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SUPERIOR COURT FOR THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

CHARLES SAN NICOLAS, an individual, NATHAN KLIPFEL, an individual, on behalf of themselves, in their representative capacity on behalf of the State of California, and on behalf of all persons similarly situated,

Plaintiffs,

vs.

WEST COVINA CORPORATE FITNESS, INC., et al,

Defendants.

CASE NO.: BC616304 [consolidated with CASE NO.. BC665577; related to CASE NOS. 20STCV07368 and 20STCV27502)

[Complaint filed April 8, 2016; before Honorable Stuart M. Rice, Dept. SS-1]

NOTICE OF MOTION AND MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT, ATTORNEY FEE AWARD, COST AWARD, AND CLASS REPRESENTATIVE ENHANCEMENT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

***Filed Concurrently Herewith*:**
1. Declaration of Scott Vick
2. Declaration of Kyle R. Nordrehaug
3. [Proposed] Order
4. [Proposed] Judgment

Date: September 6, 2022
Time: 10:30 a.m.
Dept.: SS-1

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

PLEASE TAKE NOTICE that on September 6, 2022, at 10:30 a.m. or as soon thereafter as counsel can be heard before the Honorable Stuart M. Rice, in Department SS-1 of the above-entitled court located at 312 N. Spring Street, Los Angeles, California 90012, Plaintiff Charles San Nicolas ("San Nicolas"), Plaintiff David Price ("Price), Plaintiff David Contreras ("Contreras"), and Plaintiff Nathan Klipfel ("Klipfel") (collectively, "Plaintiffs") will move for an order granting final approval of the proposed class action settlement on the terms and conditions set forth in the Stipulation of Class Action Settlement and Release of Claims ("Settlement Agreement") between Plaintiffs and Defendants Gym Management Services, Inc., Gold's Gym SoCal aka Gold's Gym SoCal Group, Angel Banos, William Banos, West Covina Corporate Fitness, Inc., Muscle Head, Inc., Muscle Bound, Inc., LA Corporate Fitness, Inc., Thousand Oaks Corporate Fitness, Inc., Simi Valley Corporate Fitness, Inc., Culver City Corporate Fitness, Inc., Fullerton Corporate Fitness, Inc., Valencia Corporate Fitness, Inc., Santa Anita Corporate Fitness, Inc., Montclair Corporate Fitness, Inc., Santa Barbara Corporate Fitness, Inc., Anaheim Corporate Fitness, Inc., Glendale Corporate Fitness, Inc., Santa Ana Corporate Fitness, Inc., and Gym Management Services, Inc. (collectively, "Defendants"). A copy of the Settlement Agreement is attached as **Exhibit A** to the Declaration of Scott Vick. Plaintiffs will further move that the Order:

1. Finally confirm the certification of the Settlement Class for settlement purposes only;

2. Finally confirm the appointment of Plaintiffs San Nicolas and Klipfel as Class Representatives as Class Representatives for settlement purposes;

3. Finally confirm the appointment of Scott Vick of Vick Law Group, APC and Kyle R. Nordrehaug of Blumenthal Nordrehaug Bhowmik De Blouw, LLP as Class Counsel for settlement purposes;

4. Finally confirm the appointment of CPT Group, Inc. ("CPT") as the Parties' Settlement Administrator;

5. Grant final approval of the Settlement Agreement;

6. Approve an award of $380,000 in attorneys' fees to Class Counsel (two-thirds of the award shall be payable to Vick Law Group, APC ("VLG"), and the remaining one-third of the award shall be payable as seventy-five percent to Blumenthal Nordrehaug Bhowmik De Blouw LLP ("Blumenthal") and twenty-five percent payable to the Law Offices of Mauro Fiore, Jr., A.P.C.;

7. Approve an award of $23,792.48 in actual and reasonable litigation costs to VLG;

8. Approve an award of $11,000 in actual and reasonable litigation costs to Blumenthal;

9. Approve an award of $10,000 to each of the Plaintiffs as a Class Representative Enhancement Payment;

10. Approve payment of settlement administration costs to CPT of $35,000 as authorized under the Settlement Agreement and preliminarily approved by order of the Court dated June 8, 2022;

11. Approve an award of $80,000 for civil penalties under the Private Attorney General Act of 2004 ("PAGA"), $60,000 of which will be paid to the California Labor and Workforce Development Agency ("LWDA");

12. Direct CPT to distribute the following from the Settlement Fund: the sum of the Individual Settlement Payments, the Class Representative Enhancements, the Class Counsel Awards, the Settlement Administration Costs, the civil penalties under PAGA to the LWDA, and any payroll taxes (including both the employers' and the employees' share);

13. Enter final judgment in the form of the [Proposed] Order Granting Plaintiffs' Motion for Final Approval of Class Action Settlement, Attorney Fee Award, Cost Award, and Class Representative Enhancement and the [Proposed] Judgment submitted herewith.

This Motion is made on the following grounds: (1) the Settlement Class continues to meet all the requirements for class certification for settlement purposes under Code of Civil Procedure section 382; (2) Plaintiffs and Class Counsel continue to be adequate to represent the

Settlement Class; (3) the terms of the Settlement are fair, adequate and reasonable; and (4) the requested awards of attorneys' fees and costs, enhancement payment, LWDA payment for its share of PAGA penalties, and settlement administration costs are all fair, adequate, and reasonable; and (5) in light of the foregoing, the [Proposed] Judgment and [Proposed] Order submitted concurrently herewith should be entered so as to give finality to, and allow for disbursements from, the Settlement.

Good cause exists for the granting of this Motion as the proposed Settlement is fair, adequate and reasonable. Plaintiffs' Motion for Final Approval of this $1,000,000 common fund class action settlement should be granted. The recovery for the class members represents a substantial portion of the realistic defense exposure in this case. As a clear validation of the reasonableness of this Class Settlement, as of the filing of this Motion, **no Class Member has submitted an objection** and only one (1) person has decided to opt out. (Declaration of Scott Vick ¶ 68, Ex. B).

This Motion is based upon this Notice and Motion, the Memorandum of Points and Authorities attached hereto, the Declarations of Scott Vick and Kyle R. Nordrehaug filed herewith, the exhibits attached thereto, the Declarations of Nathan Klipfel, Charles San Nicolas, David Price, and Peter Contreras filed in support of the Motion for Preliminary Approval of Class Action Settlement, all other pleadings and papers on file in this action, the Declaration of CPT Group, Inc. Regarding Notice and Settlement Administration (which is to be filed on or about August 29, 2022), and any oral argument or other matter that may be considered by the Court.

DATED: August 5, 2022 VICK LAW GROUP, APC

By */s/Scott Vick*
SCOTT VICK
Attorneys for Plaintiff
NATHAN KLIPFEL

DATED: August 5, 2022

BLUMENTHAL NORDREHAUG BHOWMIK DE BLOUW LLP

By */s/ Kyle Nordrehaug*
KYLE R. NORDREHAUG
Attorneys for Plaintiff
CHARLES SAN NICOLAS

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Plaintiffs seek final approval of a $1 million, non-reversionary, checks-mailed class action settlement of wage and hour and PAGA claims against Defendants. This Memorandum of Points and Authorities, filed together with the supporting papers, presents the terms of the amended Stipulation of Class Action Settlement and Release of Claims ("Settlement Agreement") together with an analysis pursuant to *Kullar v. Foot Locker Retail*, 168 Cal. App. 4th 116 (2008).

I. INTRODUCTION AND SUMMARY OF THE CASE

Gold's Gym is one of the world's most iconic brands.

"Gold's Gym SoCal" is a Gold's Gym franchisee in Southern California that operates a litany of gyms that stretch from Santa Barbara in the north, down to Orange County in the south, and east into the inland empire. While the gym's storefront signs and other paraphernalia referred to the gyms under the "Gold's Gym" banner, the titular employer – the company that issued paychecks to employees – at each of the gyms was always different – ranging from "Muscle Head, Inc." to "x" city "Corporate Fitness, Inc." The Defendants' intent in developing this corporate web was to localize liability for Labor Code violations to an individual gym, and to protect the overall enterprise from enterprise liability. For many years, it worked.

Previously, other plaintiffs had sued one of the Defendants here, or there, under PAGA for Labor Code violations – but the liability (and settlement) always stayed siloed at that single gym. Those small cases and settlements did nothing to halt or deter Defendants' ongoing Labor Code violations on an enterprise level. Until now.

