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Attorneys for Plaintiffs and the Certified Classes

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

MARLEY CASTRO and LUCIA MARMOLEJO, on behalf of themselves and all others similarly situated,

Plaintiffs,

vs.

ABM INDUSTRIES, INC.; ABM ONSITE SERVICES — WEST, INC.; ABM SERVICES, INC.; ABM JANITORIAL SERVICES — NORTHERN CALIFORNIA, INC.; and ABM JANITORIAL SERVICES, INC.,

Defendants.

Case No.: 4:17-cv-03026-YGR

NOTICE OF MOTION AND UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT

Hon. Yvonne Gonzalez Rogers
Hearing Date: February 12, 2019
Time: 2:00 p.m.
Location: Courtroom 1, 4th Floor

PLEASE TAKE NOTICE that on February 12, 2019, or as soon thereafter as the matter may be heard, in Courtroom 1, 4th Floor, of the United States District Court of the Northern District of California, located at 1301 Clay Street, Oakland, California, the Honorable Yvonne Gonzalez Rogers presiding, Plaintiffs MARLEY CASTRO and LUCIA MARMOLEJO ("Plaintiffs") as individuals and on behalf of all others similarly situated, will and hereby do move this Court for entry of an Order under Rule 23(e), as follows:

1. Conditionally certifying the proposed Settlement Class and Subclasses[1] for settlement purposes under Federal Rules of Civil Procedure 23(b)(3) and 23(e);
2. Preliminary approving the settlement as fair, adequate, and reasonable under Rule 23(e) based upon the terms set forth in the Joint Stipulation and Settlement Agreement ("Settlement Agreement");
3. Appointing Plaintiffs Marley Castro and Lucia Marmolejo as Class Representatives;
4. Appointing Hunter Pyle Law and Feinberg, Jackson, Worthman & Wasow LLP as Class Counsel;
5. Approving and directing the mailing of the Settlement Notice pursuant to the proposed notice plan;
6. Approving RG/2 Claims Administration LLC as the Claims Administrator; and
7. Scheduling a fairness hearing for final approval of the Settlement, entry of a proposed final judgment, Class Counsel's Motion for Attorneys' Fees, and the Class Representatives' Service Awards.

This motion is based on this notice of motion; the attached memorandum of points and authorities; the declarations of lead counsel Hunter Pyle and Catha Worthman, filed herewith; the declaration of proposed settlement administrator William Wickersham, filed herewith; the proposed order; the pleadings and papers filed in this case, and any oral argument the Court permits.

[1] Capitalized terms throughout this motion are used as in the Settlement Agreement, attached as Ex. 1 to the Declaration of Catha Worthman filed herewith, unless otherwise defined herein.

Defendants ABM Onsite Services-West, Inc.; ABM Services, Inc.; ABM Janitorial Services-Northern California, Inc.; and ABM Janitorial Services – Southwest, Inc. (collectively, "ABM" or "Defendants") do not oppose this motion.

DATED: January 4, 2019

Respectfully submitted,

FEINBERG, JACKSON, WORTHMAN & WASOW
HUNTER PYLE LAW

/s/ Genevieve Casey
Genevieve Casey

Attorneys for Plaintiffs and the Classes

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I. INTRODUCTION

Plaintiffs Marley Castro and Lucia Marmolejo ("Plaintiffs") submit this unopposed motion for preliminary approval of a $5.4 million non-reversionary class action settlement of contested claims against Defendants ABM Onsite Services-West, Inc.; ABM Services, Inc.; ABM Janitorial Services-Northern California, Inc.; and ABM Janitorial Services – Southwest, Inc. (collectively, "ABM" or "Defendants"). The settlement will resolve the Cleaners' claims that ABM failed to reimburse them for work-related use of personal cell phones under California Labor Code § 2802 ("§ 2802"), the Private Attorneys General Act, Cal. Lab. Code § 2698 *et seq.* ("PAGA"), and the Unfair Business Practices Act, Cal. Business & Professions Code § 17200 *et seq.* ("UCL").

The proposed $5.4 million settlement readily satisfies the standard that governs preliminary approval. It falls well within the range of reasonableness in light of the amounts at stake and the risks of potential further litigation and delay. After more than four years of hard-fought litigation, including extensive discovery and motion practice, this settlement was reached through arms-length negotiations with the assistance of an experienced mediator. It is the product of thorough factual and legal analysis and reflects Defendants' potential liability. According to the calculations of Plaintiffs' expert, it represents more than 100% of Defendants' total potential liability under the Labor Code, and 30% of total potential exposure when interest and PAGA penalties are considered. In the view of experienced Class Counsel, this settlement is a strong result for the Cleaners, weighing the benefits of immediate monetary relief and the strength of Plaintiffs' claims against the uncertainty of further litigation and Defendants' pending appeal.

Accordingly, and for the reasons discussed below, Plaintiffs request that this Court enter an order under Federal Rules of Civil Procedure 23(e) and 23(b)(3) preliminarily approving this settlement and conditionally certifying a proposed Settlement Class of all Cleaners who worked for ABM from four years prior to the date the litigation was filed, October 24, 2010, through the date of Preliminary Approval, as well as two subclasses, a Labor Code 2802 Subclass and a

PAGA Subclass, defined to account for the differing statutes of limitations and the Court's prior exclusion from this litigation of § 2802 claims subject to arbitration.[2]

II. BACKGROUND AND SUMMARY OF CLAIMS

Plaintiffs and the other members of the proposed Settlement Class are or were employed by ABM in the job classification as "Cleaners" to perform janitorial services in a variety of locations throughout the state, including office buildings, schools, hospitals, manufacturing plants, and airports. There are approximately 34,000 Cleaners in the proposed Settlement Class.

