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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN BERNARDINO

Coordination Proceeding
Special Title (Rule 3.550)
Black & Decker Wage and Hour Cases
Included Actions:

Mancillas v. Stanley Black & Decker, Inc.

Cosico and Martell v. Stanley Black & Decker, Inc., et al.

Judicial Council Coordination Proceeding
Case No.: **JCCP 5218**

[*Hon. David S. Cohn, Dept. S-26*]

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

[*Filed with the Declarations of Kane Moon, Justin Marquez, Plaintiff Martell, Plaintiff Cosico, Plaintiff Mancillas, and ILYM Group in Support of Motion, and [Proposed] Order and Judgment*]

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN BERNARDINO
NO. CIVSB2123358; SUPERIOR COURT OF CALIFORNIA COUNTY OF ALAMEDA
NO. 21CV002218

<u>FINAL APPROVAL HEARING</u>
Date: July 12, 2023
Time: 10:00 a.m.
Dept.: S-26

Action Filed: August 30, 2021
Trial Date: Not set

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

PLEASE TAKE NOTICE that on July 12, 2023 at 10:00 a.m. in Department S-26 of this Court located at 247 West Third Street, San Bernardino, CA 92415-0210, pursuant to Code of Civil Procedure § 382 and California Rules of Court 3.769 *et seq*., Plaintiffs Paul Mancillas, Matt Martell, and Edward Cosico (collectively, the "Plaintiffs") will move the Court for an Order granting final approval of the proposed class action settlement between Plaintiffs and Defendants Stanley Black Decker, Inc. and Stanley Convergent Security Solutions, Inc. (collectively, the "Parties").

Plaintiffs further move the Court for an Order:

1. Certifying a Class for settlement purposes;
2. Approving the Settlement as fair, reasonable, and adequate, and directing consummation of the terms and provisions of the Parties' Settlement Agreement.
3. Finding Class Members were given, in a reasonable manner under the circumstances, due and adequate notice of the Settlement and advised of their right to participate in, object to, or exclude themselves from the Settlement;
4. Confirming the appointment of Plaintiffs as the Class Representative for settlement purposes, and approving a service payment of $10,000.00 to each;
5. Confirming the appointment of Plaintiffs' Counsel Moon & Yang, APC ("M&Y") and the Wilshire Law Firm ("WLF"), as Class Counsel for settlement purposes, and approving a payment of $1,166,667.00 in attorneys' fees and $23,512.43 for costs actually incurred in litigation expenses;
6. Confirming the appointment of ILYM Group, Inc. as the Settlement Administrator, finding the Administrator has fulfilled its initial notice and reporting duties under the Settlement, and approving a payment of $22,906.04 for the costs of settlement administration;
7. Approving payment of $112,500.00 to the California Labor and Workforce Development Agency for PAGA penalties, and finding the State's claims for civil penalties pursuant to PAGA are hereby extinguished;
8. Directing the Clerk of the Court to enter a final Judgment, and that the final Judgment be posted on a website maintained by the Settlement Administrator for a period of not less than

90 calendar days after entry; and

9. Without affecting the finality of the final Judgment, reserving continued jurisdiction over this matter for the purposes of implementing, enforcing, and/or administering the Settlement or enforcing the terms of the Court's Judgment.

The motion will be based upon this notice, the attached memorandum of points and authorities, the declarations filed herewith and exhibits thereto supporting Plaintiffs' motion, the records and files in this action, and any other further evidence or argument that the Court may properly receive at or before the hearing.

Respectfully submitted,

Dated: June 16, 2023 **MOON & YANG, APC**

By: ______________________
Kane Moon
Allen Feghali
Charlotte Mikat-Stevens

Attorneys for Plaintiff PAUL MANCILLAS

Dated: June 16, 2023 **WILSHIRE LAW FIRM**

By: */s/Christina M. Le*
Justin F. Marquez
Christina M. Le
Zachary Greenberg

Attorneys for Plaintiffs MATT MARTELL and EDWARD COSICO

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MEMORANDUM OF POINTS AND AUTHORITIES

I. <u>INTRODUCTION</u>

This is a wage and hour class action and PAGA representative action. Plaintiffs Paul Mancillas ("Plaintiff Mancillas"), Matt Martell ("Plaintiff Martell"), and Edward Cosico ("Plaintiff Cosico") (collectively, the "Plaintiffs") seek final approval of a proposed $3,513,906.42 non-reversionary, settlement with Defendants Stanley Black Decker, Inc. ("Defendant SBD") and Stanley Convergent Security Solutions, Inc. ("Defendant SCSS") (collectively, the "Defendants") (together, Plaintiffs and Defendants are the "Parties"). Plaintiffs seek to represent a class of non-exempt, hourly-paid employees who work or worked for Defendants in California during the period from August 30, 2017 through February 22, 2023, which is the date the court issued an order granting preliminary approval of the class and PAGA representative action settlement at issue here. The Settlement will provide substantial monetary payments to 1,922 Class Members (excluding opt-outs) and 1,442 PAGA Employees. As set forth more fully below, the proposed Settlement satisfies all criteria for approval under California law. The Settlement was reached after extensive investigation, discovery, and negotiations. The negotiations were at arm's length and were facilitated by an experienced neutral mediator, Mark Rudy, Esq. Thus, the proposed Settlement is fair, reasonable, and adequate and is in the best interests of the Class.

Plaintiffs' request for attorneys' fees in the amount of $1,166,667.00 and reimbursement of litigation costs in the amount of $23,512.43 to Class Counsel, an enhancement award in the amount of $10,000.00 to each Plaintiff as the Class Representatives, settlement administration costs in the amount of $22,906.04 to ILYM Group, Inc. as the Settlement Administrator, and payment to the California Labor Workforce and Development Agency (the "LWDA") in the amount of $112,500.00 are reasonable. Accordingly, Plaintiffs request the Court grant final approval of the proposed Settlement.

II. <u>SUMMARY OF THE LITIGATION AND SETTLEMENT</u>

A. <u>Plaintiffs' Claims</u>

Plaintiff Mancillas worked for Black and Decker (U.S.) Inc., a subsidiary of Defendant SBD as a machine operator for approximately four years, from approximately October 2016 to

November 2020, and was classified as non-exempt during the entirety of his employment. (Declaration of Kane Moon in Support of Plaintiffs' Motion for Final Approval of Class Action Settlement ("Moon Decl."), ¶ 3.) Plaintiff Martell was employed by Defendant SCSS until approximately July 2022, when Securitas acquired SCSS such that Plaintiff Martell is now an employee of Securitas. (*Id.*) Plaintiff Martell was employed by Defendant SCSS as a Service Technician III out of the Fremont Office from approximately December 2019, until its acquisition in approximately July 2022. Plaintiff Cosico was hired by Defendant SCSS in approximately March 2019 as a Fire Inspector, and he is now employed by Securitas as a result of the acquisition. (*Id.*) Plaintiffs Martell and Cosico are paid on an hourly basis and classified as non-exempt. (*Id.*) During Plaintiffs' employment, Plaintiffs and other Class Members typically worked five days per workweek, and in excess of eight hours each workday. (*Id.*) Plaintiffs contend they were subjected to the same unlawful labor practices as their coworkers. (*Id.* at ¶ 5.)