This is the first case where Plaintiffs put together the evidence showing that Gold's Gym SoCal and its confusing web of interlinked individual gyms operated as one single enterprise and was an is an "employer" for all of the non-exempt employees at all of the gyms (no matter what corporation actually issues the employees a paycheck).

* * *

This putative class action asserts eleven (11) causes of action arising from a litany of Labor Code violations variously against twenty (20) separate defendants operating as a common enterprise called "Gold's Gym SoCal Group."

Plaintiffs seek this Court's final approval of a one-million-dollar ($1,000,000.00) settlement covering both Class and PAGA claims.

As to the "Class Action" portion, seek approval of a settlement class of current and former employees of Defendants from May 31, 2016 to November 15, 2021, which consists of approximately 4,514 class members, of which 1,007 were (or are) personal trainers. At issue are an estimated 109,797 pay periods, 589,665 meal breaks, and 786,645 rest periods. Class members will be able to opt out.

This settlement also settles a PAGA claim involving "aggrieved employees" from April 8, 2015 to November 15, 2021, which consists of approximately 5,080 current or former employees. At issue are an estimated 114,727 pay periods, 614,125 meal breaks, and 822,393 rest breaks. The PAGA Settlement is $80,000 of the $1,000,000. Aggrieved employees will not be able to opt out of the PAGA portion of the settlement.

In the settlement context, depending on other factors including defenses, one metric sometimes used to ballpark settlements is the $20-per-payperiod metric. Here, that metric would yield a suggested settlement of $2.3 million. In an ideal world, this case would settle for that amount. But, in the world where all of Defendants' gyms were closed for extended periods of time as a result of Covid, and Defendants' very corporate survival was on the line, the overriding settlement consideration became how much, as a practical matter, could the Defendants actually afford to pay. Another factor in structuring the settlement as a class action settlement, was how to direct more money to the actual employees (who had suffered) and less to the LWDA.

For reasons set forth below, the Court should grant Plaintiffs' Motion in its entirety because: (1) the Settlement Class continues to meet all the requirements for class certification for settlement purposes under Code of Civil Procedure section 382; (2) the terms of the Settlement are fair, adequate and reasonable compromise of the disputed claims in this case; and (3) the

amounts requested for Class Counsel's attorneys' fees and costs, Plaintiffs' enhancement payments, LWDA payment, and settlement administration costs are all fair, adequate, and reasonable. In light of the foregoing, the Court should enter the [Proposed] Judgment and [Proposed] Order Granting Plaintiffs' Motion for Final Approval of Class Action Settlement, Attorney Fee Award, Cost Award, and Class Representative Enhancement submitted concurrently herewith.

II. SUMMARY OF THE LITIGATION AND PROCEDURAL HISTORY

A. The Parties

Defendants Angel and William Banos own the Gold's Gym franchise for Southern California (and Cuba), own and control each of the gyms, and own and control Defendant Gym Management Services ("GMS"), which controlled top-down the employment policies and working conditions of all employees at all of the gyms at issue here, such that they are all joint employers under California law of all non-exempt gym employees at each of the gyms. The evidence in this case (discussed in detail in the Declaration of Scott Vick) is overwhelming.

Plaintiff Charles San Nicolas was non-exempt employee employed as a personal trainer at the Gold's Gym location in West Covina, California (West Covina Corporate Fitness, Inc.) from July of 2014 through November of 2015.

Plaintiff Nathan Klipfel was non-exempt employee employed as a personal trainer at the Gold's Gym facility in Arcadia, California (incorporated as Santa Anita Corporate Fitness, Inc.) from May 16, 2016 until January 18, 2017.

B. Procedural Background and Claims

1. The *San Nicolas Action*

On April 8, 2016, the *San Nicolas Action*, entitled *San Nicolas v. West Covina Corporate Fitness, Inc*., LASC Case No. BC616304), was filed as a class action on behalf of San Nicolas against Defendant West Covina Corporate Fitness, Inc. ("West Covina Fitness"), which operates

as a "Gold's Gym." (Declaration of Kyle Nordrehaug ("Nordrehaug Decl.") ¶ 4). On June 3, 2016, San Nicolas added a PAGA claim. (*Id.*).[1]

On October 21, 2016, Defendants filed a Motion to Compel Arbitration and Dismiss Class Claims. The litigation was stayed pending a Supreme Court ruling in *Morris v. Ernst & Young, LLP*, 834 F.3d 975 (9th Cir. 2016). During the stay, San Nicolas filed a SAC, adding two additional individuals (Peter Contreras and David Price) as plaintiffs. (*Id.* ¶ 7).

On June 22, 2018, Plaintiff David Price and Peter Contreras filed a Demand for Arbitration with the American Arbitration Association entitled *Price v. West Covina Corporate Fitness, Inc.,* AAA Case No. 01-18-0002-4496 and *Contreras v. West Covina Corporate Fitness, Inc.,* AAA Case No. 01-18-0002-4494. This left one plaintiff (San Nicolas) asserting only a PAGA claim in the *San Nicolas Action* against Defendant West Covina Fitness. (*Id.* ¶ 8).

On July 6, 2018, the San Nicolas parties stipulated to lift the 17-month-old stay after the Supreme Court decided the *Morris* case, and the Court dismissed the class action claims and the individual claims of all Plaintiffs. (*Id.* ¶ 9).

2. The *Klipfel Action*

On June 19, 2017, Klipfel filed a PAGA-only action against Santa Anita Corporate Fitness, which also operates as a Gold's Gym, entitled *Klipfel v. Gym Management Services, Inc. et al*., LASC Case No. 665577 (Judge Michael P. Linfield, Dept. 34) (the "*Klipfel Action*"). (Declaration of Scott Vick "Vick Decl." ¶ 15).

After filing the initial complaint, Klipfel's counsel conducted investigation focused on whether all of the separate Gold's Gyms in Southern California operated as a single enterprise, thereby making that enterprise a joint employer of Klipfel. Thereafter, Klipfel's counsel filed a second PAGA LWDA letter describing the entire alleged enterprise. (Vick Decl. ¶ 16, Ex. E).

This was important because, while individual Gold's Gym locations (each separately incorporated) were occasionally sued for PAGA claims, those lawsuits were on a gym-by-gym basis, rather than on an enterprise basis. (*See, e.g.*, *Steven Jones v. Simi Valley Corporate*

[1] In the PAGA claim, Plaintiff San Nicolas asserted violations of Labor Code §§ 201, 202, 203, 204, 226(a), 226.7, 510, 512, 1194, 1198, 2802 and the Applicable Wage Order.

Fitness, LASC Case No. BC 610048) (single gym settlement). No other lawyers had asserted claims against the entire enterprise (as an unincorporated association), which controlled from the top down, the employment policy and conditions at each of the gyms. (*Id.* ¶17).

In November 2017, after filing the second LWDA letter, Klipfel filed a FAC which added 12 corporate defendants (12 of which own 16 gyms), 2 individual owners (Banos Brothers), and an unincorporated association (Gold's Gym SoCal Group) under an enterprise liability theory. On September 17, 2018, Plaintiff Klipfel filed a SAC ("Klipfel SAC"), adding allegations additional Labor Code violations. (*Id.* ¶ 18).

For fourteen months, (between November 2017 and January 2019), the principal, hotly contested issues in the *Klipfel Action* centered on enterprise liability and the individual liability of the Banos Brothers under Labor Code § 558.1. (*Id.* ¶ 19).

For over a year, Klipfel propounded written discovery variously to the numerous separate defendants and eight (8) third party subpoenas were served. Klipfel also took the deposition of the head of Human Resources, and was weeks away from taking dozens more depositions scheduled to take place when Klipfel first learned of the *San Nicolas Action*. (*Id.* ¶ 20).

One of the reasons that the attorneys' fees sought in this motion are higher than a typical 33% is that throughout the *Klipfel Action*, Defendants aggressively fought discovery, necessitating numerous meet-and-confer sessions (***31 of them***), informal discovery conferences with Judge Michael Linfield (***5 of them***), and ***8 motions*** to compel by Plaintiff. Discovery alone in the *Klipfel Action* consumed at least 562.85 hours, and the docket sheet ran 40 pages by the time it was deemed related to the *San Nicolas Action* and transferred to this Court. (*Id.* ¶ 21).