The Cleaners' claims are before this Court pursuant to a Class Action Complaint originally filed in Alameda County Superior Court on October 24, 2014, alleging that ABM violated § 2802 by failing to reimburse janitorial employees for work-related use of personal cell phones, including work-related communications with supervisors and clocking in and out of Defendants' timekeeping system.[3] In addition to relief under § 2802, Plaintiffs sought relief under the UCL, and amended their complaint in 2015 to include a claim for civil penalties under PAGA.[4]

From 2015 through 2017, the Parties engaged in formal discovery, which included the exchange of interrogatories; the production of voluminous documentary evidence, including policy documents, emails, records from Defendants' timekeeping system (EPAY), and data; as well as depositions of the named Plaintiffs, two of Defendants' corporate witnesses, and the supervisor of one named Plaintiff. *See* Pyle Dec. ¶¶ 16-17; Worthman Dec. ¶¶ 25-27.

In May 2017, ABM successfully removed the case to this Court.[5] ECF No. 28. On

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[2] The Labor Code 2802 Subclass includes all Cleaners employed in California during the entire class period, excluding claims arising under and after the effective date of collective bargaining agreements ("CBAs") with arbitration clauses. The Court previously excluded from the certified classes § 2802 claims subject to these CBAs. ECF No. 78. The PAGA Subclass includes all Cleaners employed in California during the PAGA period (November 4, 2013 to the date of Preliminary Approval). Settlement Agreement at ¶¶ 19, 22.

[3] *See* ECF No. 1-5 (Complaint).

[4] *Id.*; Case No. 4:14-cv-05359-YGR, ECF No. 21 (First Amended Complaint).

[5] ABM had removed the case twice before, and it was remanded in both instances. *Castro v. ABM Indus. Inc.*, No. 14-cv-05359-YGR, 2015 WL 1520666 (N.D. Cal. Apr. 2, 2015); *Castro v. ABM Indus. Inc.*, No. 4:15-cv-01947-YGR, 2015 WL 6954894 (N.D. Cal. Nov. 10, 2015).

January 26, 2018, the Court certified three classes under Rule 23(b)(3):

> (1) EPAY Class: All employees who were, are, or will be employed by ABM in the State of California with the Employee Master Job Code Description code Cleaner, who used a personal cell phone to punch in and out of the EPAY system and who (a) worked at an ABM facility which did not contain biometric clock, and were (b) not offered an ABM-provided cell phone during the period beginning on January 1, 2012, through the date of notice to the Cleaners that a class has been certified in this action.
>
> (2) Suspicious Incidents Class: All employees who were, are, or will be employed by ABM in the State of California with the Employee Master Job Code Description code Cleaner who used a personal cell phone to report unusual or suspicious circumstances to supervisors and were not offered an (a) ABM-provided cell phones or (b) two-way radio during the period beginning four years prior to the filing of the original complaint, October 24, 2014, through the date of notice to the Cleaners that a class has been certified in this action.
>
> (3) Supervisor Communications Class: All employees who were, are, or will be employed by ABM in the State of California with the Employee Master Job Code Description code Cleaner who used a personal cell phone to respond to communications from supervisors and were not offered an (a) ABM-provided cell phones or (b) two-way radio during the period beginning four years prior to the filing of the original complaint, October 24, 2014, through the date of notice to the Cleaners that a class has been certified in this action.

ECF No. 49 at 2. The Court later modified the class definitions to exclude claims arising after the effective dates of three CBAs with arbitration agreements. ECF No. 78 at 8. Defendants appealed from the order denying their motion to compel arbitration and alternatively modifying the class definitions.[6]

On October 15, 2018, the Parties participated in an all-day mediation session with mediator Mark Rudy and reached a Memorandum of Understanding. The Parties subsequently executed a Joint Stipulation and Settlement Agreement on January 4, 2019.[7]

[6] *See* ECF No. 80. Appeal deadlines have now been vacated pending this Court's approval of the proposed Settlement. *Castro v. ABM Indus. Inc.*, No. 18-16045 (9th Cir. 2018), ECF Nos. 7, 8.
[7] Attached as Ex. 1 to the Worthman Dec., hereinafter referred to as "Settlement Agreement."

III. THE PRINCIPAL TERMS OF THE PROPOSED SETTLEMENT

A. The Settlement Amount

Under the terms of the Settlement, Defendants will pay the gross settlement amount of $5.4 million to the Claims Administrator for deposit into a Qualified Settlement Fund within 14 calendar days of the Effective Date. Settlement Agreement at ¶ 67.[8] Out of the gross amount, the following amounts will be paid, if the Court approves: (i) up to 25%, or $1,350,000, for Class Counsel's fees, and up to $110,000 for actual litigation costs; (ii) up to $125,000 for settlement administration; (iii) payment to the LWDA of $330,000;[9] and (iv) Service Awards of $10,000 per Named Plaintiff. *Id.* at ¶¶ 28, 31-33, 43, 45.

