Declaration of B. James Fitzpatrick in Support of Plaintiff's Motion for Preliminary Approval of Settlement, ¶¶ 3-8.)

C. Plaintiff's Counsel Has Substantial Class Action Experience

Class Counsel has considerable experience and has demonstrated competence with litigating wage and hour class actions. (Fitzpatrick Decl., ¶¶ 20-23; Declaration of Alison Baker "Baker Decl." ¶¶ 8-10 .) Class Counsel has substantial experience in all facets of litigation in state and federal court, including discovery, law and motion, trial, appeals, arbitration, and mediation. Class Counsel has litigated numerous class actions on behalf of plaintiffs and have been lead counsel or otherwise exercised significant case handling responsibilities in numerous cases resulting in millions of dollars in class action settlements. (ld.)

Based on Class Counsel's experience as employment and class action attorneys, Class Counsel is eminently qualified to evaluate the strength of Plaintiff's claims, the strength of Defendant's defenses against certification, the strength of Defendant's defenses on the merits, and the fairness of the Settlement. Their opinion that final approval of the Settlement would be in the best interests of class members considering the significant risks of litigation is entitled to great weight. (See *Kullar*, supra, 168 Cal.App.4th at 129 ["The court undoubtedly should give considerable weight to the competency and integrity of counsel and the involvement of a neutral mediator in assuring itself that a settlement agreement represents an arm's length transaction entered without self-dealing or other potential misconduct"]).

D. There Are No Objections To The Settlement

The response deadline elapsed on May 29, 2025. There were zero objections and zero requests for exclusion. The overwhelmingly positive response of the class strongly supports final approval of the Settlement. (See, e.g., *In re Lifelock. Inc. Marketing and Sales Practices*

Litigation (D. Ariz. 2010) 2010 WL 3715138, *6 [relatively few objections and requests for 3 exclusions support approval]).

Factors to be considered in evaluating a class action settlement include "the reaction of the class members to the proposed settlement." (*Kullar*, supra, 168 Cal.App.4th at p. 128.) Here, the reaction has been overwhelmingly positive. Courts have approved class action settlements in lesser circumstances. (See, e.g., *Hughes v. Microsoft Corp*. (W.D.Wash. 2001) 2001 U.S. 8 Dist. LEXIS 5976,2001 WL 34089697, *8 [court found that the "class members overwhelmingly support[ed] the settlement" where there were over 37,000 notices sent out, 2,745 class members participated in the settlement, "only nine objections were submitted", and there were 86 timely opt-outs and over 20 additional defective or untimely opt-outs, "these indicia of the approval of the class of the terms of the settlement support a finding of fairness under Rule 23"], citing *Hanlon v. Chrysler Corp*. (9th Cir.1998) 150 F.3d l0ll, 1027 [despite vigorous objections and appeal by objectors, "fact that the overwhelming majority of the class willingly approved the offer and stayed in the class presents at least some objective positive commentary as to its fairness", court did not abuse its discretion in approving settlement]).

Here, participating class members will receive an approximate average payment of $701.12. (Admin Decl., ¶ 12; Fitzpatrick Decl., ¶ 8.) This represents a substantial benefit to the Class that warrants final approval of the Settlement.

VI. THE COURT SHOULD AWARD PLAINTIFF THE REQUESTED AMOUNT OF ATTORNEY'S FEES AND COSTS, REPRESENTATIVE ENHANCEMENT, AND THE SETTLEMENT ADMINISTRATOR'S FEES AND COSTS

The terms of the Settlement are fair and reasonable, including the requested attorney's fees, litigation costs, and service payment. The arguments set out below address this fact and are based on the following: The Settlement indicates that the Defendant agreed to pay Class Counsel reasonable attorney's fees; reasonable litigation costs incurred; settlement administration costs; and a Class Representative service payment. The proposed attorney's fees and expenses were disclosed to the Class Members in the Notice (Settlement, Exh. A.)

"In general, questions whether a settlement was fair and reasonable, whether certification of the class was proper, and whether the attorney fee award was proper are matters addressed to the trial court's broad discretion." (*Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 234-235.) "Courts recognize two methods for calculating attorney fees in civil class actions: the lodestar/multiplier method and the percentage of recovery method." (Id. at p. 254; see also *Vincent v. Hughes Air West, Inc*. (9th Cir. 1977) 557 F.2d 759, 769.)