But the intensity of the litigation did not stop there. After Defendants' second demurrer was overruled as to Defendants' contention that Angel and William Banos could not be individually liable under Labor Code § 558.1, Defendants filed a writ before the 2nd DCA. The 2nd DCA requested briefing, and the parties filed 150 pages of substantive briefing and hundreds of pages of exhibits. The writ was ultimately denied. (*Id.* ¶ 31).

3. The LWDA's Role Leading to this Settlement Agreement

On October 3, 2018, unaware of the San Nicolas Action, Plaintiff Nathan Klipfel and the-then 16 Defendants mediated the *Klipfel* action before JAMS mediator Hon. Ronald Sabraw (Ret.) in San Jose, California. With no settlement reached at the end of the day, Judge Sabraw made a mediator's proposal of $1,150,000. Defendants accepted; Plaintiff did not. (*Id.* ¶ 32).

On January 15, 2019, Plaintiff San Nicolas mediated with West Covina Fitness in the *San Nicolas* action before Hon. William C. Pate (Ret.). The San Nicolas Plaintiffs led to a settlement for all claims (for $775,000) that was never approved.[2] (*Id.* ¶ 33).

Shortly thereafter, Klipfel (1) filed a motion to intervene in the San Nicolas Action (which was granted): (2) filed an opposition to the proposed settlement (which was never heard); and (3) urged that the LWDA intervene to investigate oppose the settlement and/or investigate, which would stay the action. (*Id.* ¶ 34).

On April 9, 2019, the LWDA issued a "Notice of Commencement of Investigation" which, during the investigatory period, provided the LWDA exclusive jurisdiction over the PAGA claims and prohibited any of the parties from proceeding with a civil action. (*Id.* ¶ 35).

On August 5, 2019, the LWDA notified the parties that it was extending the time to investigate. Although the LWDA investigation is now closed, during the period it was open, and at the LWDA's suggestion, all of the parties discussed a global resolution. Defendants increased their global settlement offer and Class Counsel, with client consent, have also agreed to a settlement and allocation of settlement proceeds splitting of attorney's fees and costs. (*Id.* ¶ 36).

Although nobody foresaw the Covid pandemic, it turns out that Klipfel's litigation on the Labor Code § 558.1 issue up to the 2nd DCA may have ultimately been critical to reaching a settlement in this consolidated case. It is widely known that during the COVID pandemic, gyms were shut down and suffered financially (*e.g.*, on June 15, 2020, 24 Hour Fitness filed a Chapter 11 Bankruptcy Petition). (*Id.* ¶ 38).

[2] On February 4, 2019, San Nicolas filed and served a Third Amended Complaint in the San Nicolas action pursuant to the terms of their attempted settlement.

Plaintiffs and Class Counsel concluded, after taking into account the sharply disputed factual and legal issues involved in this action, the risks attending further prosecution, and the benefits to be received pursuant to the compromise and settlement of the action as set forth in the Parties' agreement, that settlement on the terms set forth herein is in the best interest of the representative Plaintiffs and the Class Members and is fair and reasonable. (*Id.* ¶ 42).

Following the filing of Plaintiffs' Motion for Preliminary Approval of Class Action Settlement, the Court issued a Checklist for Preliminary Approval, and the Parties subsequently amended the settlement agreement in accordance therewith. (*Id.,* ¶ 43). On March 22, 2022, Plaintiffs filed a supplemental brief in support of their Motion for Preliminary Approval, and on April 11, 2022, the Court preliminarily approved the Parties' Amended Settlement Agreement. (*Id.*, Ex. C (Preliminary Approval Order).

III. SUMMARY OF THE SETTLEMENT TERMS AND NOTICE PROCESS

A. Summary of the Terms of the Amended Settlement

The key terms and conditions set forth in the Settlement Agreement attached to the Vick Declaration as Exhibit "A" are as follows:

1. The Settlement Class. The Settlement Class Members are comprised of all individuals who worked as non-exempt employees for the Corporate Defendants during the "**Class Period**," which runs from May 31, 2016 to November 15, 2021. There are approximately **4,514 class members**, of which there are or were **1,007 personal trainers** during the Class Period. At issue are an estimated 109,797 pay periods, 589,665 meal breaks, and 786,645 rest periods. Class members may opt out of the class portion of the settlement.

2. The PAGA Aggrieved Employees. The Settlement will settle a PAGA claim involving all current or former non-exempt employees of any of the Corporate Defendants who were paid by the hour and/or by session (the "**Aggrieved Employees**") from April 8, 2015 to November 15, 2021, which consists of approximately **5,080 Aggrieved Employees**. At issue are an estimated 114,727 pay periods, 614,125 meal breaks, and 822,393 rest breaks. Aggrieved employees will not be able to opt out of the PAGA portion of the settlement.

3. Settlement Fund. Defendants will pay $1,000,000 as the Settlement Amount. The Settlement Amount is the total amount that Defendants shall be obligated to pay under the Settlement to the Class Members and Aggrieved Employees. The Settlement Amount will pay Class Representative Enhancements, Attorneys' Fees and Litigation Costs, Settlement Administration Costs, payment of the PAGA Claim, and payment of the Net Settlement Amount, which includes payroll taxes.

4. Class Representative Enhancements. Class Representatives (Charles San Nicolas, Nathan Klipfel, David Price, and Peter Contreras) will seek approval from the Court for a payment of $10,000 each for prosecuting the Actions and for the Complete and General Release that they are individually providing to Defendants as part of the Settlement. If awarded by the Court, the Class Representative Payments will be paid out of the Settlement Amount. If less than the requested amount is awarded to Plaintiffs as the Class Representatives Service Payment; the unawarded sum shall be added to the Net Settlement Fund for distribution to the Participating Class Members.

5. Attorneys' Fees. Class Counsel have spent over five years prosecuting the Actions on behalf of the Class, including briefing in the Court of Appeals. In consideration for these unusually extensive efforts, Class Counsel intend to request 38% percent ($380,000) as an award of attorneys' fees for the services the attorneys representing the Plaintiffs in the Action have rendered and will render to the Settlement Class Members and PAGA class members. Two-thirds of any award shall be payable to the Vick Law Group, and the remaining one-third of the award shall be payable as follows: Seventy-five percent (75%) payable to Blumenthal Nordrehaug Bhowmik De Blouw LLP ("Blumenthal"), and Twenty-five percent (25%) of that will payable to the Law Offices of Mauro Fiore, Jr., A.P.C. The payment of the Attorneys' Fees from out of the Settlement will constitute full and complete compensation for all legal fees of all attorneys representing Plaintiffs in the Actions and all work done through the completion of the Actions, whatever date that may be.

6. Litigation Costs: Vick Law Group will request up to $25,000 and Blumenthal shall request up to $11,000 for actual and reasonable litigation costs incurred in the investigation, litigation, and resolution of the Actions. The payment of the Litigation Costs from out of the Settlement Amount will constitute full and complete compensation for all costs and expenses of all attorneys representing Plaintiffs in the Actions.

7. Settlement Administration Costs: Defendant agrees to pay the reasonable costs incurred by the Settlement Administrator in administering the Settlement, as approved by the Court, from the Settlement Fund. Those costs are currently bid by CPT Group for a flat-rate of thirty thousand dollars ($30,000). (*Id.* Ex. A ¶ 64).

8. Payment of PAGA Claim. $80,000 of the Settlement Amount has been allocated to PAGA civil penalties, 75% of which is payable to the California Labor and Workforce Development Agency as required by Labor Code section 2699, and 25% payable on a pro-rata basis to the Aggrieved Employees.

9. Net Settlement Amount. The Net Settlement Amount means the Settlement Amount, less Attorneys' Fees and Litigation Costs, Class Representative Enhancements, PAGA Payment, and Settlement Administration Costs.

10. Payment of Class Claims. The Net Settlement Amount shall be paid to the Participating Class Members (who do not opt-out) as follows:

    a. Twenty-Five Percent (25%) of the Net Settlement Amount shall be paid to the 1,007 members of the Personal Trainer Subclass. The Settlement Administrator will calculate the amount due to each Participating Personal Trainer Class Member by multiplying the appropriate Dollars-

per-Compensable Workweek amount by the number of Compensable Workweeks worked by each Participating Personal Trainer Class Member.

b. Seventy-Five Percent (75%) of the Net Settlement Amount shall be paid to all Participating Class Members based on the total number of Compensable Workweeks for all Participating Class Members, including Personal Trainer Class Members. The Settlement Administrator will calculate the amount due to each Participating Class Member by multiplying the appropriate Dollars-per-Compensable Workweek amount by the number of Compensable Workweeks worked by each Participating Personal Trainer Class Member.