After these payments are made, the Net Settlement Fund will be at least $3,465,000. This amount shall be distributed to the Settlement Class, with at least $3,355,000 to be paid to the Labor Code 2802 Subclass and $110,000 (the "PAGA Employee Share") reserved for payments to the PAGA Subclass. Individual awards will be calculated according to the allocation method further described below in Section III.D.

B. The Proposed Settlement Class and Subclasses

The proposed Settlement Class includes all non-exempt hourly workers employed as Cleaners by Defendants in California from October 24, 2010 through the date of Preliminary Approval, and thus includes all Cleaners who were potentially eligible to recover in this litigation. Settlement Agreement at ¶¶ 19, 22, 26. It includes two subclasses:

(1) the Labor Code 2802 Subclass, defined as all non-exempt hourly employees who worked as a Cleaner for Defendants in California for the period starting October 24, 2010, to the date of Preliminary Approval, except that for those Cleaners who are subject to a CBA which contains an operative arbitration clause, this Subclass shall

[8] The Effective Date is defined to occur after final approval and the time for filing all appeals has run and, if any appeals are filed, the conclusion of those appeals.

[9] Pursuant to Labor Code § 2699(i), the $330,000 payment to the LWDA is equal to 75% of the total "PAGA Payment" of $440,000 allocated to the PAGA claims. Settlement Agreement at ¶ 28. Twenty-five percent of the PAGA Payment, or $110,000, will be distributed to the PAGA Subclass Members, as detailed below in Section III.D.

exclude all claims arising under and after the effective date of the relevant CBA; and

(2) the PAGA Subclass, defined as all non-exempt hourly employees who worked as a Cleaner for Defendants in California for the period starting November 4, 2013, to the date of Preliminary Approval.

Id. at ¶¶ 19, 22.

The proposed Settlement Class differs from the classes certified by the Court in two respects.[10] First, the Settlement Class includes all Cleaners who were covered by the original Complaint, although the Settlement excludes the § 2802 claims that are covered by the applicable CBAs. Second, the Settlement Class identifies two subclasses that are consistent with the applicable statutes of limitations and reflect subclass members' eligibility to recover § 2802 damages and/or PAGA penalties.

The two subclasses take into account that the Court excluded the § 2802 claims of Cleaners arising under three CBAs.[11] However, the Court did not exclude the PAGA claims of these CBA-covered Cleaners. ECF Nos. 58, 78. Accordingly, those PAGA claims are properly covered by the Settlement.

The Subclasses partially overlap. Some Labor Code 2802 Subclass Members' employment ended before the beginning of the PAGA period, and they are therefore not part of the PAGA subclass. Some PAGA Subclass Members have no § 2802 claims at issue in this litigation, because they worked only at times and sites covered by the relevant CBAs, and they are therefore not part of the Labor Code 2802 Subclass.[12]

[10] *See* Nov. 1, 2018 Procedural Guidance for Class Action Settlements, section (1)(b) (requiring discussion of any modification of the class definition).

[11] The union representing the Cleaners covered by these CBAs is pursuing a grievance on their behalf. ECF Nos. 67-1, 78.

[12] Approximately 4,000 individuals are in the PAGA Subclass only, because they worked exclusively during the effective dates of the relevant CBAs and at CBA-covered sites, and thus all of their potential § 2802 claims were excluded from this litigation by the Court's modification of the class definitions. ECF No. 78.

C. The Scope of the Releases[13]

The two releases in the proposed Settlement are appropriately tailored to the scope of the two subclasses. *See* Settlement Agreement at ¶¶ 49-50. The claims released by Labor Code 2802 Subclass Members are limited to those pertaining to unreimbursed business expenses for the use of personal cell phones (and related claims of unfair business practices) during the relevant time period. *Id.* at ¶ 49. This release explicitly excludes claims subject to arbitration under the relevant CBAs. *Id.* The releases by PAGA Subclass Members are limited to PAGA claims pertaining to unreimbursed business expenses for work-related personal cell phone use during the statutory PAGA period. *Id.* at ¶ 50.

D. Allocation Plan and Anticipated Recovery[14]

The allocation plan is fair and objectively reasonable. It ensures that all members of the Settlement Class receive at least a minimum payment of $20, with higher minimum payments of $56 for Labor Code 2802 Subclass members (including those who are members of both Subclasses). Settlement Agreement at ¶ 46.

In addition to their minimum payments of $56, some Labor Code 2802 Subclass Members will receive additional payments. Specifically, for each month in the Class Period when a Labor Code 2802 Subclass Member's personal cell phone number appears in EPAY data or in ABM-provided phone records (i.e., records of supervisors' calls and texts), that Subclass Member will receive an additional payment of approximately $12. *Id.*

PAGA Subclass Members who are not members of the Labor Code 2802 Subclass will receive payments of $20 from the $110,000 PAGA Employee Share. *Id.* After payments of $20 are made to all such Subclass Members, the remaining portion of the PAGA Employee Share will be distributed pro rata to all other PAGA Subclass Members. *Id.*

[13] *See* Nov. 1, 2018 Procedural Guidance for Class Action Settlements, section (1)(d).
[14] *See* Nov. 1, 2018 Procedural Guidance for Class Action Settlements, section (1)(f).