Plaintiffs' claim for unpaid wages is multi-fold and stems, in part, from Defendants' alleged unlawful practice of not incorporating all remunerations into the calculation of regular rate of pay and Defendants' failure to pay Plaintiffs and the putative Class for off-the-clock work. (*Id.* at ¶ 4.) Additionally, Defendants' records also reflect a 44.9% meal period violation rate (including a 97.6% violation rate with respect to the second meal breaks; however, this figure does not consider waivers of meal periods that were in place). (*Id.*) Furthermore, many of the employee handbooks produced by Defendants did not have any specific policies regarding meal and rest breaks. (*Id.*) Additionally, Plaintiffs and Class Members were required use their personal cell phones for work without reimbursement by Defendants, and warehouse employees, like Plaintiff Mancillas, were required to purchase gloves, boots, safety glasses, and other miscellaneous items, but were not reimbursed by Defendants. (*Id.*) In addition to the foregoing claims, Plaintiffs bring derivative claims against Defendants for waiting time penalties, wage statement violations, unfair business practices, and civil penalties under the Private Attorneys General Act ("PAGA"). (*Id.*)

Because of Defendants' alleged violations of various provisions of the Labor Code, Plaintiff Mancillas filed a class and representative action on August 30, 2021, which, in its amended form, alleges that Defendants systematically: (1) failed to pay minimum wages, (2) failed to pay overtime compensation, (3) failed to provide meal periods, (4) failed to authorize and permit rest periods, (5) failed to indemnify necessary business expenses, (6) failed to timely pay wages at termination, (7) failed to provide accurate itemized wage statements, (8) engaged in unfair business practices, and (9) violated civil penalty provisions recoverable as PAGA penalties pursuant to Labor Code section 2698 *et seq.* (the "*Mancillas* Action"). (*Id.* at ¶ 5.) On November 9, 2021, Plaintiffs Martell and Cosico filed a class action which alleges that Defendants systematically: (1) failed to pay minimum and straight time wages, (2) failed to pay overtime compensation, (3) failed to provide meal periods, (4) failed to authorize and permit rest period, (5) failed to provide accurate itemized wage statements, (6) failed to indemnify necessary business expenses, and (7) engaged in unfair business practices (the "*Cosico* Action"). (*Id.* at ¶ 6.) On or about December 10, 2021, Defendants filed a petition to coordinate the *Mancillas* Action and the *Cosico* Action. (*Id.* at ¶ 7.) This Court heard and granted Defendants' petition on or about March 9, 2022. (*Id.*)

Defendants ardently oppose the merits of this case and deny Plaintiffs' factual allegations. (*Id.* at ¶ 8.) Defendants maintain they complied with all of their meal and rest period obligations and that meal period waivers were in use where allowed by law. (*Id.*) Defendants argue everyone in fact had an opportunity to take uninterrupted meal and rest periods to which they were entitled, and any violation was the result of employees' choice to take a late or short meal or rest break. (*Id.*) Defendants argue Plaintiffs and putative Class Members were paid all wages owed, and extra remuneration was discretionary so there was no failure to incorporate the regular rate of pay in overtime, meal premiums, and sick pay. (*Id.*) As for off-the-clock work, Defendants maintain any time spent by Plaintiffs and putative Class Members to undergo COVID screening was not compensable, that Defendants' policies and practices prohibited off the clock work, and that if such work was performed without it being recorded on timesheets, Defendants were unaware of it. (*Id.*) Defendants contend further that personal cell phone use was reimbursed when required by the Company and that employees were not required to furnish or pay for any work-related items that were necessary for their jobs. (*Id.*) Defendants maintain none of the claims alleged are appropriate for class treatment given the individualized and testimony-intensive nature of such claims. (*Id.*) Moreover, Defendants maintain that all wage statements were accurate, and to the extent that Plaintiffs received wage statements that were allegedly inaccurate, Defendants assert Plaintiffs suffered no actual damage or harm as a result. (*Id.*; *see, e.g.*, *Angeles v. U.S. Airways, Inc.* (N.D. Cal. Feb. 19, 2013, No. C 12-05860 CRB, 2013 WL 622032) at *10 ["A plaintiff must adequately plead an injury arising from an employer's failure to provide full and accurate wage statements, and the omission of the required information alone is not sufficient."].) With respect to Plaintiffs' claim for waiting time penalties, Defendants allege their good-faith belief that they paid all wages precludes the imposition of waiting time penalties since Plaintiffs cannot prove Defendants' alleged failure to pay all final wages at the time of separation was "willful." (Moon Decl., ¶ 8; *see, e.g.*, *Pedroza v. PetSmart, Inc.* (C.D. Cal. June 14, 2012, No. ED CV 11–298 GHK (DTBx)) 2012 WL 9506073, *5.) For these reasons, Defendants claim they did not engage in any unfair business practices and denied liability under PAGA. (Moon Decl., ¶ 8.)

B. <u>Discovery and Investigation</u>

Following the filing of the *Mancillas* Action, Plaintiff Mancillas propounded formal discovery, but before responses were due, the Parties agreed to mediate this matter and scheduled mediation with Mark Rudy, Esq. on September 22, 2022. (*Id.* at ¶ 9.) After mediation was scheduled, the *Mancillas* Action was consolidated with the *Cosico* Action. (*Id.*) The Parties agreed on a protocol for an informal exchange of documents and information before the mediation. (*Id.*) Defendants produced a sample of time and pay records for Class Members, as well as policy manuals in effect during the statutory period, and additional documents helpful for Class Counsel's analysis of the claims and Defendants' liability. (*Id.*) The sample produced by Defendants included detailed time and payroll records for approximately 15% of the putative Class, including detailed time entries for 107,447 shifts and corresponding payroll. (*Id.*) In their informal pre-mediation discovery responses, Defendants also provided information regarding the total number of current and former putative Class Members, the total number of pay periods worked by putative Class Members, the average hourly pay of all putative Class Members, and the total amounts paid in meal period premiums. (*Id.*)

After reviewing documents regarding Defendants' wage and hour policies and practices, and analyzing Defendants' time and pay records, Class Counsel were able to evaluate the probability of class certification, success on the merits, and Defendants' maximum monetary exposure for all claims. (*Id.* at ¶ 10.) Class Counsel reviewed these records and prepared a damage analysis prior to mediation with the aid of a statistics expert. (*Id.*) Class Counsel also investigated the applicable law regarding the claims and defenses asserted in the litigation. (*Id.*) Thus, Plaintiffs' and Class Counsel's familiarity with the facts of the case and the legal issues raised by the pleadings allowed them to act intelligently in negotiating the settlement. (*Id.*)

C. Settlement Negotiations

On September 22, 2022, the Parties participated in private, full-day mediation with professional neutral mediator Mark Rudy, Esq. (*Id.* at ¶ 11.) The settlement negotiations were at arm's length and, although conducted in a professional manner, were adversarial. (*Id.*) 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 their positions through trial and appeal if a settlement had not been reached. (*Id.*) After extensive negotiations and discussions regarding the strengths and weaknesses of Plaintiffs' claims and Defendants' defenses, a settlement was reached by the Parties, the material terms of which are encompassed within the Joint Stipulation of Class and PAGA Representative Action Settlement. (*Id.*, Exh. 1 [the "Settlement Agreement"].)

Class Counsel have conducted a thorough investigation into the facts of this case. (*Id.* at ¶ 18.) Based on the foregoing discovery and independent investigation and evaluation, Class Counsel are of the opinion that the Settlement is fair, reasonable, and adequate. (*Id.*) Furthermore, in light of all known facts and circumstances, the risk of significant delay, trial risk, appellate risk, the defenses that could be asserted by Defendants both to certification and on the merits, settlement is in the best interests of the Class. (*Id.*; *see also id.* at ¶¶ 19–32.) **Indeed, the $3,513,906.42 settlement figure represents approximately 91.68% of Plaintiffs' predicted realistic maximum recovery of $3,832,965.25.** (*Id.* at ¶ 26.)