A. The Requested Attorney's Fees Are Fair And Reasonable

The requested attorney's fees are fair and reasonable for the following reasons: the fees (1) were calculated using the common fund doctrine and are in line with leading treatises on awards calculated using the common fund doctrine, (2) comport with the fee-shifting provision set out under Labor Code sections 2698, et seq.; (3) reflect Class Counsel's significant experience, reputation, and ability in class action settlements; and (4) are reasonable when cross-checked with the lodestar method. "In general, questions, whether a settlement was fair and reasonable, whether certification of the class was proper, and whether the attorney's fee award was proper, are matters addressed to the trial court's broad discretion." *Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 234-235].

1. The Requested Attorney's Fees Were Calculated Using The Common Fund Doctrine And Are In Line With Leading Treatises On Awards Calculated Using The Common Fund Doctrine

i. The Common Fund Doctrine Is Applicable In The Context Of Class Action Settlements

The common fund doctrine provides that, when a number of persons are entitled in common to a specific fund, and an action brought by a plaintiff or plaintiffs for the benefit of all results in the creation or preservation of that fund, the plaintiff or plaintiffs may be awarded attorney's fees and costs out of the fund. (*Progressive West Ins. Co. v. Superior Court* (2005) 135 Cal.App.4th 263, 273.) The common fund doctrine is therefore applicable in the context of class action settlements, as class action settlements produce a specific fund to which a number of persons are entitled in common and are the product of an action brought by a plaintiff or plaintiffs for the benefit of a class. (See *Petrovic v. Amoco Oil Co*. (8th Cir. 1999) 200 F.3d 1140, 1153.)

ii. The Common Fund Doctrine Is Favorable In The Context Of Class Action Settlements

In *City and County of San Francisco v. Sweet* (1995) 12 Cal.4th 105, the California Supreme Court recognized that the common fund doctrine has been applied "consistently in California when an action brought by one party creates a fund in which other persons are entitled to share." (Id. at p. 110.) In fact, California Courts now routinely use the common fund doctrine to determine the award of attorney's fees. (See, e.g., *In re Pacific Enterprises Securities City and County of San Francisco Litigation* (9th Cir. 1994) 47 F.3d 373, 378-79 [approving attorney's fees of 33 1/3%]).

One reason California Courts do so is the common fund doctrine attempts to "spread litigation costs proportionally among all the beneficiaries so that the active beneficiary does not bear the entire burden alone." (*Vincent v. Hughes Air West, Inc*. (9th Cir. 1977) 557 F.2d 759, 769.) More specifically, the common fund doctrine seeks to offset those who "expend attorney's fees in winning a suit which creates a fund from which others derive benefits" by requiring "those passive beneficiaries to bear a fair share of the litigation costs." (*Quinn v. State of California* (1995) 15 Cal.3d 162, 167.) Other reasons California Courts do so include: "…fairness to the successful litigant, who might otherwise receive no benefit because his recovery might be consumed by the expenses; correlative prevention of an unfair advantage to the others who are entitled to share in the fund and who should bear their share of the burden of its recovery; and encouragement of the attorney for the successful litigant, who will be more willing to undertake and diligently prosecute proper litigation for the protection or recovery of the fund if he is assured that he will be properly…compensated should his efforts be successful." (Id.)

The common fund doctrine is also applied in light of the fact that several courts have expressed frustration with the alternative "lodestar" approach for deciding fee awards, as the lodestar approach usually involves wading through voluminous and often indecipherable time records. Commenting on the lodestar approach, Chief Judge Marilyn Hall Patel wrote in *In re Activision Securities Litigation* (N.D. Cal. 1989) 723 F.Supp.1373: "This court is compelled to ask, 'Is this process necessary?' Under a cost-benefit analysis, the answer would be a resounding, 'No!' Not only do the *Lindy Kerr-Johnson* analyses consume an undue amount of court time with little resulting advantage to anyone, but in fact, it may be to the detriment of the Class Members."

In contrast to the lodestar approach, the common fund doctrine aligns with the interests of Class Counsel and absent Class Members, encourages efficient resolution of the litigation by providing an incentive for early, yet reasonable, settlement; and reduces the demands on judicial resources—thus making it preferable to the lodestar approach. (Id. at pp. 1378-79.) The common fund doctrine is therefore favorable in the context of class action settlements.

iii. The Requested Attorney's Fees Are In Line With The Leading Treatises On Awards Calculated Using the Common Fund Doctrine

The requested attorney's fees are in line with leading treatises, which concur that "[n]o general rule can be articulated on what is a reasonable percentage of a common fund. Usually, 50% of the fund is the upper limit on a reasonable fee award from a common fund in order to assure that the fees do not consume a disproportionate part of the recovery obtained for the class, although somewhat larger percentages are not unprecedented." (See *Conte & Newberg, Newberg on Class Actions* (3rd Ed.) § 14.03.) Thus, attorney's fees that are fifty percent of the fund are typically considered the upper limit, with thirty to forty percent commonly awarded in cases where the settlement is relatively small. (Id; see also *Van Vranken v. Atlantic Richfield Company* (N.D. Cal. 1995) 901 F. Supp. 294 [stating that most cases where 30-50 percent was awarded involved "smaller" settlement funds of under $10 million]).