E. Administrator[15]

Plaintiffs propose RG/2 Claims Administration LLC ("RG/2") as the Claims Administrator. Class Counsel requested bids from five third party administrators. RG/2 had the lowest bid. The bid includes translating the Notice from English to Spanish, mailing Notice, updating addresses and conducting skip traces, calculating settlement shares, maintaining a settlement website where Class Members can submit disputes, and mailing all payments if the Settlement receives Final Approval.[16] There is no claims process.

Plaintiffs' counsel, Hunter Pyle Law, previously engaged RG/2 as the settlement administrator in *James v. Packers Sanitation Services, Ltd., Inc*., Alameda County Superior Court No. RG16822242. Plaintiffs' counsel have not engaged RG/2 on any other matters in the past two years.

RG/2 has estimated that the administration costs will be $96,995.[17] This is approximately 1.8% of the total $5.4 million settlement, which is reasonable considering the scope of the administration and the number of class members. Plaintiffs have requested administration costs be approved preliminarily for an amount up to $125,000, to ensure that sufficient funds are allocated if administration becomes more expensive than expected in light of the fact that the Administrator is charged with making efforts to locate workers who may move frequently or otherwise be hard to locate. Worthman Dec. ¶ 32.

F. Settlement Notice[18]

The proposed Settlement Notice[19] explains the terms of the settlement, including the two Subclasses and corresponding releases, identification of which Subclass(es) each recipient belongs to, the number of "Qualifying Months"[20] that will be used to calculate Labor Code 2802

[15] *See* Nov. 1, 2018 Procedural Guidance for Class Action Settlements, section (2).
[16] *See* Ex. B to the Declaration of William Wickersham, filed herewith.
[17] *Id.*
[18] *See* Nov. 1, 2018 Procedural Guidance for Class Action Settlements, sections (3)-(5).
[19] Ex. A to the Settlement Agreement ("Notice").
[20] "Qualifying Months" are months during the class period (October 24, 210 through the date of preliminary approval of the proposed Settlement) in which a personal cell phone number associated with the Labor Code 2802 Subclass member appears in either ABM-provided phone

Subclass Members' awards, an estimate of the recipient's individual award, a straightforward process for challenging Subclass Members' estimated awards, information about how to object to or be excluded from the settlement, and information about the Final Approval Hearing. Each Settlement Class member will receive both English and Spanish versions of the approved Notice.

Notice will be sent by First Class U.S. Mail 21 days after Defendants produce an updated class list and additional classwide data that will be used to calculate estimated individual awards, and will be supplemented with email notice where feasible. Settlement Agreement at ¶¶ 58-60. Notices that are returned with forwarding addresses shall be remailed, and the Administrator will perform skip traces to find current addresses for Settlement Class Members whose Notices are returned without forwarding addresses. *Id.* at ¶ 60(a).

G. Proposed Attorneys' Fees and Costs[21]

Class Counsel will move for attorneys' fees and reimbursement of litigation costs 35 days before the deadline for Subclass Members to opt out of or object to the Settlement.[22] Counsel will request not more than 25% of the gross settlement amount, or $1,350,000, in attorneys' fees, and will request up to $110,000 actual litigation costs.[23] *See In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d 935, 941–43 (9th Cir. 2011) (the Ninth Circuit "benchmark" for a reasonable fee award is 25% of common fund); *Hopwood v. Nuance Commc'ns, Inc.*, No. 4:13-CV-02132-YGR, 2015 WL 12941896, at *2 (N.D. Cal. Oct. 28, 2015) (same). The settlement is not contingent on approval of requested attorneys' fees. Settlement Agreement at ¶ 41.

H. Proposed Service Awards for Class Representatives

The Settlement provides that Plaintiffs will request Service Awards of up to $10,000 for each Named Plaintiffs at the same time as Plaintiffs request attorneys' fees. The Service Awards

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records or EPAY punch records produced by ABM in this Action.

[21] *See* Nov. 1, 2018 Procedural Guidance for Class Action Settlements, section (6).

[22] *See* Nov. 1, 2018 Procedural Guidance for Class Action Settlements, section (9).

[23] Litigation costs include expert analysis of voluminous classwide data (comparing class member phone numbers to EPAY records and ABM-provided phone records) in preparation for mediation, and the costs that will be incurred to update this analysis to calculate individual settlement awards. Worthman Dec. ¶ 35.

would recognize the substantial role the Named Plaintiffs played in the success of this litigation, as will be detailed in their applications to this Court, and the fact that the Named Plaintiffs will provide general releases. *Id.* at ¶¶ 33-34, 51-52. The Settlement is not contingent on approval of the Service Awards. *Id.* at ¶ 35. Plaintiffs' request for Service Awards is further discussed below, § IV.C.6.

I. Cy Pres Awardees[24]

After expiration of individual settlement checks, residual funds, if any, are proposed to be awarded to cy pres beneficiaries Centro Legal de la Raza in Oakland and the Wage Justice Center in Los Angeles, in equal shares. *Id.* at ¶ 70. The parties and their counsel have no special relationships with these organizations, which were selected because they provide advocacy and legal services for low-income, Spanish-speaking workers in the two regions where the majority of Settlement Class Members live and work. The requested cy pres awards are therefore consistent with the objectives underlying the statutes at issue in this litigation and with the interests of the Settlement Class, and will benefit communities that are not remote from the Settlement Class. *See Dennis v. Kellogg Co.*, 697 F.3d 858, 865 (9th Cir. 2012).