11. Distribution of Settlement. The Class Representative Enhancements, Attorneys' Fees and Litigation Costs, Settlement Administration Costs, PAGA Settlement Amount, and payment of the Net Settlement Amount will be paid 60 days after the Court enters a Final Approval Order and the Judgment if no motions for reconsideration or appeals or other efforts to obtain review have been filed (the "**Effective Date**").

12. Unclaimed Funds. Any unclaimed funds resulting from Settlement Class Members' failure to cash Class Payment checks and/or Individual PAGA Payment checks by the Void Date shall be transmitted by the Settlement Administrator to **Legal Aid at Work**, a nonprofit legal services organization that has been assisting low-income, working families for more than 100 years.

13. **Class Released Claims**. Class Members who do not opt out of the settlement will be unable to sue, continue to sue, or be a part of any other lawsuit against the Released Parties for the "Class Released Claims" in this Settlement.

a. "**Released Parties**" means Defendants, their past or present officers, directors, shareholders, employees, agents, principals, heirs, representatives, accountants, auditors, consultants, insurers and reinsurers, and their respective successors and predecessors in interest, subsidiaries, affiliates, parents and attorneys.

b. "**Class Released Claims**" consist of any and all claims, demands, rights, liabilities, and causes of action that were actually alleged in the Actions, including for violation of California Labor Code Sections 201, 202, 203, 204, 223, 226, 226.3, 226.7, 510, 512, 558, 558.1, 1174, 1174.5, 1194, 1197, 1198, 2698, 2699, 2802, and claims for violations of California Business & Professions Code § 17200 *et seq*., and all claims, demands, rights, liabilities and causes of action that could have been alleged in the Actions based on the facts alleged. The release shall run for the duration of the Class Period.

14. **PAGA Released Claims**. If the Court grants final approval of the settlement, all Aggrieved Employees will receive their share of the PAGA Payment, whether or not they objected to the settlement or opted-out as a class member. However, all Aggrieved Employees will release the PAGA Released Claims, which consist of Labor Code violations that could have been premised on the facts identified in both: (i) the Plaintiffs' underlying PAGA letters to the LWDA; and (ii) the operative complaints (both of which can be provided to you upon request). All Aggrieved Employees shall be deemed to have released their PAGA claims, notwithstanding whether they timely opted out of the class action settlement.

15. **Individual Plaintiffs' Releases**. The four Individual Named Plaintiffs – Charles San Nicolas, Nathan Klipfel, David Price, and Peter Contreras –

> as to themselves only and for no other person, class member, or Aggrieved Employee – shall provide their own individual release to the Defendants. The Individual Released Claims of named Plaintiffs Charles San Nicolas, Nathan Klipfel, David Price, and Peter Contreras shall mean the release of any and all claims, demands, rights, liabilities, and/or causes, of any form whatsoever, whether known or unknown, unforeseen, unanticipated, unsuspected or latent, that have been or could have been asserted by Plaintiffs in their individual capacity, or the heirs, successors, and/or assigns of Plaintiffs against Defendants or any of the other Released Parties, arising at any time prior to entry of the Final Order and Judgment. The four individual named Plaintiffs also expressly waive all rights and benefits under the terms of Section 1542 of the California Civil Code. Section 1542 reads as follows:

B. Summary of Notice Process

On April 9, 2022, the Settlement Administrator, CPT Group, Inc. ("CPT"), was provided with the text for the Class Notice which was approved by the Court on April 11, 2022. (Vick Decl. ¶ 64). On or about April 29, 2022, Defendants provided CPT with the Class Members' names, last known addresses, dates of employment and social security numbers as well as any other information requested by CPT. (Vick Decl. ¶ 65). CPT mailed the Notice Packets on July 11, 2022 to 4,778 Class Members. (Vick Decl. ¶ 66, Ex. B (CPT Weekly Report)). Following the initial mailing 166 Notice Packets were returned. (*Id.* ¶ 67). As a result of a skip trace, a total of 149 Notice Packets were re-mailed. *Id.* Ultimately, eighteen (18) Notice Packets remained undeliverable. *Id.* Settlement Class members have until August 25, 2022 to submit an objection to the Settlement or a request for exclusion from the Settlement and/or to dispute the basis for a Class Member's estimated Individual Settlement Payment, and the date, time and place for the Final Approval Hearing. The Class Members were also given the opportunity to dispute the workweeks allocated to them using the Allocation Form which was sent with the notice of settlement. *Id.* As of the date of this filing, zero (0) Settlement Class Members have objected to the Settlement and one (1) Settlement Class Member has opted-out from the Settlement, resulting in a 99.98% participation rate. (*Id.* ¶ 68, Ex. C). CPT also reports zero (0) outstanding disputes regarding the basis for a Class Member's estimated Individual Settlement Payment, and the date, time and place for the Final Approval Hearing. *Id.*

C. Timing of Payments

Defendants are to provide the funding for the full amount of the Settlement Fund, totaling one million dollars, $1,000,000, in an interest-bearing account opened and maintained by CPT. The funding is to be provided within five (5) Court days of the Effective Date. (Vick Decl., Ex A ¶ 61). The Settlement Fund shall not be distributed until all appeals have been finally resolved. (*Id.*, Ex. A ¶ 67). Within fifteen calendar days after the funding of the Settlement Fund, CPT will calculate the individual payments to each Settlement Class member and mail the Individual Settlement Payments by regular First Class U.S. Mail to the Settlement Class Members' last known address. (*Id.,* Ex. A ¶ 69). Any checks issued to Settlement Class Members shall remain valid and negotiable for one hundred and eighty (180) calendar days from their issuance. The Parties shall report to the Court, at a date no less than 300 days after Final Judgment, the total amount actually paid to class members pursuant to California Civil Procedure Code Section 384(b). After the report is received, the Court shall amend the judgment to direct Defendants to pay the sum of the unpaid residue or unclaimed or abandoned class member funds, plus any interest that has accrued thereon, to Legal Aid at Work, or any other cy-pres organization as agreed upon by the Parties and in compliance with California Civil Procedure Code Section 384(b). (*Id.,* Ex. A ¶ 70).

IV. ARGUMENT IN FAVOR OF FINAL APPROVAL

The trial court has broad discretion to determine whether a class action settlement is fair and reasonable. *Chavez v. Netflix, Inc.,* 162 Cal. App. 4th 43, 52 (2008). To determine whether the settlement is fair, courts consider relevant factors such as "the strength of plaintiffs' case, the risk, expense, complexity and likely duration of further litigation, the risk of maintaining class action status through trial, the amount offered in settlement, the extent of discovery completed and the stage of the proceedings, the experience and views of counsel, the presence of a governmental participant, and the reaction of the class members to the proposed settlement." *Dunk v. Ford Motor Co.,* 48 Cal. App. 4th 1794, 1801 (1996). "The list of factors is not exclusive and the court is free to engage in a balancing and weighing of the factors depending on

the circumstances of each case." *Wershba v. Apple Computer, Inc.,* 91 Cal. App. 4th 224, 245 (2001). "Due regard should be given to what is otherwise a private consensual agreement between the parties." *Dunk*, 48 Cal. App. 4th at 1801.

The burden is on the proponent of the settlement to show that it is fair and reasonable. *Wershba,* 91 Cal. App. 4th at 245. However, a presumption of fairness exists where: "(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 1802. In considering the class settlement, the court need not reach any ultimate conclusions on the issues of fact and law that underlie the merits of the dispute. *7-Eleven Owners for Fair Franchising v. Southland Corp.,* 85 Cal. App. 4th 1135, 1146 (2000). The inquiry is not whether the settlement agreement is the best one that class members could have possibly obtained, but whether the settlement taken as a whole is "fair, adequate, and reasonable." *Chavez*, 162 Cal. App. 4th at 55. A settlement need not obtain 100 percent of the damages sought in order to be fair and reasonable. *Wershba*, 91 Cal. App. 4th at 251. Even if the relief afforded by the proposed settlement is substantially narrower than it would be if the lawsuit was to be successfully litigated, that is no bar to a class settlement because the public interest may indeed be served by a voluntary settlement in which each side gives ground in the interest of avoiding litigation. *Id.*

A. <u>The Settlement is a Result of Informed and Non-Collusive Negotiations</u>

The proposed settlement was reached as a result of arm's length negotiations facilitated by experienced mediators (Ronald Sabraw (Ret.) and Hon. William C. Pate (Ret.)) in two separate mediations as well as the informal intervention of the LWDA, and subsequent (protracted) negotiation. While Plaintiffs believe in the merits of their case, they also recognize the inherent risks of litigation and the benefits of a settlement now in a class action. (Nordrehaug Decl. ¶¶ 11-12; Vick Decl. ¶¶ 32, 42).