D. Key Terms of the Proposed Settlement

Under the Settlement Agreement, Defendants will pay a non-reversionary, all-inclusive amount of $3,513,906.42 to resolve this litigation, in addition to the employer share of payroll taxes on the wage portion of Settlement Payments to Class Members. (Settlement Agreement, ¶¶ 12, 38(b), (c), (d) (g).) The Settlement Agreement's key terms include:

1. Class or Class Members: The proposed Settlement Class for purposes of the Settlement contains 1,922 Class Members and is defined as: All current and former non-exempt employees of Defendants who worked in California during the Class Period. (*Id.* at ¶ 4.)

2. Participating Class Members or Settlement Class Members: Any Class Member who does not submit a timely and valid Request for Exclusion is a Settlement Class Member and entitled to a pro-rata share of individual Settlement Class Payments. (*Id.* at ¶¶ 4, 38(h).) Class Members cannot exclude themselves from the PAGA portion of the Settlement. (*Id.* at ¶¶ 38(i), t).)

3. Class Period: The Class Period means the period from August 30, 2017 through February 22, 2023, which is the date the court issued an order granting preliminary approval of the class and PAGA representative action settlement at issue here. (*Id.* at ¶ 3.)

4. Covered Workweeks: Covered Workweeks means the number of weeks a Class Member worked at Defendants' locations in California during the Class Period. (*Id.* at ¶¶ 7, 38(h).)

5. PAGA Pay Periods: the number of pay periods each PAGA Employee worked during the PAGA Period. (*Id.* at ¶ 18).)

6. PAGA Period: The PAGA Period means the period between August 30, 2020 through February 22, 2023, which is the date the court issued an order granting preliminary approval of the class and PAGA representative action settlement at issue here. (*Id.* at ¶ 19).)

7. PAGA Employee: The proposed Settlement Class for purposes of the Settlement contains 1,442 Aggrieved Employees. PAGA Employee means all Class Members that worked during the PAGA Period. It is stipulated by the Parties that, for purposes of this Settlement only, all PAGA Employees are "aggrieved employees" as defined pursuant to PAGA. (*Id.* at ¶ 17).)

8. No Reversion: This is a non-reversionary settlement requiring Defendants to make payments to Settlement Class Members and PAGA Employees that shall be issued by the Settlement Administrator according to a specific formula based on Covered Workweeks and PAGA Pay Periods, and under no circumstance will there be any reversion to Defendants of any of the funds. (*Id.* at ¶¶ 38(d), (h), (i).) Class Members will not be required to submit a claim to receive their Settlement payment. (*Id.* at ¶ 38(e).)

9. Gross Settlement Amount: This amount is $3,513,906.42[1] and excludes Defendants' employer share of payroll taxes owed on the wage portion of Settlement Class Payments. (*Id.* at ¶¶ 38(b), (g); ILYM Group Decl., ¶ 14.)

10. Release of Claims: The release of claims by Settlement Class Members is limited to actions or causes of action which are alleged, or reasonably could have been alleged based on the facts and claims asserted in the action. (Settlement Agreement, ¶ 49(c).) All Class Members, including all PAGA Employees, release the Released PAGA Claims, regardless of whether they have requested exclusion from the Settlement as to Class claims. (*Id.* at ¶ 49(d).) Released PAGA Claims means any and all claims arising under PAGA which were or could have been raised in the Action during the entire PAGA Period. (*Id.* at ¶ 23.) Releases are effective upon the final approval by the Court of this Settlement and Defendants' payment of all sums due pursuant to this Settlement. (*Id.* at ¶ 49.)

11. PAGA Allocation: The PAGA Allocation means the portion of the Gross Settlement Amount that the Parties have agreed to allocate to resolution of the Released PAGA Claims. (*Id.* at ¶ 16.) The Parties have agreed that the PAGA Allocation will be $150,000.00 from the Gross Settlement Amount. (*Id.*) Pursuant to PAGA, Seventy Five Percent (75%), or $112,500.00, of the PAGA Allocation will be paid to the Labor and Workforce Development Agency (the "LWDA") (the "PAGA Penalty Payment"), and Twenty Five Percent (25%), or $37,500.00, of the PAGA Allocation will be included in the Net Settlement Amount for PAGA Employees (the "PAGA Settlement Payment"). (*Id.*) Class Counsel have submitted the proposed Settlement Agreement to the LWDA. (Moon Decl., ¶ 12, Exh. 2.)

12. Net Settlement Fund: The Net Settlement Fund is the amount that remains and that shall be paid to Class Members after the following court-approved amounts are subtracted from the Gross Settlement Amount: (a) attorneys' fees (not to exceed one-third of the Gross Settlement Amount, or

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[1] The Settlement Agreement provides Defendants will pay a Gross Settlement Amount (the "GSA") of $3,500,000.00, subject to the Escalator Clause (i.e., Settlement Agreement, ¶ 38(c)) and payment of an additional amount for employer payroll taxes on the wage portion of Settlement Payments to Class Members. (*Id.* at ¶ 38(b).) Following the Settlement Administrator's receipt of the Class Data, the Administrator determined the Escalator Clause was triggered, and therefore the GSA has been increased to $3,513,906.42. (Declaration of Nathalie Hernandez of ILYM Group, Inc., in Support of Motion for Final Approval of Class Action Settlement ["ILYM Group Decl."], ¶ 14.)

$1,166,667.00), (b) reasonable litigation costs (not to exceed $25,000.00), (c) class representative service payments (not to exceed $10,000.00 to each of the named Plaintiffs), (d) the PAGA Penalty Payment to the LWDA ($112,500.00), and (e) settlement administration costs (not to exceed $30,000.00). (Settlement Agreement, ¶¶ 14, 38(f).) Settlement Payments to the Class Members and PAGA Employees will be calculated by the Settlement Administrator and paid out of the Net Settlement Amount. (*Id.* at ¶ 38(f).)

13. Individual Settlement Class Payments (Excludes PAGA Settlement Payments): Settlement Class Payments will be paid out of the Net Settlement Amount. (*Id.* at ¶ 38(h).) Each Settlement Class Member will be paid a pro-rata share of the Net Settlement Amount (less the PAGA Settlement Payment), as calculated by the Settlement Administrator. (*Id.*) The pro-rata share will be determined by comparing the individual Settlement Class Member's Covered Workweeks employed during the Class Period in California to the total Covered Workweeks of all the Settlement Class Members during the Class Period as follows: [Workweeks worked by a Settlement Class Member] ÷ [Sum of all Covered Workweeks worked by all Settlement Class Members] x [Net Settlement Amount – PAGA Settlement Payment] = individual Settlement Payment for a Settlement Class Member. (*Id.*) Settlement Class Payments in the appropriate amounts will be distributed by the Settlement Administrator by mail to the Settlement Class Members. (*Id.*)

14. Individual PAGA Settlement Payments: PAGA Settlement Payments will be paid out of the Net Settlement Amount. (*Id.* at ¶ 38(i).) Each PAGA Employee will be paid a pro-rata share of the PAGA Employees' PAGA Settlement Payment. (*Id.*) PAGA Employees will not be permitted to exclude themselves from this portion of the Settlement. (*Id.*) The pro-rata share will be determined by comparing the individual PAGA Employees' PAGA Pay Periods during the PAGA Period to the total PAGA Pay Periods of all the PAGA Employees during the PAGA Period as follows: [PAGA Pay Periods worked by a PAGA Employee] ÷ [Sum of all PAGA Pay Periods worked by all PAGA Employees] x [PAGA Settlement Payment] = individual PAGA Employee's portion of the PAGA Settlement Payment. (*Id.*) PAGA Settlement Payments to PAGA Employees in the appropriate amounts will be distributed by the Settlement Administrator by mail to the PAGA Employees at the same time Settlement Class Payments issue to the Settlement Class. (*Id.*)

15. Uncashed Settlement Payments: All checks not cashed within 180 days of payment shall be forwarded to the State of California's Unclaimed Property Fund in the name of the Settlement Class Member and PAGA Employee who failed to cash their checks. (*Id.* at ¶¶ 38(h)–(i).)