In this case, Plaintiff requests attorney's fees of ~30.3% of the Gross Settlement Amount, which is in line with the prevailing guidelines established in California case law and academic literature and consistent with prior awards in California. (See *Chavez v. Netflix, Inc.* (2008) 162 Cal.App.4th 43, 66, n.11 ["Empirical studies show that, regardless of whether the percentage method or the lodestar method is used, fee awards in class actions average around one-third of the recovery."]).

2. While the Lodestar Method is Not Necessary in Common Fund Cases, Courts May Perform a Cross-Check to Award Fees

"Despite its primacy, the lodestar method is not necessarily utilized in common fund cases." (*Lealao v. Beneficial California, Inc.* (2000) 82 Cal.App.4th 19, 27.) Courts have criticized the lodestar method as a drain on the judicial system, and a disincentive on attorneys to take on high-risk, challenging cases. (Id. at p. 29.) Indeed, the lodestar approach: "(1) 'increases the workload of an already overtaxed judicial system,' (2) is 'insufficiently objective and produces results that are far from homogenous,' (3) 'creates a sense of mathematical precision that is unwarranted in terms of the realities of the practice of law,' (4) 'is subject to manipulation by judges who prefer to calibrate fees in terms of percentages of the settlement fund or the amounts recovered by the plaintiffs or of an overall dollar amount,' (5) 'encourages lawyers to expend excessive hours, and ... engage in duplicative and unjustified work,' (6) 'creates a disincentive for the early settlement of cases,' (7) deprives trial courts of 'flexibility to reward or deter lawyers so that desirable objectives, such as early settlement, will be fostered,' (8) 'works to the particular disadvantage of the public interest bar,' and (9) results in 'confusion and lack of predictability.'" (Id.)

Although California supports the common fund doctrine, the lodestar method can be used to cross-check fee awards. "It may be appropriate in some cases, assuming the class benefit can be monetized with a reasonable degree of certainty, to 'cross-check' or adjust the lodestar in comparison to a percentage of the common fund to ensure that the fee awarded is reasonable and within the range of fees freely negotiated in the legal marketplace in comparable litigation." (*In re Consumer Privacy Cases* (2009) 175 Cal.App.4th 545, 557.) Applying the lodestar method requires a two-step process. The first step is to multiply the number of hours reasonably expended by a reasonable hourly rate. The second step is to apply a multiplier to the lodestar to take into account various factors. "The purpose of such adjustment is to fix a fee at the fair market value for the particular action. In effect, the court determines retrospectively, whether the litigation involved a contingent risk or required extraordinary legal skill justifying augmentation of the unadorned lodestar in order to approximate the fair market rate for such services." (Id. at pp. 556-57.) "Under certain circumstances, a lodestar calculation may be enhanced on the basis of a percentage-of-the-benefit analysis." (Id. at p. 557.) Further, "California case law permits fee awards in the absence of detailed time sheets." (*Wershba*, supra, 13 91 Cal.App.4th at pp. 254-55.)

With respect to Class Counsel's lodestar, Class Counsel and their support staff will have expended approximately 57.8 hours (53 attorney hours + 4.8 paralegal hours) litigating this case, which includes anticipated time spent after final approval responding to correspondence and phone calls from Settlement Class Members, the Settlement Administrator, and defense counsel. (Fitzpatrick Decl., ¶ 20, Ex. A.)

Here, based on the hours worked and the applicable hourly rate, Class Counsel's lodestar—without application of a multiplier—amounts to $31,535.00. (Fitzpatrick Decl., ¶ 22.) Plaintiff requests an attorney's fee award of $25,000.00, which reflects a negative multiplier of approximately 0.8 ($25,000 ÷ $31,535). This request is reasonable and fair in light of the factors discussed above. Accordingly, Plaintiff's request for attorney's fees is reasonable under the lodestar method.

3. The Requested Attorney's Fees Comport With The Fee-Shifting Provision Set Out Under Labor Code Sections 2698, et seq.

The instant matter arose under Labor Code sections 2698, et seq. Labor Code sections 2698, et seq. provide that "any employee who prevails in any action [thereunder] shall be entitled to an award of reasonable attorney's fees and [litigation] costs. (Cal. Lab. Code § 2699(g)). This fee-shifting provision reflects the understanding that Class Counsel must accept significant risk of substantial expenses and consumption of time, energy, and other resources in litigating a PAGA cause of action, and thus, that it is reasonable for Class Counsel to recover reasonable attorney's fees and litigation costs if successful in litigating a PAGA cause of action.