B. Information and Discovery Obtained

As described above, and in the concurrently filed Vick Declaration, the Plaintiffs' claims were thoroughly investigated and Plaintiffs' counsel through *extensive* formal discovery and informal discovery produced by Defendants during mediation. (Vick Decl. ¶¶ 20-31). The proposed settlement came only after substantial investigation, conflicts between Plaintiffs' counsel as to adequacy of an initial settlement (of $750,000), and later proactive LWDA involvement. As a result of the forgoing, "the Parties certainly have a clear view of the strengths and weaknesses of their cases" sufficient to support the Settlement. *Boyd v. Bechtel Corp*., 485 F. Supp. 610, 617 (N.D. Cal. 1979).

C. Experience of Class Counsel

Experienced counsel, operating at arms-length, have weighed the strengths of the case and examined all of the issues and risks of litigation and endorse the proposed settlement. The view of the attorneys actively conducting the litigation "is entitled to significant weight" in deciding whether to approve the settlement. *Fisher Bros. v. Cambridge Lee Industries, Inc.,* 630 F. Supp. 482, 488 (E.D. Pa. 1985); *Ellis v. Naval Air Rework Facility,* 87 F.R.D. 15, 18 (N.D. Cal. 1980), *affd.* 661 F.2d 939 (9th Cir. 1981); *Boyd*, 485 F. Supp. at 617.

Plaintiffs' and Defendants' counsel are experienced in employment, wage and hour and class action matters as detailed in the concurrently filed declarations. (Nordrehaug Decl. ¶ 3, Ex. 1; Vick Decl. ¶¶ 6-9). Class Counsel are experienced and qualified to evaluate the class claims and to evaluate settlement versus trial on a fully informed basis, and to evaluate the viability of the defenses. Counsel on both sides share the view that this is a fair and reasonable settlement in light of the complexities and circumstances of the case, the state of the law and uncertainties of litigation and trial, and the benefit the settlement confers on the class. (Nordrehaug Decl. ¶ 11, Ex. 1; Vick Decl. ¶ 42).

D. The Settlement is Fair and Reasonable

There are significant legal uncertainties associated with cases such as this as they can be factually complex and require protracted litigation to resolve. A settlement is not judged solely

against what might have been recovered bad plaintiff prevailed at trial, nor does the settlement have to provide 100% of the damages sought to be fair and reasonable. *Linney v. Cellular Alaska Partnership*, 151 F. 3d 1234, 1242 (9th Cir. 1998); *Wershba*, 91 Cal. App. 4th at 246 and 250; *Rebney v. Wells Fargo Bank*, 220 Cal. App. 3d 1117, 1139 (1990). Instead, "[c]ompromise is inherent and necessary in the settlement process . . . even if the relief afforded by the proposed settlement is substantially narrower than it would be if the suits were to be successfully litigated, this is no bar to a class settlement because the public interest may indeed be served by a voluntary settlement in which each side gives ground in the interest of avoiding litigation" *Wershba*, 91 Cal. App. 4th at 250.

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

> Greenwell misunderstands *Kullar*, apparently interpreting it to require the record in all cases to contain evidence in the form of an explicit statement of the maximum amount the plaintiff class could recover if it prevailed on all its claims-a number which appears nowhere in the record of this case. But *Kulla*r does not, as Greenwell claims, require any such explicit statement of value; it requires a record which allows "an understanding of the amount that is in controversy and the realistic ranges of outcomes of the litigation."

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

As set forth in more detail in the Vick Declaration, the gravamen of the case involved the following claims (initially in a PAGA-only lawsuit, but now as a class action) and defenses.

1. <u>Defendants' Precarious Financial Condition</u>

Over time, particularly as long months passed where all of the Defendants' gyms were closed during Covid, the driving factor in this settlement became "what could Defendants afford to pay." To be sure, Plaintiffs have arguments about the merits, and Defendants have defenses,

particularly as to class certification. But, if the Defendants cannot pay, or further litigation (and expenses) won't likely yield a better result, settlement is the best course of action.

2. LWDA Involvement

One unusual feature of this settlement was the actual involvement of the LWDA. While they have not filed anything in connection with this settlement, they played an active role to encourage each side into a settlement. (Vick Decl. ¶ 48).

3. Meal and Rest Break Violation Claims

Plaintiffs' sixth and seventh causes of action allege claims for meal and rest break violations. (4th AC ¶¶ 150-57).

Plaintiffs allege that Defendants GMS, Gold's Gym SoCal, and each gym have set up systems whereby a personal trainer's schedule is filled in when customers sign up for sessions on-line. The scheduling software does not provide time for meal or rest breaks when customers sign up for continuous and uninterrupted training sessions from the beginning to the end of a shift. Thus, personal trainers who were booked end-to-end were not able to take meal or rest breaks. (4th AC ¶¶ 54, 57(b), 63, 73, 74, 79). The claims of these personal trainers are the strongest.

During the Class Period, there were an estimated 589,665 meal breaks and 786,645 rest periods. Because 1,007 of the 4,514 class members were personal trainers, we can extrapolate that 22.3% of the meal breaks and rest periods related to personal trainers. With a (conservative) hourly average rate of $12.50 per hour, the maximum damages for personal trainers for meal and rest break violations would be $1,643,619 and $2,19,772, respectively.

While the case for meal and rest break violations for the personal trainers appears stronger, than other employees, Plaintiffs allege Defendants failure to provide *uninterrupted* meal and rest breaks across the board. Thus, for all employees, Defendants face a maximum exposure for meal and rest break violations of $7,370,812 and $9,833,062, respectively.

For their part, Defendants have defenses. They would argue that their meal and rest break policies were legally compliant, and that they expected and required their employees to

take those breaks. As to the personal trainers in particular, Defendants would argue that, unlike other employees, personal trainers had complete freedom over their schedules. Defendants would argue that any assessment of whether meal and rest break violations occurred would require an individualized inquiry, precluding class certification. Courts have declined to cases in similar circumstances. *See, e.g., Dailey v. Sears, Roebuck & Co.*, 214 Cal. App. 4th 974, 1000-02 (2013).

4. Reporting Time Claim

Plaintiffs' Ninth Cause of Action alleges that Defendants failed to pay personal trainers for reporting time, in violation of Labor Code § 203, which incorporates § 1198. Personal trainers often had clients that make appointments in waves: (1) an early morning wave; (2) mid-afternoon waves; and (3) evening wave. Thus, some personal trainers often report back to work at their gyms for two or even three shifts in a single day. The law requires that when an employee is required to report back for a second or third shift, they must be provided, or paid, for two hours of work. Plaintiffs allege that Defendants systematically did not pay employees for two hours of work on second or third shifts, meaning some employees would drive back to work to train one person for one hour (at minimum wage), and then go home.

Defendants contend that reporting time violations only occur when an employee is "required" to report back to work, and that requirement is not met here because personal trainers set their own schedules. Defendants further contend that there is no systematic policy or practice. Additionally, Plaintiffs face the risk that individualized issues with respect to individual employees would preclude class certification. Plaintiffs set the maximum recovery of this claim at zero.

5. Expense Reimbursement Claim

Plaintiffs' Fourth Cause of Action alleges that Defendants failed to reimburse expenses in violation of Labor Code § 2802 principally with respect to cell phones and travel (*See* 4th AC ¶¶ 137-141, 24(d), 29, 53, 57, 62, 77).