16. Allocation of Individual Settlement Payments: The Parties have agreed that Settlement Class Payments will be allocated as follows: 33 1/3% to wages, 33 1/3% to penalties, and 33 1/3% to interest. The PAGA Settlement Payment shares to PAGA Employees will be entirely allocated to penalties. Appropriate federal, state and local withholding taxes will be taken out of the wage allocations, and each Class Member will receive an IRS Form W-2 with respect to this portion of the Settlement Payment. (*Id.* at ¶ 38(j).)

17. Procedure for Disputing Workweeks, Opting-Out, or Objecting: Each Class Member was mailed a notice setting forth the material terms of the proposed Settlement, along with instructions about how to object or request exclusion from the proposed class action Settlement (the "Notice"). (*Id.* at ¶ 38(r); ILYM Group Decl., ¶ 7, Exh. A.) For each Class Member, there was pre-printed information on the mailed Notice, based on Defendants' records, stating the Class Member's Covered Workweeks during the Class Period and the estimated total Settlement Payment under the Settlement, including the Settlement Class Payment and the PAGA Settlement Payment that will be distributed irrespective of any exclusion request. (Settlement Agreement, ¶ 38(r); ILYM Group Decl., ¶ 7, Exh. A.) Class Members had an opportunity to dispute the pre-printed information on the Notice as to his or her Covered Workweeks during the Class Period by submitting any dispute regarding the information on the Notice as to his or her Covered Workweeks within the Response Deadline. (*Id.* at ¶ 38(r); ILYM Group Decl., ¶ 7, Exh. A.) Unless a disputing Class Member submitted documentary evidence in support of his or her dispute, the records of the Defendants will be determinative. (Settlement Agreement, ¶ 38(r).) The Class Member Response Deadline was May 29, 2023, and no written objections or requests for exclusion were received. (ILYM Group Decl., ¶¶ 11–12.)

18. Service Payments: Subject to Court approval, Plaintiffs shall each be paid an enhancement award not to exceed $10,000.00, in addition to individual Settlement Payments to which each Plaintiff is entitled to receive as a Class Member, for Plaintiffs' time and effort in bringing and presenting the action

and for their general release of claims, known and unknown, and waiver of section 1542 rights. (*Id.* at ¶¶ 25, 38(m).)

19. Attorneys' Fees and Costs: Defendants will not oppose a fee application of up to one-third of the Gross Settlement Amount or $1,166,667.00, plus out-of-pocket costs incurred in litigation expenses not to exceed $25,000.00. (*Id.* at ¶¶ 38(f), (l).) At this time, the litigation costs incurred by Wilshire Law Firm (the "WLF") are $3,322.18. (Declaration of Justin F. Marquez in Support of Plaintiffs' Motion for Final Approval of Class Action Settlement ("Marquez Decl."), ¶ 20, Exh. A.) Additionally, the litigation costs incurred by Moon & Yang, APC ("M&Y") are $20,190.25. (Moon Decl., ¶ 15, Exh. 4.)[2]

20. Notice of Proposed Settlement: The Notice sent to all Class Members set forth, in plain terms, a statement of case, the terms of the Settlement Agreement, the approximate amount of attorneys' fees, costs, penalties, and service payments being sought, and an explanation of how the settlement payments are being calculated. (Settlement Agreement, Exh. A; ILYM Group Decl., ¶ 7, Exh. A.) All 1,922 Class Members were notified by U.S. First Class Mail of the Settlement. (ILYM Group Decl., ¶ 7.) ILYM Group, Inc., the appointed Settlement Administrator, undertook its best efforts to ensure that the Notice was provided to the current address of each Class Member, including conducting a national change of address search and re-mailing the notice to updated addresses. (*Id.* at ¶ 6.) Of the Notice Packets mailed, 64 were returned as non-deliverable, 2 of which included a forwarding address and were promptly re-mailed. (*Id.* at ¶ 8.) As to the 62 non-deliverable Notice Packets that did not include a forwarding address, the Settlement Administrator then employed standard skip-tracing to obtain updated address information, and thereby was able to promptly re-mail Notice Packets to 38 Class Members. (*Id.*) The Settlement Administrator was unable to successfully deliver only 24 Notice Packets, notwithstanding standard skip-tracing performed in efforts to obtain current address information. (*Id.* at ¶ 10.) This means that of the

[2] As shown in Exhibit 4, there are five entries totaling $593.50 that are marked as "Non-billable," and a total of $19,596.75 entries marked as "Billable." (Moon Decl., ¶ 15, n.1.) To clarify, M&Y seeks reimbursement for both the "Non-billable" and "Billable" entries, for a total of $20,190.25. (*Id.*) Due to technological difficulties, M&Y was unable to mark the "Non-billable" entries as "Billable." (*Id.i*) Additionally, current litigation costs incurred by M&Y are only slightly higher than litigation costs reported in Plaintiffs' Motion for Preliminary Approval of Class Action Settlement ($19,425.75). (*Id.*) This increase in $764.50 is due to necessary expenses, such as costs for filing and service of court documents as well as court attendance fees, which are normally incurred during the course of litigation. (*Id.*)

total 1,922 Class Members, 1,898—the large majority of the total Class—received the Notice Packets via U.S. First Class Mail.

21. Settlement Administration Costs: The Settlement Administrator shall be paid the costs for actual and direct fees and expenses reasonably incurred by the Settlement Administrator in administering the Settlement and for work done to date regardless of the outcome of this Settlement. (Settlement Agreement, ¶ 38(o).) At the time of settlement, the Parties estimated Settlement Administration Costs would not exceed $30,000.00. (*Id.*) Following a competitive bidding process, Class Counsel obtained a not-to-exceed cost estimate of $22,500.00 from ILYM Group, Inc. (Moon Decl., ¶ 16, Exh. 5.) The Settlement Administrator has since provided the Parties' respective counsel with its final costs of administration, in an amount of $22,906.04. (*Id.*; ILYM Group Decl., ¶ 15, Exh. B.)[3] Any difference between the maximum allocation and actual costs awarded will revert to Settlement Class Members. (Moon Decl., ¶ 16.)

III. THE SETTLEMENT MERITS FINAL APPROVAL

The law favors the settlement of lawsuits, particularly in class actions and other complex cases. (*See, e.g.*, *Neary v. Regents of Univ. of Cal.* (1992) 3 Cal.4th 272, 277–81.) To prevent fraud, collusion, or unfairness to the class, the settlement of a class action requires court approval. (*Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1800–01 [citing authority omitted].) To approve a settlement, the Court must find "the settlement is fair, adequate, and reasonable." (*Id.*) The Court has wide discretion in making this determination. (*Mallick v. Super. Ct.* (1979) 89 Cal.App.3d 434, 438.) Fairness, adequacy, and reasonableness are presumed, as here, when: "(1) the settlement is reached through arm's-length bargaining; (2) investigation and discovery are 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. 1802 [citing Newberg, Newberg on Class Actions (3rd ed. 1992) § 11.41].)