J. Class Action Fairness Act Notice[25]

Defendants will comply with the notice requirements of the Class Action Fairness Act, 28 U.S.C. § 1715, within 10 days of the filing of this Motion, and will file a proof of service with the Court indicating such compliance before the preliminary approval hearing. Settlement Agreement at ¶ 57.

IV. ARGUMENT

A. The Court Should Preliminarily Approve this Class Action Settlement Under Rule 23(e) of the Federal Rules of Civil Procedure.

Any settlement of a certified class requires court approval. *See* Fed. R. Civ. P. 23(e). In

[24] *See* Nov. 1, 2018 Procedural Guidance for Class Action Settlements, section (8).
[25] *See* Nov. 1, 2018 Procedural Guidance for Class Action Settlements, section (10).

reviewing proposed class action settlements, the court should give "proper deference to the private consensual decision of the parties." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1027 (9th Cir. 1998). This reflects the longstanding policy in favor of encouraging settlement of class action suits, because "settlements offer parties and their counsel relief from the burdens and uncertainties inherent in trial. . . . The economics of litigation are such that pre-trial settlement may be more advantageous for both sides than expending the time and resources inevitably consumed in the trial process." *Franklin v. Kaypro*, 884 F.2d 1222, 1225 (9th Cir. 1989).

In the preliminary approval stage, where the proposed settlement class differs from a class that the court has previously certified, "the proposed modified class must meet the requirements of Rule 23." *Spann v. J.C. Penney Corp.*, 314 F.R.D. 312, 318-19 (C.D. Cal. 2016). Once the court has determined whether a permissible Rule 23 class exists, the court then evaluates whether the proposed settlement is "within the range of possible approval." *In re Tableware Antitrust Litig.*, 484 F. Supp. 2d 1078, 1079-80 (N.D. Cal. 2007); *see also* Manual for Complex Litigation § 22.923 (4th ed. 2004). The ultimate fairness determination occurs after class members receive notice of the settlement and have an opportunity to voice their views or to exclude themselves. *See* Manual for Complex Litigation § 21.31 (4th ed. 2004).

There is an initial presumption of fairness when a proposed settlement was negotiated at arm's length by Class Counsel. *See* 4 *Newberg on Class Actions* § 13:45 (5th ed. 2011). Courts recognize that the opinion of experienced counsel supporting the settlement is entitled to considerable weight. *See In re Pac. Enters. Sec. Litig.*, 47 F.3d 373, 378 (9th Cir. 1995) ("Parties represented by competent counsel are better positioned than courts to produce a settlement that fairly reflects each party's expected outcome in litigation.").

B. The Settlement Class Satisfies the Requirements of Rule 23 of the Federal Rules of Civil Procedure for Conditional Certification.

1. Conditional Certification of the Settlement Class, with Subclasses, Is Appropriate Under Rule 23.

Provisional certification of the Settlement Class and Subclasses is appropriate because

the requirements for class certification under Rule 23 are met, for essentially the same reasons that the Court certified the previous classes in this Case. ECF No. 49 at 6-16. The Rule 23(a) requirements of (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy of representation are satisfied. Fed. R. Civ. P. 23(a)(1)-(4). Furthermore, under Rule 23(b)(3), "the questions of law or fact common to class members predominate over any questions affecting only individual members," and "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3).

Additionally, provisional certification of a Settlement Class that differs from the previously certified classes is appropriate given that the Settlement provides substantial relief to all Cleaners who had the potential to recover as members of the certified classes and as potentially aggrieved employees under PAGA. Specifically, the Labor Code 2802 Subclass provides relief for all Cleaners who were potentially eligible to recover damages under § 2802 as members of one or more of the three certified classes. The PAGA Subclass provides relief for all Cleaners who could potentially have recovered PAGA penalties in this litigation. Plaintiffs did not previously seek certification of the PAGA claims, and accordingly the Court did not address the PAGA claims in its class certification order (ECF Nos. 49, 78).

Thus, provisional certification of the proposed Settlement Class and Subclasses ensures that all Cleaners who were subject to ABM's relevant policies and practices, and whose claims were before this Court, will receive monetary relief. *See supra* §§ III.A; III.D.

2. FRCP 23(a) Requirements for Class Certification Are Met.

a. The Class Is Sufficiently Numerous.

The numerosity prerequisite demands that the class be large enough that joinder of all members would be impracticable. Fed. R. Civ. P. 23(a)(1). While there is no exact numerical cut-off, courts routinely find numerosity satisfied with classes of at least forty (40) members. *See, e.g., Ikonen v. Hartz Mountain Corp.*, 122 F.R.D. 258, 262 (S.D. Cal. 1988) (40 class members satisfies numerosity). Here, the proposed Settlement Class includes approximately

34,000 members, easily satisfying the numerosity requirement. Worthman Dec. ¶ 31.

b. The Commonality Requirement Is Satisfied.

The commonality prerequisite for class certification concerns the existence of questions of law and/or fact common to the class. The plaintiff must assert at least one common contention that is capable of classwide resolution. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). In the wage and hour context, a plaintiff may demonstrate commonality by presenting significant proof that the defendant "operated under a general policy" of allegedly violating California labor laws. *Wang v. Chinese Daily News, Inc.*, 737 F.3d 538, 543 (9th Cir. 2013) (quoting *Wal-Mart*, 564 U.S. at 353).