While highly paid executives received $50 or more reimbursement per month for cell phones, personal trainers earning minimum wage received $2 per month. Plaintiffs allege that personal trainers at each of the gyms were required to use their own personal cell phones in the course of performing their jobs. They were actively encouraged and required to use their cell phones (for example when a client who scheduled a training session is late) to call other clients, referrals, or prospective clients and encourage them to buy expensive personal training sessions. Yet, prior to November 2016, the employees at all of the gyms were not reimbursed whatsoever for the use of their personal cell phones. Beginning in November 2016, employees would receive only $1 for every two-week pay period as "reimbursement" for the use of their cell phones. Plaintiffs estimate the damages for failure to pay cell phone reimbursements as follows:

Damages for Failure to Pay Cell Phone Reimbursements	
Number of personal trainers at issue	1007
Average (est.) cell phone monthly bill:	$100
Actual Cost (est.) to EE of cell phone per day (est. for 30-day month)	$3.34
Actual Cost (est.) to EE of cell phone for 8-hour work day (1/3 of $3.34)	$1.11
Actual Cost (est.) to EE of cell phones paycheck (assume full time)	$11.10
Actual Reimbursement per paycheck (4/1/16-11/1/17) (18 months)	$0.00
Amount *Underpaid* (4/1/16-11/1/17) (18 months) per check (assume FTE)	$11.10
Actual Reimbursement per paycheck (11/1/17-present) (11 months)	$1.00
Actual Cost (est.) to EE per paycheck (assumes 5-day workweek)	$11.10
Amount *Underpaid* (11/1/17-present) (11 months) per check (assume FTE)	$10.10
Percent of personal trainers = 22.3% x 109,797 pay-periods	24,485
Pay-periods x $10.10	**$247,298**

Defendants contend that employees knew they were not required to use their cell phones for work purposes, and the vast majority vast number of employees didn't use their cell phone for work or used them sporadically at best. For those who used their cell phones more extensively for work (principally personal trainers), Defendants contend that they had a

compliant reimbursement policy. The foregoing challenges present not only merits risks, but class certification risks as well. Defendants may be able to persuade the Court, for example, that an individual inquiry would be required to determine which employees were actually using their phones for work purposes, and which employees requested and obtained reimbursements.

Plaintiffs also alleged that Defendants had a pattern and practice of not paying employees for their travel expenses, in particular for a required initial three-day training session held for new employees in Van Nuys, away from their home gym. While Plaintiffs had strong anecdotal evidence of violations, they faced potentially insurmountable problems with manageability, including: (1) whether each new employee drove to Van Nuys, as opposed to taking public transportation or some other means would require individualized inquiries; (2) the number of miles between each employee's home and the Van Nuys location was different in each case; (3) whether employees attended the new employee training, and, if so, for how many days would require individualized inquiries, and (4) whether employees sought and obtained mileage reimbursement would require individualized inquiries. Ultimately, the burdens of pursuing this steam of damages appeared to outweigh potential benefits.

6. The Wage Statement And Derivative Violations

As a result of the foregoing violations, Plaintiffs claim Defendants engaged in an unlawful business practice, in violation of B&P Code § 17200 (the first cause of action), failed to pay overtime compensation, in violation of Labor Code §§ 204, 510, 1194 (the second cause of action), failed to provide accurate and itemized wage statements, in violation of Labor Code § 226 (the third cause of action), failed to pay wages when due, failed to pay minimum wages, and failed to pay for all hours worked, in violation of Labor Code §§ 201, 202, 203 (the fifth, eighth, and tenth causes of action of action). These claims are all derivative in that they depend upon Plaintiffs proving the previously identified underlying claims. Also, had the case gone to trial, it is likely that these claims would be dropped to focus on issues of meal and rest breaks, and expense reimbursement. Thus, Defendants value these claims at zero.

7. The PAGA Claim

There are an estimated 114,727 pay periods during the PAGA Period. This would yield PAGA statutory penalties in the aggregate of $23 million ($11,472,700 and $11,472,700 for meal break and rest period violations, respectively), assuming the penalties were stacked. By themselves, these penalties appear to cross the line into the territory of "unjust, arbitrary and oppressive, or confiscatory," pursuant to which a Court could use its discretion to reduce the award. *See* Labor Code § 2699(e). Thus, adding other PAGA penalties to these would be pointless.

The fact that Defendants have improved their policies and practices also increases the risk that the Court would award reduced PAGA penalties. Given these risks, which must be added to the risk that Plaintiffs would lose on some or all of the underlying claims giving rise to PAGA penalties, Plaintiff views the allocation of $80,000 of the settlement to PAGA penalties to be reasonable. When the parties have "negotiated a good faith amount" for PAGA penalties, and "there is no indication that this amount was the result of self-interest at the expense of other Class Members," such an amount is generally considered reasonable. *See Hopson v. Hanesbrands Inc.*, No CV-08-0844 ELD, 2009 WL 928133, at *9 (N.D. Cal. Apr. 3, 2009); *see also, e.g., Barasani v. Coldwell Banker Res. Brokerage Co.,* 2016 WL 1243589 (Cal. Super. L.A. Cty. Jan 13, 2016) (granting final approval to settlement with PAGA allocation of $10,000 from a gross settlement of $4.5 million); *Garcia v. Gordon Trucking, Inc.*, No. 1:10-CV-0324 AWI SKO, 2012 WL 5364575, at *3 (E.D. Cal. Oc. 31, 2012) (approving PAGA allocation of $10,000 in gross settlement of $3.7 million).

Class Counsel is convinced that the proposed settlement is in the best interest of the class based on the negotiations and a detailed knowledge of the issues present in this action. The length and risks associated with the pending motion for summary adjudication, trial, and other perils of litigation that may have impacted the value of the claims and were all weighed in reaching the proposed settlement. In addition, the affirmative defenses asserted by Defendant, the prospect of a potential adverse summary adjudication ruling, the inability to proceed on a

class basis without Defendants' consent, the difficulties of complex litigation, the lengthy process of establishing specific damages and various possible delays and appeals, were also carefully considered by Class Counsel in agreeing to the proposed settlement. In light of the above, the proposed Settlement is well within the "ballpark" of reasonableness and should be granted final approval.

E. There are no Objections to the Settlement

The Settlement was well received by the Class – not a single Class Member objected to the Settlement as of the date of this filing. Specifically, no objections were made as to the Gross Settlement Amount, the request for Class Representative Enhancement Payment, the request for Attorney Fee Award and Cost Award, the PAGA Payment, or the Administration Costs. (Vick Decl. ¶ 68, Ex. B). California courts have consistently found that a small number of objectors indicates the class' support for a settlement and strongly favors final approval. *Wershba*, 91 Cal. App. 4th at 250-251 (final approval granted despite 20 objectors); *7-Eleven Owners*, 85 Cal. App. 4th at 1152-1153 (final approval granted despite 9 objectors).

The lack of any objections speaks volumes about the fairness, reasonableness, and adequacy of this Settlement. Accordingly, the Settlement is presumed to be fair, reasonable, and adequate, and the Court should grant final approval of the entire Settlement. *Dunk*, 48 Cal. App. 4th at 1802.

V. ARGUMENT FOR AWARDS OF ATTORNEYS' FEES, COSTS, EXPENSES, ENHANCEMENT PAYMENTS, AND PAYMENT TO THE SETTLEMENT ADMINISTRATOR

A. Attorneys' Fees

1. Legal Standard

Where the amount of a settlement is a "certain easily calculable sum of money," California courts may calculate attorneys' fees as a reasonable percentage of the settlement created. Weil and Brown, California Practice Guide, Civil Procedure Before Trial, Chapter 14, section 14:145; *Dunk v. Ford Motor Co,.* 48 Cal. App. 4th 1794, 1808 (1996). The ultimate goal is the award of a "reasonable" fee to compensate counsel for their efforts, irrespective of the

method of calculation. *Apple Computer, Inc. v. Superior Court,* 126 Cal. App. 4th 1253, 1270 (2005); *Consumer Privacy Cases,* 175 Cal. App. 4th 545, 557-8 (2009).