[3] ILYM Group, Inc's administration costs increased from $22,500.00 to $22,906.04 as a result of the increase in the Class size from when the original bid was requested. (ILYM Group Decl., ¶ 15.) Nonetheless, because the increase is slight (a difference of $406.04) and because the current amount remains within the $30,000.00 maximum allocated under the Settlement Agreement, the Court should approve the requested administration costs. (Moon Decl., ¶ 17, n.2.)

In evaluating a settlement, the trial court considers the following factors: (1) the strength of the 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 settlement amount offered; (5) the extent of discovery completed and the stage of the proceedings; (6) counsel's experience and views; (7) the presence of a governmental participant; and (8) the class members' reaction to the proposed settlement. (*Kullar v. Foot Locker Retail, Inc*. (2008) 168 Cal.App.4th 116, 128.) In order 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 L.A.* (2010) 186 Cal.App.4th 399, 408–09 [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 have 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. <u>The Settlement Amount Provides a Realistic Value for the Claims</u>

There can be no doubt that this Settlement is the result of vigorous, adversarial, non-collusive, and arms-length negotiations between the Parties. (Moon Decl., ¶¶ 9–11.) Following the filing of the *Mancillas* Action, Plaintiff Mancillas propounded formal discovery, but before responses were due, the Parties agreed to mediate this matter and scheduled mediation with Mark Rudy, Esq. on September 22, 2022. (*Id.* at ¶ 9.) After mediation was scheduled, the *Mancillas* Action was consolidated with the *Cosico* Action. (*Id.*) The Parties agreed on a protocol for an informal exchange of documents and information before the mediation. (*Id.*) Defendants produced a sample of time and pay records for Class Members, as well as policy manuals in effect during the statutory period, and additional documents helpful for Class Counsel's analysis of the claims and Defendants' liability. (*Id.*) The sample produced by Defendants included detailed time and payroll records for approximately 15% of the putative

Class, including detailed time entries for 107,447 shifts and corresponding payroll. (*Id.*) In their informal pre-mediation discovery responses, Defendants also provided information regarding the total number of current and former putative Class Members, the total number of pay periods worked by putative Class Members, the average hourly pay of all putative Class Members, and the total amounts paid in meal period premiums. (*Id.*)

To determine the approximate potential damages owed to each Class Member, Class Counsel reviewed documents regarding Defendants' wage and hour policies and practices and analyzed Defendants' time and pay records for putative Class Members. (*Id.* at ¶ 10.) Class Counsel reviewed these records and prepared a damage analysis prior to mediation with the aid of a statistics expert. (*Id.*) Class Counsel also investigated the applicable law regarding the claims and defenses asserted in the litigation. (*Id.*) Accordingly, Class Counsel were able to evaluate the probability of class certification, success on the merits, and Defendants' maximum monetary exposure for all claims and act intelligently in negotiating the Settlement Agreement. (*Id.*; *see also id.* at ¶¶ 18–32.)

According to the data Defendants provided at the time of mediation, there were an estimated 1,806 Class Members and 170,231 workweeks, 830,532 shifts, a weighted average hourly rate for the entire Class Period of $24.38 (with the following annual average hourly rates of pay: $21.31 (2017), $22.39 (2018), $24.26 (2019), $25.00 (2020), $24.82 (2021), and $27.35 (2022)), and roughly 89,937 pay periods and 1,130 Aggrieved Employees within the PAGA Period.[4] (*Id.* at ¶ 19.) With the assistance of a statistics expert, Class Counsel estimated as follows: the risk-inclusive exposure (90% discount) for the unpaid overtime wage and sick pay at regular rate claim to be **$24,628.10**; the risk-inclusive exposure (90% discount) for the unpaid

[4] Following the Preliminary Approval Order, ILYM Group, Inc. processed the Class Data and determined there are 1,922 Class Members who cumulatively worked 187,743 workweeks; and that there are 1,442 Aggrieved Employees who cumulatively worked 106,506 pay periods. (ILYM Group Decl., ¶¶ 5, 13–14.) This means that between when the Parties prepared for the September 22, 2022 mediation and the date of Preliminary Approval (February 22, 2023)—a time lapse of over five months—the Class size and total workweek count only increased by 116 and 17,512, respectively; and that the PAGA group size and total pay period counts only increased by 310 and 16,569, respectively. This increase is reasonable in light of the time lapse between mediation and preliminary approval and the large-scale nature of Defendants' operations.

wages due to off-the-clock work to be **$492,758.90**; the risk-inclusive exposure (90% discount) for unreimbursed business expenses to be **$106,477.50**; the risk-inclusive exposure (90% discount) for meal period violations to be **$923,801.60**; the risk-inclusive exposure (95% discount) for the rest break violations to be **$1,042,525.30**; the risk-inclusive exposure (95% discount) for the wage statement violation claim to be **$443,540.00**; the risk-inclusive exposure (95% discount) for the waiting time penalty claim to be $349**,548.85**; and the risk-inclusive exposure (95% discount) for the PAGA penalties claim to be **$449,685.00**. (*Id.*; *see also id.* at ¶¶ 20–25.)

Using these figures, **Plaintiffs predicted the realistic maximum recovery for all claims, including penalties, to be $3,832,965.25.** (*Id.* at ¶ 26.) **This means that the $3,513,906.42 gross settlement figure represents approximately 91.68% of the realistic maximum recovery.**[5] (*Id.*) This is an excellent result for the Class. Indeed, because of the proposed Settlement Agreement, Class Members will receive timely, guaranteed relief and will avoid the risk of an unfavorable judgment. (*Id.*) **The Net Settlement Amount** currently available for Settlement Payments to Participating Class Members and PAGA Employees **is estimated to be $2,158,320.95**.[6] The Settlement Administrator has reviewed the Class Data and determined there are **1,922 Class Members** who cumulatively worked **187,743 workweeks**, and **1,442 PAGA Employees** who cumulatively worked **106,506 pay periods**. (ILYM Group Decl., ¶¶ 5, 13–14.) As a result, **each Participating Settlement Class Member** is eligible to receive **an average benefit of approximately $1,103.44**, subject to wage-related tax withholdings, and **each PAGA Employee** is eligible to receive **an average benefit of approximately $19.51**. (*Id.*

[5] At the time of Plaintiffs' Motion for Preliminary Approval of Class Action Settlement, it was represented to the Court that the initial 3,500,000.00 GSA constituted approximately 91.31% of the $3,832,965.25 amount for Plaintiffs' realistic maximum recovery. In other words, the value of the settlement in comparison to the realistic maximum recovery has increased since the Court found it fair and reasonable to preliminarily approve the Settlement Agreement at issue.