The Court has already identified questions common to the Settlement Class in its class certification order. These questions include (1) whether Defendants knew that Settlement Class Members were using their cell phones for certain work-related purposes; (2) whether Settlement Class Members incurred expenditures or losses in direct consequence of their duties and in obedience to the directions of Defendants; and (3) whether it was necessary under the circumstances for Settlement Class Members to use their personal phones while discharging their duties. ECF No. 49 at 7-8. These same common questions apply to the Settlement Class.

c. Plaintiffs' Claims Are Typical of the Class and the Subclasses.

Typicality under Rule 23(a) exists if the named plaintiff's claims "are reasonably co-extensive with those of absent class members; they need not be substantially identical." *Hanlon*, 150 F.3d at 1020. Here, typicality is satisfied because the Plaintiffs' claims are the same as the Settlement Class' claims, as the Court previously found. ECF No. 49 at 14. For example, Plaintiffs were employed as Cleaners and alleged that they used their personal cell phones to discharge their work duties for ABM and were not reimbursed; exchanged work-related calls and texts with Leads and Supervisors on their personal cell phones; and clocked in and out with their cell phones. *Id.*; *see also* ECF No. 31-20 at ¶¶ 2, 4, 6-7 and No. 31-21 at ¶¶ 2, 4, 6-7.

In addition, the Plaintiffs are both members of and typical of the two subclasses. ABM

employed Plaintiff Castro as a Cleaner from June 2013 to June 2015 (ECF No. 31-20 at ¶ 2), and Plaintiff Marmolejo from April 2009 to December 31, 2014. ECF No. 31-21 at ¶ 2. Both are therefore members of the PAGA Subclass. Neither named Plaintiff worked under any of the applicable CBAs that contain an arbitration provision, as the CBAs did not become effective until 2016,[26] so they are both members of the Labor Code 2802 Subclass.

d. Plaintiffs and Their Counsel Will Fairly and Adequately Represent the Settlement Class.

The adequacy prerequisite permits class certification if the "representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). Proposed class representatives and their counsel cannot have conflicts of interest with the class and must vigorously prosecute the action on behalf of the class. *Hanlon*, 150 F.3d at 1020. Neither Plaintiffs nor their Counsel have a conflict with any Settlement Class Member.

The Court previously found that Hunter Pyle Law and Feinberg Jackson Worthman & Wasow are adequate class counsel. ECF No. 49 at 15. Both firms have significant experience representing plaintiffs in complex wage and hour class actions and PAGA cases.[27]

3. The Rule 23(a)(b)(3) Requirements for Class Certification Are Met.

a. Predominance.

The common questions raised in this action predominate over any individualized questions concerning the proposed Settlement Class under Rule 23(b)(3). Predominance does not require "that each element of [a plaintiff's] claim [is] susceptible to classwide proof." *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 469 (2013) (internal quotation marks and citation omitted). Common questions may predominate "even though certain class members' circumstances var[y] and some of the defendant's practices would have to be proven by anecdotal testimony." *Delagarza v. Tesoro Ref. & Mktg. Co.*, No. 90-cv-5803-EMC, 2011 WL

[26] *See* ECF No. 78 at 2.
[27] Pyle Dec. ¶¶ 3-15, 23-25; Worthman Dec. ¶¶ 5, 37; Worthman Dec. Exs. 2 and 3. *See also supra* § IV.C.4.

4017967, at *12 (N.D. Cal. Sept. 8, 2011).

The common questions the Court identified previously also predominate as to the Settlement Class, Plaintiffs contend, because they can be addressed with common proof in the form of ABM's records that will identify the Cleaners in the Class as a whole, and in each of the two Subclasses. ECF No. 49 at 7-12. Furthermore, expert analysis of Defendants' data can determine when Cleaners' cell phones were used to clock in or out, and to identify records of calls or texts between Cleaners on their personal phones and supervisors using company-issued phones. ECF No. 49 at 8-9; Worthman Dec. ¶ 25.

Once liability is established, Plaintiffs can prove damages on an individual basis if necessary. *Leyva v. Medline Indus. Inc.*, 716 F.3d 510, 514 (9th Cir. 2013) ("the presence of individualized damages cannot, by itself, defeat class certification under Rule 23(b)(3)"); *Pulaski & Middleman, LLC v. Google, Inc.*, 802 F.3d 979, 987 (9th Cir. 2015) ("the mere fact that there might be differences in damage calculations is not sufficient to defeat class certification").

b. Superiority.

A class action is also superior here as it is on the only method that will allow Settlement Class "to pool [their individual] claims which would be uneconomical to litigate individually." *Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc.*, 244 F.3d 1152, 1163 (9th Cir. 2001). Lack of a viable alternative to a class action necessarily means that it satisfies the superiority requirement. *See Valentino v. Carter-Wallace*, 97 F.3d 1227, 1234-35 (9th Cir. 1996) ("a class action is a superior method for managing litigation if no realistic alternative exists"). Further, a class action is superior when a "case involves multiple claims for relatively small sums," as here. *Culinary/Bartender Trust Fund*, 244 F.3d at 1163.