Trial courts have "wide latitude" in assessing the value of attorneys' fees, and their decisions will "'not be disturbed on appeal absent a manifest abuse of discretion.'" *Lealao v. Beneficial Cal., Inc.,* 82 Cal. App. 4th 19, 41 (2000); *Ketchum v. Moses*, 24 Cal. 4th 1122, 1132 (2001) (The "experienced trial judge is the best judge of the value of professional services rendered in his court[.]"); *Cellphone Termination Fee Cases,* 180 Cal. App. 4th 1110, 1118 (2009). California law provides that attorneys' fees awards should be equivalent to fees freely negotiated in the legal marketplace and paid in comparable litigation based on the result achieved and risk incurred. *See Lealao* at 47, 50. Fee awards that are too small will "chill the private enforcement essential to the vindication of many legal rights and obstruct the representative actions that often relieve the courts of the need to separately adjudicate numerous claims." *Id.* at 53. Therefore, fees in representative actions should approximate the probable terms of a contingent fee contract negotiated by a sophisticated attorney and client in comparable litigation. *Id.* at 48. The percentage-of-the-benefit approach is preferred in such cases because "it better approximates the workings of the marketplace than the lodestar approach." *Id.* at 49.

2. Fees Should Be Awarded From The Common Fund Created By The Settlement

Class Counsel is seeking an award for fees of $380,000, which is 38% of the settlement, for the time spent litigating this matter. This amount is less than the amount of fees that would be incurred on an hourly basis given the amount of work required in this case – a large portion of which was a result of Defendants' resistance to discovery and filing of a writ – which was briefed – to the 2nd DCA.

Labor Code § 2699(g)(1) of PAGA states that "[a]ny employee who prevails in any action shall be entitled to an award of reasonable attorney's fees and costs ...." California Code of Civil Procedure § 1021.5 states: "a court may award attorneys fees to a successful party against one or more opposing parties in any action which has resulted in the enforcement of an important right affecting the public interest if [among other things] a significant benefit, whether

pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons ....."

In addition, when the prosecution of a matter results in the creation of a common fund, a court can and should award fees and costs from that fund. The reason is "that persons who obtain the benefit of a lawsuit without contributing to its cost are unjustly enriched at the successful litigant's expense. Jurisdiction over the fund involved in the litigation allows a court to prevent this inequity by assessing attorney's fees against the entire fund, thus spreading fees proportionately among those benefitted by the suit." *Boeing Co. v. Van Gernert,* 444 U.S. 472, 478 (1980). Thus, it is proper to award from a fund attorneys' fees and costs "to a party who has recovered or preserved a monetary fund for the benefit of himself or herself and others," *Laffitte v. Robert Half Intern Inc.,* 1 Cal.5th 480, 488 (2016).

3. The Court Should Use The Percentage-of-Recovery Method In Calculating The Fee Award

California courts have recognized that one appropriate method for awarding attorney's fees in class actions is to award a percentage of the "common fund" created as a result of the settlement. *City & County of San Francisco v. Sweet*, 12 Cal. 4th 105, 110-11 (1995); *Quinn v. State*, 15 Cal. 3d 162, 168 (1975); *see also Apple Computer, Inc. v. Superior Court*, 126 Cal. App. 4th 1253, 1270 (2005); *Lealao v. Beneficial California, Inc.*, 82 Cal. App. 4th 19, 26 (2000). The basis of the common fund is 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 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 of recovery of the fund if he is assured that he will be properly and directly compensated should his efforts be successful. *City & County of San Francisco*, 12 Cal. 4th at 111. In *Quinn*, the California Supreme Court stated: "[O]ne 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." *Quinn v. State*, 15 Cal. 3d at 167. Similarly, in *Sweet*, 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." *City & County of San Francisco*, 12 Cal. 4th at 110.

Some courts have expressed frustration with the "lodestar" approach, which usually involves wading through voluminous time records. *Lealao*, 82 Cal. App. 4th at 31 n.5 (citing *In re Activision Sec. Litig.*, 723 F. Supp. 1373, 1375 (N.D. Cal 1989)). 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. *In re Activision Sec. Litig.*, 723 F. Supp. at 1378-79. The Ninth Circuit now routinely uses this approach to determine attorney's fees awards. *Lealao*, 82 Cal. App. 4th at 30-31; *see e.g., In re Pacific Enters. Sec. Litig.*, 47 F.3d 373, 378-79 (9th Cir. 1995).

Class Counsels' request for fees of 38% of the Settlement Fund falls well within the range of reasonableness under the particular circumstances of this case due to the extensive amount of formal discovery on numerous parties, and third parties, motion practice, discovery disputes, and extensive briefing of a critical issue before the 2nd DCA. *See In re Activision Sec. Litig.*, 723 F. Supp. at 1378 (awards of fees range from 20% to 50% based on circumstances). Class Counsel have borne, and continue to bear, the entire risk and cost of litigation associated with this class action on a pure contingency basis, including substantial cash advances for litigation costs in the tens of thousands of dollars. The Court should approve the requested attorney's fees and costs, which are justified by the results achieved, the complexity of the issues, the difficulty of the case, and the risk Class Counsel undertook.

4. Plaintiffs' Counsel's Lodestar

If the Court chooses to perform a lodestar cross-check in this case, such a cross-check will confirm the reasonableness of Plaintiffs' fee request. Courts have discretion to use the lodestar as a cross-check to confirm that the requested fees are appropriate. *Laffitte*, *supra*, 1 Cal. 5th at 506.

In calculating an initial lodestar figure, a court considers: (1) the reasonable hours spent; and (2) the prevailing hourly rates for "private attorneys in the community conducting *non-contingent* litigation of the same type." *Ketchum v. Moses*, 24 Cal. 4th 1122, 1134 (2001) (emphasis in original). These facts may be established through a declaration by counsel. *Wershba v. Apple Computer, Inc.,* 91 Cal. App. 4th 224, 254-55 (2001) (relying on Plaintiffs' counsel's declarations as sufficient evidence to demonstrate the appropriate hourly rate).

a. Plaintiffs' Counsel's Hourly Rates

The best indicator of a "reasonable market rate" is the actual rate charged by an attorney to his or her private clients. *Ohio-Sealy Mattress Mfg. Co. v. Sealy Inc.,* 776 F.2d 646, 660 (7th Cir. 1985). As explained by one Court of Appeal: "When an attorney's customary billing rate is the rate at which the attorney requests the lodestar be computed and that rate is within the range of prevailing market rates, the court should consider this rate when fixing the hourly rate to be allowed. When the rate is not contested, it is prima facie reasonable." *Islamic Center of Mississippi v. City of Starkville*, 876 F.2d 465, 469 (5th Cir. 1989).

The hourly rates for VLG were as follows: Scott Vick (attorney): $495-$565; Catherine Kim (attorney): $425; April Paton (legal assistant): $125-$225. These are the rates that individuals and corporate clients pay VLG to represent them on an hourly basis. Accordingly, they are *prima facie* reasonable. (Vick Decl. ¶ 77).

The hourly rates for Blumenthal were as follows: from $475 to $795. These are the rates that individuals and corporate clients would pay Blumenthal to represent them on an hourly basis and have been approved by Courts throughout California in prior fee applications. Accordingly, they are *prima facie* reasonable. (Nordrehaug Decl. ¶ 14).

Moreover, these rates are undoubtedly less than the hourly rates charged by Plaintiffs' Counsel's peers at large corporate firms. (Vick Decl. ¶ 77).

b. Time Spent by VLG in the *Klipfel Action* and Consolidated Action

Defendants have contested this case at every step. Summarizing the time spent concerning the claims released by the settlement is, inevitably, imprecise, because certain tasks furthered, not just the settled claims, but other claims and the entire case as well.

To date, VLG has invested approximately **1,227** hours in this case as a whole, which resulted in lodestar for VLG relating to the class claims for this period in the amount of $467,609.75. (Vick Decl. ¶ 77, Ex. F). For over a year, VLG propounded voluminous written discovery variously to the numerous separate defendants and eight (8) third party subpoenas were served. VLG also took the deposition of the head of Human Resources, and was weeks away from taking dozens more depositions scheduled to take place when VLG first learned of the *San Nicolas Action*. (Vick Decl. ¶¶ 20-25, 74).

One of the reasons that the attorneys' fees sought in this motion are higher than a 33% benchmark is that throughout the *Klipfel Action*, Defendants aggressively fought against discovery to establish an enterprise (while steadfastly denying any enterprise), necessitating numerous meet-and-confer sessions (***31 of them***), informal discovery conferences with Judge Michael Linfield (***5 of them***), and motions to compel (***8 of them***) by Plaintiff (4 of which were heard; all were granted). Discovery alone in the *Klipfel Action* consumed at least 562.85 hours, and the docket sheet in the *Klipfel Action* ran 40 pages by the time it was deemed related to the *San Nicolas Action* and transferred to this Court. (Vick Decl. ¶¶ 21, 73).