It is notable that the reasonableness of an award is unaffected when the attorney's fees and litigation costs are larger than the total recovery for the PAGA Settlement Members at the conclusion of the case because once counsel undertakes the litigation on behalf of the

Aggrieved Employees, it is committed to pursuing the case to its conclusion, placing its fiduciary duty to the Aggrieved Employees ahead of all other concerns.

In this case, the prosecution of the action involved significant financial risk for Plaintiff's Counsel, as they undertook this matter solely on a contingent basis, with no guarantee of recovery. (Fitzpatrick Decl., ¶ 20.) The proposed attorney's fees and costs, therefore, comport with the fee-shifting provision set out under Labor Code sections 2698, et seq., and are thus fair and reasonable.

4. The Requested Attorney's Fees Reflect Class Counsel's Significant Experience, Reputation, and Ability In Class Action Settlements

The experience, reputation, and ability of Plaintiff's Counsel support the requested fee award. Plaintiff's Counsel has significant and specific experience in pursuing, as well as litigating, class and representative actions on behalf of employees. (Fitzpatrick Decl., ¶¶ 20-26; Baker Decl. ¶¶ 7-10.) Moreover, Class Counsel has been involved as lead counsel or co-counsel in a multitude of class and representative actions resulting in beneficial results to aggrieved employees in California. (Id.) Therefore, Class Counsel is familiar with the rapidly evolving substantive law, both state and federal, as well as the procedural law of wage-and-hour litigation.

Further, Class Counsel possesses significant expertise in the narrow field of wage and hour litigation, which it has employed in each case, including the instant case, to evaluate the legal and factual strengths and weaknesses and proposed Settlement. Class Counsel's requested fee award is therefore supported here, as it is reasonable to compensate Class Counsel commensurate with their experience, reputation, and skill. Also, Class Counsel has often received fee awards of this percentage from the gross recovery in other class action settlements.

B. The Requested Litigation Costs Are Fair And Reasonable

The requested litigation costs are fair and reasonable, as Class Counsel are entitled to recover the out-of-pocket litigation costs they reasonably incur in investigating, prosecuting, and settling a PAGA claim, and the requested costs reflect such expenses. (*Staton v. Boeing*

Co. (9th Cir. 2003) 327 F.3d 938, 974.) In addition, this Court may award costs pursuant to the Parties' Settlement Agreement and Labor Code sections 226, 1194, 2802, and 2698 et. seq. As such, this request should be approved. Here, Class Counsel seeks reimbursement of out-of-pocket litigation costs in the amount of $3,329.26. (Fitzpatrick Decl., ¶ 25, Ex. B.)

C. The Requested Class Representative Service Payment Is Fair And Reasonable

The requested Class Representative service payment is fair and reasonable, as named plaintiffs in class action lawsuits "are eligible for reasonable incentive payments to compensate them for the expense or risk they have incurred in conferring a benefit on other members of the class," and the service payment here compensates the named Plaintiff for the benefit he conferred on the Class. (*Munoz v. BCI Coca-Cola Bottling Co.* (2010) 186 Cal.App.4th 399, 412; *Clark v. Am. Residential Servs. LLC* (2009) 175 Cal.App.4th 785, 806; See *In re Cont'l Ill. Sec. Litig.* (7th Cir. 1992) 962 F.2d 566, 571 ["Since without a named plaintiff there can be no class action, such compensation as may be necessary to induce him to participate in the suit could be thought the equivalent of the lawyers' nonlegal but essential case-specific expenses, such as long-distance phone calls, which are reimbursable"]).

Courts routinely grant approval of class action settlement agreements containing enhancements for the class representatives, which are necessary to provide incentive to represent the class, and are appropriate given the benefit the class representatives help to bring about for the class. (See *Rodriguez v. W. Publ'g Corp*. (9th Cir. 2009) 563 F.3d 948, 958-59). "[C]riteria courts may consider in determining whether to make an incentive award include: 1) the risk to the class representative in commencing suit, both financial and otherwise; 2) the notoriety and personal difficulties encountered by the class representative; 3) the amount of time and effort spent by the class representative; 4) the duration of the litigation; and 5) the personal benefit (or lack thereof) enjoyed by the class representative as a result of the litigation. (*In re Cellphone Fee Termination Cases* (2010) 186 Cal.App.4th 1380, 1394-95 [holding that trial court did not abuse its discretion in awarding enhancements of $10,000 to each of the four named plaintiffs]).