[6] The Net Settlement Amount (the "NSA") is $3,513,906.42 minus: $30,000.00 for class representative service payments, $22,906.04 in settlement administration costs, $112,500.00 for the PAGA portion to the LWDA, $1,166,667.00 for attorneys' fees, and $23,512.43 for litigation costs. (ILYM Group Decl., ¶ 14.) From the NSA, $37,500.00 shall be distributed to the PAGA Employees and the remaining $2,120,820.95 shall be distributed to Participating Class Members. (*Id.*)

at ¶ 14.) Considering Class Members' average hourly rate is $24.38, the **average Class benefit is approximately 45.26 hours of work**. (Moon Decl., ¶ 31.) The percentage of liability exposure recovered in this case exceeds percentages routinely approved by courts. (*See, e.g.*, *Viceral v. Mistras Grp., Inc*. (N.D. Cal. Oct. 11, 2016, No. 15-cv-02198-EMC) 2016 WL 5907869, *7–8 [approving wage and hour class action settlement amounting to 8.1% of potential damages]); *Dunleavy v. Nadler* (9th Cir. 2000) 213 F.3d 454, 459 [approving settlement which represented "roughly one-sixth of the potential recovery"].) Given the litigation risks involved, the proposed Settlement is well within the realm of being fair, reasonable, and adequate.

Among those matters considered during the course of settlement negotiations were the strength of Plaintiffs' case versus the amounts offered in settlement; the risks, expenses, and length of further litigation, including class certification and the appeals process; the present state of the law as it applies to wage-and-hour class actions; the present value of a settlement versus the long wait necessitated by any potential judgment in Class Members' favor; the burdens of proof necessary to establish liability against Defendants; and Defendants' defenses to the action. (Moon Decl., ¶¶ 8, 20–30.) These factors each indicated that the interests of Class Members are best served by a settlement of this action in the manner and upon the terms set forth in the Settlement Agreement.

The Settlement Agreement confers a gross benefit on the Class of $3,513,906.42. (Settlement Agreement, ¶¶ 38(b), (c); ILYM Group Decl., ¶ 14.) Moreover, the amounts to Class Members and PAGA Employees will vary based on the duration of employment during the Class Period. (Settlement Agreement, ¶¶ 38(h)–(i).) Thus, Class Members and PAGA Employees who worked longer for Defendants during the Class Period will receive a benefit greater than the average amount. (Moon Decl., ¶ 31.)

B. <u>The Settlement Reflects a Reasonable Compromise</u>

The Gross 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. (*Id.* at ¶ 26.) The Settlement, of course, reflects a compromise—the amount of settlement benefits takes into account all the litigation risks related to obtaining class certification, proving Defendants' liability, and proving Class Members' damages. (*Id.* at ¶¶ 18–32.)

In light of all the defenses asserted by Defendants which posed substantial litigation risks, a compromise effectively awarding Class Members a significant percentage of the realistic maximum value of their claims is eminently fair and reasonable. **The $3,513,906.42 gross settlement amount represents approximately 91.68% of the $3,832,965.25 realistic maximum recovery for Class Members.** (*Id.* at ¶ 26.) 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* Hilary Hehman, Findings of the Study of California Class Action Litigation, 2000-2006, at C11 (March 2009), *available at* https://www.courts.ca.gov/documents/class-action-lit-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.

To be sure, Defendants ultimately must pay less under the Settlement than they would have had to pay if Plaintiffs had achieved a judgment through trial. But 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 Serv. Comm'n of City & Cty. of S.F.* (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.*)

C. Plaintiffs' Counsel Have Substantial Class Action Experience

Class Counsel have considerable experience and have demonstrated competence with litigating wage and hour class actions. (Moon Decl., ¶¶ 37–54; Marquez Decl., ¶¶ 21–31.) Class Counsel have substantial experience in all facets of litigation in state and federal court, including discovery, law and motion, trial, appeals, arbitration, and mediation. (Moon Decl., ¶¶ 37–54; Marquez Decl., ¶¶ 21–31.) Class Counsel have 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. (Moon Decl., ¶¶ 37–54; Marquez Decl., ¶¶ 21–31.)

Based on Class Counsel's experience as employment and class action attorneys, Class Counsel are eminently qualified to evaluate the strength of Plaintiffs' claims, the strength of Defendants' defenses against certification and on the merits, and the fairness of the proposed Settlement Agreement. (Moon Decl., ¶ 55; Marquez Decl., ¶ 2.) Class Counsel's opinion that final approval of the proposed Settlement Agreement, which was reached after private mediation with professional neutral mediator Mark Rudy, is in the best interests of Class Members in light of the significant risks of litigation is entitled to great weight. (*See Kullar*, *supra*, 168 Cal.App.4th at p. 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. **The Response to the Settlement is Overwhelmingly Positive**

The deadline to opt-out from or submit a written objection to the proposed Settlement was May 29, 2023. (ILYM Group Decl., ¶¶ 11–12.) According to the Settlement Administrator, no written objections or opt-out requests were received. (*Id.*) Further, the Settlement Administrator had employed reasonable methods to ensure the majority of the total 1,922 Class Members—whose identifies were known—received the Notice Packet by processing their addresses that were on file in Defendants' employment records against a National Change of Address ("NCOA") database maintained by the U.S. Postal Service, for purposes of updating and confirming their mailing addresses. (*Id.* at ¶¶ 5–6.) To the extent an updated address was found in the NCOA database, the updated address was used for the mailing the Class Notice. (*Id.* at ¶ 6) To the extent no updated address was found in the NCOA database, the original address provided by Defendants was used for the mailing. (*Id.*) Of the 1,922 Notice Packets mailed out, 64 were returned as undeliverable, 2 of which included a forwarding address and were promptly re-mailed to the forwarding addresses provided. (*Id.* at ¶ 8.) As to the remaining 62 undeliverable Notice Packets, the Settlement Administrator performed a computerized skip trace in an effort to obtain updated addresses for the purpose of re-mailing those Notice Packets. (*Id.*) As a result of this skip trace, 38 updated addresses were obtained and the Notice Packets were promptly re-mailed to those Class Members, via U.S. First Class Mail. (*Id.*) Thus, out of a total of 1,922, only 24 Notices Packets were ultimately deemed undeliverable despite reasonable methods to locate current addresses. (*Id.* at ¶ 10.) Thus, out of a total Settlement Class size of 1,922, the there is an overwhelmingly positive response from the entire Class, which strongly supports final approval of the Settlement. (*See, e.g.*, *In re Lifelock, Inc. Mktg. & Sales Practices Litig.* (D. Ariz. Aug. 31, 2010, No. 08–1977–MHM) 2010 WL 3715138, *6 [finding relatively few objections and requests for exclusion support approval of proposed settlement].)

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. (ILYM Group Decl., ¶¶ 11–13.) Courts have approved class action settlements in lesser circumstances. (*See, e.g.*, *Hughes v. Microsoft Corp.* (W.D. Wash. March 26, 2001, No. C98–1646C, C93–0178C) 2001 WL 34089697, *8 [finding "class members overwhelmingly support[ed] the settlement" where over 37,000 notices were sent out, 2,745 class members participated in the settlement, 9 objections were submitted, and there were 68 timely opt-outs (less than 1%) and over 20 additional defective or untimely opt-outs, and that "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 1011, 1027 [despite vigorous objections and appeal by objectors, considering "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, 100% of the total 1,922 Class Members remain in the Settlement Class. (ILYM Group Decl., ¶ 13.) Because there were minimal issues with mailing Notice Packets to Class Members and the large majority received notice, and no written objections or requests for exclusion were received, the Court should find there is overwhelming support for the proposed Settlement by the Class.