C. The Settlement Warrants Preliminary Approval as Fair, Reasonable, and Adequate.

1. Legal Standard

Once the Court has determined that certification of the Settlement Class is appropriate, the next step is to determine whether the settlement is "fundamentally fair, adequate, and

reasonable." *Staton v. Boeing Co.*, 327 F.3d 938, 959 (9th Cir. 2003); *see* Fed. R. Civ. P. 23(e)(2). "[A] strong judicial policy . . . favors settlements, particularly where complex class action litigation is concerned." *In re Syncor ERISA Litig.*, 516 F.3d 1095, 1101 (9th Cir. 2008).

Courts conduct a preliminarily assessment of the following factors, which are addressed more thoroughly at final approval: (1) the amount offered in settlement in relation to "the strength of the plaintiffs' case," "the risk, expense, complexity, and likely duration of further litigation," and "the risk of maintaining class action status through trial," (2) "the extent of discovery completed and the stage of proceedings," and (3) "the experience and views of counsel." *Hanlon*, 150 F.3d at 1026.[28] Courts generally grant approval where there are no "obvious deficiencies," and where the settlement is non-collusive and within the range of possible final approval. *Tableware Antitrust Litig.*, 484 F. Supp. 2d at 1079; *see also Civil Rights Educ. & Enfor't Ctr. v. RLJ Lodging Trust*, No. 15-cv-0224-YGR, 2016 WL 314400, at *11. Courts often "put a good deal of stock in the product of an arms-length, non-collusive, negotiated resolution." *Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 965 (9th Cir. 2009).

As shown below, the settlement is fair and reasonable in light of all these factors.

2. The Settlement Is Fair and Reasonable in Light of the Strengths of Plaintiffs' Case and the Risks and Uncertainties of Litigation.

Here, the Settlement results in a substantial monetary benefit to all Settlement Class Members, who will receive shares of a fund of no less than $3,465,000. Settlement Class Members will each receive minimum payments of at least $56 (for Labor Code 2802 Subclass Members, including those also in the PAGA Subclass), or $20 (for Settlement Class Members who are in the PAGA Subclass but not in the Labor Code 2802 Subclass). *See supra* § III.D. The minimum payments are comparable to two times the measure of damages Plaintiffs' expert identified for the minimum cost of a month's cell phone use, for Labor Code 2802 Subclass

[28] Courts also consider "the presence of a government participant," and "the reaction of the class members to the proposed settlement." There is no government participant here, and the class members' reaction is better evaluated at final approval after Settlement Notice is disseminated and class members have a chance to opt-out or object.

Members, and just under one month's minimum cell phone use, for PAGA Subclass Members. In addition, the Settlement provides greater payments for Labor Code 2802 Subclass members whose personal cell phone usage is shown in ABM's data, reflecting the relative strength of their claims, as well as additional payments for PAGA Subclass Members who are also in the Labor Code 2802 Subclass. *See id.*

The monetary value of the Settlement represents a very strong result for the Class given the litigation risks and uncertainties. Plaintiffs calculated that Defendants' maximum exposure, if Plaintiffs had prevailed upon all of their claims, was approximately $3,500,000 for the § 2802 claims of the three certified classes (exclusive of interest, which Plaintiffs calculated as approximately $1,170,000) and approximately $13,000,000 for the PAGA penalties of all Cleaners employed during the class period. The total settlement amount therefore represents approximately 30% of the $17,670,000 maximum exposure Defendants' faced for both the § 2802 claims and the PAGA penalties. It is greater than the total maximum exposure for the § 2802 damages and interest. Worthman Dec. ¶ 34.

Although Plaintiffs believe in the strength of the Cleaners' claims, they faced a number of risks. First, although Plaintiffs believe their arguments regarding the scope of the arbitration agreements would have prevailed, they faced risk that Defendants would prevail on their pending appeal of the Court's Order denying Defendants' motion to compel all CBA-covered Cleaners' claims to arbitration and instead modifying the class definitions.[29] Plaintiffs also faced the risk of possible decertification before, at, or after trial, as Defendants argued that liability for one or more of the classes raised significant individualized issues. Furthermore, while Plaintiffs assert that proving liability would have been data-driven, Defendants contend that Plaintiffs faced challenges in proving that each type of cell phone use identified in the class definitions was necessary under the circumstances, including as to the necessity of using personal cell phones to clock in and out of EPAY where other methods were ostensibly available.

[29] *Castro v. ABM Indus. Inc.*, No. 18-16045 (9th Cir. 2018).

Defendants also challenge Plaintiffs' damages model. Specifically, Defendants have argued that any reimbursement owed should be determined based upon a percentage of the individual's actual monthly cell phone expenses, rather than a flat amount equal to the lowest-cost available cell phone. ECF No. 33 at 22-23. If the Court agreed, it could have resulted in lower monthly damages as well as the need to make individualized damages calculations.

In addition, had Plaintiffs prevailed at trial, their PAGA award would very likely have been significantly lower than the maximum exposure Plaintiffs calculated, given judicial discretion to reduce PAGA penalties in the interest of equity. Cal. Lab. Code § 2699(e)(2). Three-fourths of any PAGA penalties awarded would have been owed to the state, leaving only 25% of the total amount of penalties for the Cleaners with PAGA claims. *See Arias v. Super. Ct.*, 46 Cal.4th 969, 986 (2009) ("75 percent of any civil penalties recovered must be distributed to the Labor and Workforce Development Agency"). Therefore, the PAGA aggrieved employees risked receiving minimal relief for their claims.