The work that was required of VLG in this case was especially intense due to the litigation activities of the Defendants. After Defendants' second demurrer was overruled as to Defendants' contention that Angel and William Banos could not be individually liable under Labor Code § 558.1, Defendants filed a writ before the 2nd DCA. The 2nd DCA requested briefing, and the parties filed 150 pages of substantive briefing and hundreds of pages of exhibits. The writ was ultimately denied. (Vick Decl. ¶ 31, 75).

c. Time Spent by Blumenthal in the *San Nicolas Action* and Consolidated Action

To date, Blumenthal has invested approximately 323 hours prosecuting these class claims with the attorneys' hourly fee rates for attorneys ranging from $475 to $795, which resulted in lodestar for Blumenthal relating to the class claims for this period in the amount of $198,943.75. (Nordehaug Decl. ¶ 13, Ex. 2).

B. Attorneys' Costs and Expenses

Class Counsel seek reimbursement for litigation costs and expenses incurred by Class Counsel. VLG has actually incurred $23,792.48 in reasonable litigation costs and expenses to date and seeks reimbursement of those costs. (Vick Decl. ¶ 78, Ex. F). Blumenthal has actually incurred $17,077.30 in reasonable litigation costs and expenses to date and seeks reimbursement for $11,000 in accordance with the Settlement Agreement. (Nordrehaug Decl. ¶ 16, Ex. 2). Class Counsel seek reimbursement for taxable and commonly reimbursed costs, including filing and process serving fees, court reporter fees, travel expenses related to depositions, mediation and court appearances, expert expenses, copying, delivery, legal research charges, mediator fees, and the like. (Vick Decl. ¶ 78, Nordrehaug Decl. ¶ 16).

Plaintiffs are entitled to recover litigation costs and expenses reasonably incurred in the prosecution of their wage-and-hour claims. *See* Cal. Lab. Code §§ 1194, 226(e), 2802(c) and 2699(g)(1); Cal. Civ. Proc. Code § 1021.5; 29 U.S.C. § 216(b).

The requested fee is a fair compensation for undertaking complex, risky, expensive, and time-consuming litigation on a contingent fee basis, especially in light of the substantial benefits achieved by Plaintiffs' counsel for the Class Members.

C. Enhancement Awards

Plaintiffs and Class Counsel request, and Defendants agree not to oppose, payment by Defendants from the Common Fund of $10,000 to each of the four individual Plaintiffs (Charles San Nicolas, Nathan Klipfel, David Price, and Peter Contreras) as a service payment and for their individual full and general releases (as opposed to the limited release by other class members). The named Plaintiffs are entitled to an enhancement award for their countless hours of service as

Class Representatives and the stigma and risks in connection with those roles. (Vick Decl. ¶ 79). Enhancement awards in overtime cases typically range from $5,000.00 to $40,000.00, although some awards are higher. Often, multiple class representatives receive awards in the higher range. *See, e.g., Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles*, 186 Cal. App. 4th 399, 412 (2010) (approving an enhancement request of $10,000.00 per named plaintiff in a 188 member class); *Thornton v. East Texas Motor Freight,* 497 F.2d 416, 420 (6th Cir. 1974) ("We also think there is something to be said for rewarding those drivers who protect and help to bring rights to a group of employees who have been the victims of discrimination."). Here, the requested enhancement is relatively modest, reasonable, and should be approved. The requested award is .01 percent of the total settlement. Plaintiffs have performed considerable services on behalf of the Class during the litigation by seeking attorneys, participating throughout litigation, searching for and providing information related to their employment and the employment conditions, spending time in meetings with counsel to get a better understanding of their work environment and requirements, provided needed information for mediation, and settlement discussions, and approved the settlement on the class's behalf. *Id.*

D. Payment to The Settlement Administrator is Fair and Reasonable

Plaintiffs also request that the Court approve $35,000 in administration costs to CPT Group, Inc. as the Settlement Administrator. CPT performed duties in connection with this Settlement that were integral in effectuating the Settlement and the Notice process. Among other things, CPT calculated each Settlement Class member's Individual Settlement Payment, updated addresses contained in the class data supplied by Defendants, formatted and translated the Notice Packets for mailing, mailed Notice Packets to all 4,778 Settlement Class members, kept the Parties informed of the status of the Notice mailing through weekly reports, and otherwise administered the Settlement. (Vick Decl. ¶ 81). For these reasons, CPT's requested costs are fair, reasonable, and adequate, and should be finally approved.

VI. THE CLASS SHOULD BE CERTIFIED FOR SETTLEMENT PURPOSES

The court may make an order approving certification of a provisional settlement class after the preliminary settlement hearing. CRC, Rule 3.769(d). For settlement purposes, courts use a less stringent standard for certification of classes. *Global Minerals & Metals Corp. v. Superior Court*, 113 Cal. App. 4th 836, 859 (2003). "The reason for this is that no trial is anticipated in a settlement class case, so the case management issues inherent in the ascertainable class determination need not be confronted." *Id.*; *see also 7-Eleven Owner for Fair Franchising v. Southland Corp.,* 85 Cal. App. 4th 1135, 1161-1162 (2000) (affirming certification of class action for settlement purposes only). Accordingly, this Court has discretion to certify Plaintiff's class for settlement purposes only.

The requirements under California Code of Civil Procedure Section 382 are all met for the purposes of certifying this case for settlement purposes:

- Numerosity: The settlement class consists of approximately 4,100 class members, and joinder of 4,100 individual plaintiffs into a single case is impracticable in light of the circumstances of this case.
- Ascertainability: The proposed "Settlement Class" is easily ascertainable based on Defendants' own payroll records.
- Typicality: The claims of the class representative are typical of the claims of the class members as a whole. The named Plaintiffs suffered the same alleged violations as the class as a whole did and, thus, the named Plaintiffs fairly represent the claims of the class as a whole.
- Adequacy: Plaintiffs have proven to be an adequate class representatives. They have conducted themselves diligently and responsibly in representing the class in this litigation, understands their fiduciary obligations, and have actively participated in the prosecution of this case. Plaintiffs have spent many hours in meetings and conferences with counsel to provide counsel with a better understanding of their work environments and requirements. (Declaration of Charles San Nicolas "San Nicolas Decl." ¶¶ 8, 11; Declaration of Nathan Klipfel "Klipfel Decl." ¶ 20). Further, Plaintiffs do not have any interest that is averse to the interests of the

other class members. (San Nicolas Decl. ¶ 5; Klipfel Decl. ¶ 23). Moreover, proposed class counsel is adequate to represent the class for settlement purposes. (Nordrehaug Decl. ¶ 3, Ex. 1; Vick Decl. ¶¶ 5-8).

- Commonality/Predominance: Many common issues of law and fact unite the class. The common questions of law and fact include. but are not limited to:

    1. Whether Defendants illegally failed to provide proper meal periods;
    2. Whether Defendants illegally failed to provide proper rest periods;
    3. Whether Defendants failed to reimburse adequate cell phone expenses;
    4. Whether Defendants systematically failed to pay for reporting time;
    5. Whether Defendants illegally failed to provide overtime wages;
    6. Whether Defendants failed to provide accurate itemized wage statements;
    7. Whether Defendants failed to provide timely final wages;
    8. Whether Defendants violated Business & Professions Code § 17200;
    9. Whether Class Members are entitled to unpaid wages, penalties, interest, fees and other relief in conjunction with their claims;

- Superiority: A class action is superior to other available means for the fair and efficient adjudication of this controversy. Joinder of all members of the proposed class is impractical. Class treatment will permit a large number of similarly-situated persons to prosecute their common claims in a single forum simultaneously for settlement purposes without the necessary duplication of effort and expense that numerous individual actions would engender. Moreover, because a number of the class members are current employees, the fear of retaliation further supports superiority of class-wide relief because that fear of retaliation often discourages victims from seeking legal redress while currently employed by the same employer.

VII. CONCLUSION

The proposed class action settlement is fair, adequate, and reasonable. It is non-collusive; and it was achieved as the result of informed, extensive, and arms-length negotiations

conducted by experienced counsel. The Court should grant final approval of this class action settlement.

DATED: August 5, 2022

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