IV. THE COURT SHOULD AWARD THE REQUESTED AMOUNTS OF ATTORNEYS' FEES, COSTS, AND SERVICE PAYMENTS

Under the proposed Settlement Agreement, subject to the Court's approval, Defendants agree to pay Class Counsel their reasonable attorneys' fees in an amount of up to $1,116,667.00, which is less than one-third of the Gross Settlement Amount, and up to $25,000.00 for actual litigation costs. (Settlement Agreement, ¶¶ 38(f), (l).) At this time, Class Counsel have cumulatively incurred $23,512.43 in actual costs.[7] In addition, Defendants agree not to oppose the payment of Settlement Administration Costs of up to $30,000.00 and Class Representative Service Payments of up to $10,000.00 to each Plaintiff from the Gross Settlement Amount. (*Id.* at ¶¶ 38(m), (o).) Settlement Administration Costs have been billed for $22,906.04, and Plaintiffs hereby request a service payment in the amount of $10,000.00 to each for their time and effort, exposure to substantial risk in bringing and presenting the action, and for their general release of claims, known and unknown, and waiver of section 1542 rights. (*Id.* at ¶ 38(m); Moon Decl., ¶¶ 14, 16, Exh. 5.) The foregoing attorneys' fees, costs, and service payments were disclosed to Class Members in the Notice Packets. (ILYM Group Decl., ¶ 7, 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 Comp., Inc.* (2001) 91 Cal.App.4th 224, 234–35.) "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 W., Inc.* (9th Cir. 1977) 557 F.2d 759, 769.)

A. Class Counsel Request an Award of Fees Based on the "Common Fund" Method

California courts have long awarded attorneys' fees as a percentage of the benefit created by counsel in pursuing claims on behalf of a class. (*See, e.g.*, *Serrano v. Priest* (1977) 20 Cal.3d 25.) The

[7] At this time, M&Y has incurred $20,190.25 in expenses litigating this action and the WLF has incurred $3,322.18. (Moon Decl., ¶ 15, Exh. 4; Marquez Decl., ¶ 20, Exh. A.) Pursuant to a joint prosecution and fee-sharing agreement between the two Class Counsel law firms and consented to in a signed writing by Plaintiffs (the "JPA"), the firms will be reimbursed in full to the extent possible for their respective costs actually incurred; however, should the amount awarded for costs not be sufficient to fully reimburse either law firm, the award shall be distributed among the firms, with 75% going to M&Y office and 25% to the WLF. (Moon Decl., ¶ 57.)

California Supreme Court has held, "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, such plaintiff or plaintiffs may be awarded attorney's fees out of the fund." (*Id.* at p. 34.)

Class Counsel seek an award of attorneys' fees on the "percentage of recovery/common fund" theory. The purpose of this approach is to "spread litigation costs proportionately among all the beneficiaries so that the active beneficiary does not bear the entire burden alone." (*Vincent*, *supra*, 557 F.2d at p. 769.) In *Quinn v. State of Cal.* (1975) 15 Cal.3d 162, the California Supreme Court stated, "one who expends attorneys' fees in winning a suit which creates a fund from which others derive benefits, may require those passive beneficiaries to bear a fair share of the litigation costs." (*Id.* at p. 167.) Similarly, 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 pp. 110–11 [pincite omitted].) The reasons for applying the common fund doctrine 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; 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 and directly compensated should his efforts be successful.

(*Id.* at p. 111.)

Several courts have expressed frustration with the alternative "lodestar" approach for deciding fee awards, which 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* and *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.

(*Id.* at p. 1375 [emphasis added].) The percentage approach is preferable to the lodestar because: (1) it aligns the interests of class counsel and absent class members; (2) it encourages efficient resolution of the litigation by providing an incentive for early, yet reasonable, settlement; and (3) it reduces the demands on judicial resources. (*Id*. at pp. 1378–79.) California Courts now routinely use the percentage of the common fund approach to determine the award of attorney's fees. (*See*, *e.g.*, *In re Pac. Enter. Sec. Litig.* (2nd Cir. 1995) 47 F.3d 373, 378–79 [approving attorneys' fee award of 33%].)

1. The Requested Fee Award Is in Line with Typical Cases

According to a leading treatise on class actions: "No 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." (Newberg, Newberg on Class Actions (3rd ed. 1992) § 14.03.) Attorneys' fees that are 50% of the fund are typically considered the upper limit, with 30–40% commonly awarded in cases where the settlement is relatively small. (*Id.*; *see also Van Vranken v. Atlantic Richfield Co.* (N.D. Cal. 1995) 901 F.Supp. 294, 297 [stating that most cases where 30–50% was awarded involved "smaller" settlement funds of under $10 million].)

Here, Plaintiffs requests attorneys' fees less than one-third of the Gross Settlement Amount, which is in line with the prevailing guidelines established under California case law and in academic literature and is consistent with awards in California. (*See Chavez v. Netflix, Inc.* (2008) 162 Cal.App.4th 43, 66, n.11 ["Empirical studies show that, regardless whether the percentage method or the lodestar method is used, fee awards in class actions average around one-third of the recovery."].) Pursuant to Class Counsel's JPA, the firms will split the award for attorneys' fees, with 75% going to M&Y and 25% going to the WLF, regardless of the amount awarded or whether the award is based on a common fund or lodestar analysis. (Moon Decl., ¶ 57.) Accordingly, of the total $1,166,667.00 award requested for attorneys' fees, M&Y seeks $875,000.25 and the WLF seeks $291,666.75. (*Id.* at ¶ 58; Marquez Decl., ¶ 10.) Plaintiffs respectfully request that the Court approve the attorneys' fees payment as negotiated by the Parties and requested herein.

2. This Matter Involves a "Fee-Shifting" Provision of the Labor Code

Labor Code sections 218.5, 226, 1194, 2699, and 2802 provide for the recovery of reasonable fees and costs of suit, for the claims made in this action. (Lab. Code §§ 218.5, 226, 1194, 2699(g)(1), 2802(d).) Under these sections, Plaintiffs would be permitted to recover his actual attorneys' fees, even if those fees were larger than the total class recovery at the conclusion of this case. (*Id.*) This Settlement is beneficial in that it limits the risk of continued expenses and consumption of time, energy, and resources facing Defendants while at the same time rewarding Class Counsel for their decision to assume risk by taking on this matter. (Moon Decl., ¶¶ 26–30.) In fact, prosecution of this action involved significant financial risk for Class Counsel. (*Id.* at ¶¶ 59–67; Marquez Decl., ¶¶ 12–20.) Class Counsel undertook this matter solely on a contingent basis, with no guarantee of recovery. (Moon Decl., ¶¶ 62–67; Marquez Decl., ¶ 16.) Once Class Counsel undertook this litigation on behalf of the Class, they committed to pursue it to its conclusion, placing its fiduciary duty to the Class ahead of all other concerns.

3. The Experience, Reputation, and Ability of Class Counsel Support the Requested Fee Award

As demonstrated by their past experience in pursuing class actions on behalf of consumers and employees, Class Counsel possess considerable expertise in litigating class actions. (Moon Decl., ¶¶ 37–55; Marquez Decl., ¶¶ 21–31.) Class Counsel have been involved as lead counsel or co-counsel in several class actions that resulted in millions in recovery. (Moon Decl., ¶¶ 37–55; Marquez Decl., ¶¶ 37–55.) Because it is reasonable to compensate Class Counsel commensurate with their skill, reputation, and experience, Class Counsel's requested fee award is supported here.