Service payments are particularly important to plaintiffs in wage and hour cases because they promote the important public policies underlying the wage and hour laws. As discussed above, this strong policy is codified in California Labor Code section 90.5. Nonetheless, the California Supreme Court has recognized that "retaliation against employees for asserting statutory rights under the Labor Code is widespread," despite anti-retaliation statutes designed to protect employees. (*Gentry v. Super. Ct.* (2007) 42 Cal.4th 443, 460-61). In this context, class representatives should be rewarded for assuming the risk of retaliation for the sake of Class Members. (See *Frank v. Eastman Kodak Co*. (W.D.N.Y. 2005) 228 F.R.D. 174, 187).

Under the Settlement, subject to the Court's approval, Defendant agreed to pay a service payment in the amount of $2,500.00 to Plaintiff. Plaintiff communicated with counsel very frequently for litigation and to prepare for mediation. This amount is reasonable, particularly in light of the significant benefits Plaintiff generated for all Class Members. (Id.)

Indeed, when compared with the amounts awarded in typical class action cases, the amount requested here is particularly reasonable. A 2006 study examining the average incentive award given to class action plaintiffs from 1993 to 2002 found that the "average award per class representative was $15,992 and the median award per class representative was $4,357." Theodore Eisenberg & Jeffrey P. Miller, *Incentive Awards to Class Action Plaintiffs: An Empirical Study* (2006) 53 UCLA L. Rev. 1303, 1308. That same study found that named plaintiffs in employment discrimination class actions received an average award of $69,850 and a median award of $31,081, while named plaintiffs in other employment class actions received an average award of $12,121 and a median award of $13,059. (Id. at p. 1334.) The authors of the study found that higher awards in employment cases reflected the "courts' wish to make representative plaintiffs whole by compensating them for the high costs of their service to the class, including risks of stigmatization or retaliation on the job." (Id. at p. 1308.)

D. The Settlement Administrator's Fees And Costs Should Be Approved

Pursuant to the terms of the Settlement Agreement, the fees and costs of the Settlement Administrator, Phoenix Settlement Administrators, are to be paid out of the Gross Settlement

Amount. In total, the settlement administration costs total $5,000.00. *See* Admin. Decl. ¶ 15, Exhibit B.

Plaintiff solicited bids from two qualified claims administrators, ensuring that both candidates met the necessary professional standards and industry experience. After careful evaluation, the selected administrator submitted the lowest bid, demonstrating both cost-effectiveness and efficiency in its proposed services. Accordingly, the requested costs, which reflect the most economical option available, should be approved.

VII. THE SETTLEMENT SATISFIES CODE OF CIVIL PROCEDURE SECTION 384

In pertinent part, Code of Civil Procedure section 384 requires the court to amend judgment, and

> "[...] to direct the defendant to pay the sum of the unpaid residue or unclaimed or abandoned class member funds, plus any interest that has accrued thereon, to non-profit organizations or foundations to support projects that will benefit the class or similarly situated persons, or that promote the law consistent with the objectives and purposes of the underlying cause of action, to child advocacy programs, or to non-profit organizations providing civil legal services to the indigent."

Here, the Settlement Agreement provides that: "Class Members shall have one-hundred eighty (180) days from the date of issuance of the check to negotiate the check. The funds from any checks not negotiated within 180 days shall be transmitted to the CASA of Monterey County as the *cy pres* recipient. In such event, those Participating Class Members and Aggrieved Employees will nevertheless remain bound by the Settlement." (Settlement, ¶¶ 45.d.iii, 45.d.viii.1.) Class Counsel does not have a conflict of interest with the cy pres recipient. (Fitzpatrick Decl. ¶ 28; Baker Decl. ¶ 12.)

VIII. PLAINTIFF HAS PROVIDED NOTICE TO THE LWDA

On November 6, 2024, Plaintiff uploaded his Motion for Preliminary Approval of Class Action Settlement and Settlement Agreement to the LWDA. As of the filing of this motion, the LWDA has not objected to the proposed settlement. On October 2, 2025, Plaintiff uploaded this motion and proposed order to the LWDA. (Fitzpatrick Decl. ¶ 29.)

IX. CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court grant final approval of the proposed Settlement and award Plaintiff the full amounts of costs, attorney's fees, administration fees, and enhancement payment agreed upon by the Parties.

Dated: October 2, 2025

FITZPATRICK & SWANSTON

By: *___/s/ B. James Fitzpatrick___*
B. James Fitzpatrick
Attorneys for Plaintiff,
Leonardo Ortega on behalf of himself
and all similarly aggrieved employees