Class Counsel's experience in wage and hour class actions was integral in evaluating the strengths and weaknesses of the case against Defendant and the reasonableness of the proposed Settlement. (Moon Decl., ¶ 55; Marquez Decl., ¶ 2.) Practice in the narrow field of wage and hour litigation requires skill and knowledge concerning the rapidly evolving substantive law (state and federal), as well as the procedural law of class action litigation. Based on these and other factors, Class Counsel have frequently received fee awards of this percentage from the gross recovery for the class. (*See, e.g.*, Moon Decl., ¶¶ 40, 43, 44, 48, 52; Marquez Decl., ¶¶ 21–31.) Therefore, the requested fee award is reasonable and fair.

B. <u>While the Lodestar Method Is Not Necessary in Common Fund Cases, Courts May Perform a Cross-Check to Award Fees</u>

"Despite its primacy, the lodestar method is not necessarily utilized in common fund cases."

(*Lealao v. Beneficial Cal., 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 produce[s] 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.* [quoting Third Circuit Task Force, *Court Awarded Attorney Fees* (1985) 108 F.R.D. 237, 246–49].)

Although California Courts support 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 [quoting *Lealao*, *supra*, 82 Cal.App.4th at pp. 49–50].)

Applying the lodestar method is a two-step process. The first step is to multiply the number of hours reasonably expended by a reasonable hourly rate, and the second step is to apply a multiplier to the lodestar to account for various factors. (*Id.* at p. 556.) "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*.) "Under certain circumstances, a lodestar calculation may be enhanced on the basis of a percentage-of-the-benefit analysis." (*Id*. at pp. 556–57.) Further, "California case law permits fee awards in the absence of detailed time sheets." (*Wershba*, *supra*, 91 Cal.App.4th at p. 255.)

Here, M&Y's current lodestar is no less than $196,857.50, which is based on approximately 370 hours of attorney time at their customary hourly rates. (Moon Decl., ¶ 59.) The WLF's current lodestar is no less than $110,420.00, which is based on approximately 174.8 hours of attorney time at their customary hourly rates. (Marquez Decl., ¶ 12.) Additionally, Class Counsel estimate they will together devote a minimum of 20 additional each to this litigation that are not reflected in the foregoing lodestar, including time to obtain and monitor final approval of the Settlement and requested awards, oversee the settlement administration process and distribution of funds, respond to Class Member inquiries, and communicate with Plaintiffs regarding the case. (Moon Decl., ¶ 60; Marquez Decl., ¶ 17.) In comparison to the requested amount of $875,000.25 to M&Y for attorneys' fees, its lodestar represents a positive multiplier of 4.4. (Moon Decl., ¶ 62.) In comparison to the requested amount of $291,666.75 to the WLF for attorneys' fees, its lodestar represents a positive multiplier of 2.6. (Marquez Decl., ¶ 12.) Applying these multipliers here to the respective Class Counsel firms is reasonable and appropriate based on the contingent risk that Class Counsel incurred, the difficulty of the questions involved, the substantial benefit conferred on the Class and State of California as a result of the proposed Settlement Agreement, and the skill displayed by Class Counsel. (Moon Decl., ¶ 62; Marquez Decl., ¶¶ 15–20) Accordingly, Plaintiffs' total request for $1,166,667.00 in attorneys' fees is reasonable under the lodestar method.

C. <u>Class Counsel's Costs Are Reasonable</u>

Class Counsel are entitled to recover the out-of-pocket costs and litigation expenses they reasonably incurred in investigating, prosecuting, and settling this case. (*Staton v. Boeing Co.* (9th Cir. 2003) 327 F.3d 938, 974.) Accordingly, the proposed Settlement Agreement provides for reimbursement of costs up to $25,000.00. (Settlement Agreement, ¶ 38(l).) As of the drafting of this motion, Class Counsel seek reimbursement of actual costs in the cumulative amount of $23,512.43. (Moon Decl., ¶ 15, Exh. 4; Marquez Decl., ¶ 20, Exh. A.) These costs were reasonably and actually incurred in prosecuting this action on behalf of the Class, are below the maximum allocation under the Settlement Agreement, and thus should be reimbursed in full. (Moon Decl., ¶¶ 15, 66; Marquez Decl., ¶ 20.)

D. <u>The Court Should Award Plaintiffs the Requested Service Payments</u>

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." (*Munoz*, *supra*, 86 Cal.App.4th at p. 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 awards are particularly important to plaintiffs in wage and hour cases because they promote the important public policies underlying the wage-and-hour laws. This strong policy is codified in California Labor Code section 90.5, which provides that "[i]t is the policy of this state to vigorously enforce minimum labor standards in order to ensure employees are not required or permitted to work under substandard unlawful conditions . . ." (Lab. Code § 90.5.) Nonetheless, the California Supreme Court has noted 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 Agreement here, subject to the Court's approval, Defendants agree to pay Service Payments in the amount of $10,000.00 to each Plaintiff. (Settlement Agreement, ¶ 38(m).) Class Counsel represent that Plaintiffs have devoted a great deal of time and work assisting counsel in the case and communicated with counsel very frequently for litigation and to prepare for mediation. (Moon Decl., ¶¶ 33–36; Marquez Decl., ¶ 4.) The requested amounts are reasonable, particularly in light of the substantial benefits Plaintiffs generated for all Class Members. (Moon Decl., ¶¶ 31–36; Marquez Decl., ¶¶ 3–9.)

Indeed, when compared with the amounts awarded in typical class action cases, the amounts requested here are 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 $4357." (Eisenberg & Miller, *Incentive Awards to Class Action Plaintiffs: An Empirical Study* (2006) 53 UCLA L. Rev. 1303, 1307–08.) The 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. 1333.) 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.)

V. <u>**THE SETTLEMENT DOES NOT INVOKE CODE OF CIVIL PROCEDURE SECTION 384**</u>

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

> 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 nonprofit 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 nonprofit organizations providing civil legal services to the indigent.

(Civ. Proc. Code § 384(b).)

Here, the Settlement Agreement provides that after one-hundred and eighty (180) calendar days from the date of mailing, the Class Members' checks shall become null and void, and any monies remaining in the distribution account shall be distributed by the Settlement

Administrator to the State of California's Unclaimed Property Fund in the names of the Settlement Class Members and/or PAGA Employees who failed to cash their checks. (Settlement Agreement, ¶¶ 46–47.) Accordingly, this disposition results in no "unpaid residue" under Civil Procedure Code section 384, as the entire Net Settlement Amount will be paid out to Class Members, whether or not they all cash their Settlement Payment Checks. (*Id.*) The Settlement Agreement allows Class Members who do not receive or cash their check, for whatever reason, to obtain those funds at a later time. (*Id.*) This is further support for granting Final Approval of the Settlement Agreement.

VI. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request the Court grant Final Approval of the proposed Settlement Agreement.

Respectfully submitted,

Dated: June 16, 2023

MOON & YANG, APC

By: ______________________________

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Dated: June 16, 2023

WILSHIRE LAW FIRM

By: */s/Christina M. Le*

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PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss
COUNTY OF LOS ANGELES)

I am employed in the county of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 1055 West Seventh Street, Suite 1880, Los Angeles, California 90017. On June 16, 2023, I served the foregoing document described as:

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

X by placing ___ the original X a true copy thereof enclosed in sealed envelope(s) addressed as follows:

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[✓] **BY U.S. MAIL:** I deposited such envelope in the mail at Los Angeles, California. The envelope was mailed with postage thereon fully prepaid. I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

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

Executed on June 16, 2023, at Los Angeles, California.

Ximena Reyes	*/S/ Ximena Reyes*
Name	Signature