Finally, if Plaintiffs maintained certification and prevailed at trial, Defendants would in all likelihood have appealed the judgment, resulting in further delays of the resolution of these claims and an additional risk that Plaintiffs would not ultimately obtain relief.

In this context, the settlement amount is a positive result for the Settlement Class. The settlement amount represents a significant portion of the maximum exposure including PAGA penalties, and in total it is equal to over 100% of the maximum exposure for the § 2802 claims. *See, e.g.*, *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 459 (9th Cir. 2000) (finding a settlement amount of one-sixth of the potential recovery to be fair and reasonable under the circumstances); *McLeod v. Bank of America, N.A.*, No. 16-cv-03294-EMC, 2018 WL 5982863, at *4 (N.D. Cal. Nov. 14, 2018) (citing cases approving settlements from 24% to 32.4% of exposure).

Additionally, the $440,000 allocated to the PAGA claims, 75% of which will be provided to the LWDA, is typical of wage and hour settlements and appropriate in light of the risks, the

inherent discretion of the Court over PAGA awards, and the "[robust] value of the settlement as a whole." *See O'Connor v. Uber Techs., Inc.*, 201 F. Supp. 3d 1110, 1132–35 (N.D. Cal. 2016) (discussing sliding scale applicable to review of PAGA awards); *McLeod*, 2018 WL 5982863, at *2 (granting preliminary approval to wage and hour settlement that allocated $50,000 to PAGA out of $11 million gross settlement fund).

3. Extensive Discovery and Data Analysis Informed the Settlement.

Counsel in a class action settlement must have conducted sufficient investigation and discovery to make informed decisions about the settlement. *Mego Fin. Corp. Sec. Litig.*, 213 F.3d at 459. Class Counsel here have thoroughly investigated the facts, including reviewing thousands of pages of documents and emails produced during discovery, deposing two of Defendants' corporate witnesses, and hiring an expert to review large quantities of EPAY and company-owned phone records data to evaluate the frequency and prevalence of personal cell-phone use by Cleaners. Pyle Dec. ¶¶ 16-17; Worthman Dec. ¶¶ 25-27.

4. The Settlement Compares Favorably to Class Counsel's Prior Class Action Settlements.

Pursuant to the November 1, 2018 Procedural Guidance for Class Action Settlements, several comparable class action settlements in which Hunter Pyle and Catha Worthman have represented plaintiffs are summarized below and in their attached declarations. Class counsel, who are experienced in wage and hour class actions and PAGA litigation, consider this to be an excellent result, which compares favorably to previous settlements that Courts have approved. Pyle Dec. at ¶¶ 20, 23-25; Worthman Dec. at ¶¶ 5, 34, 37.

Hunter Pyle: Comparable Class Action Settlements			
	***Hooper v. URS Midwest, Inc.*, Case No. CIV DS1607489 (San Bernardino County Superior Court)**	***Newcomb v. J.B. Hunt Transport*, Case No. RG16815734 (Alameda County Superior Court),**	***Brooks v. Chariot Transit, Inc.*, Case No. CGC-16-554398 (San Francisco Superior Court)**
How Comparable Claims	Similar claims	Similar claims	Similar claims
	Minimum wage, meal and rest periods, § 2802 claims	§ 2802 claims	Minimum wage, rest periods, § 2802 claims

Hunter Pyle: Comparable Class Action Settlements (continued)			
Total Settlement Fund	$3,000,000	$750,000	$750,000
Total Number of Class Members	351	4,842	741
Total Number of Class Members to Whom Notice Was Sent	351	4,842	741
Method of Notice	U.S. Mail	U.S. Mail; website	U.S. Mail; website
Number and Percentage of Claim Forms Submitted	N/A (no claim form)	N/A (no claim form)	N/A (no claim form)
Average Recovery per Class Member	$1,836.37	$74.66	$571.26
Amounts Distributed to Cy Pres Recipients	$2,080.67 (Unclaimed Wages Fund)	$40,137.03 (Legal Aid at Work)	Partnership for Children & Youth (deadline for cashing checks has not expired)
Administrative Costs	$25,000	$25,594	$25,000
Attorneys' Fees	$993,069.75	$250,000	$225,000
Approved Costs	$25,226.89	$8,830.43	$9,776.62
PAGA Amount (including 75% to LWDA and 25% to Plaintiffs)	$30,000	$75,000	$43,780
Service Awards to Named Plaintiffs	$10,000 (to 3 plaintiffs)	$10,000 (to 3 plaintiffs)	$3,000 (to 2 plaintiffs)

Catha Worthman: Comparable Class Action Settlements[30]			
	***Rogers v. Kindred Healthcare*, Case No. RG-14-729507 (Alameda County Superior Court)**[31]	***Lindell v. Synthes*, Case No. 1:11-cv-02053-LJO-BAM (E.D. Cal.)**[32]	***Gutierrez v. Schmid Insulation Contractors*, Case No. 08-cv-6010-DSF (C.D. Cal.)**[33]
How Comparable	Similar clients	Similar claims (§ 2802)	Similar clients & claims (tools)
Claims	Minimum wage, meal and rest periods, overtime	§ 2802 claims, Labor Code deduction claims	Minimum wage, meal and rest periods, overtime, tools
Total Settlement Fund	$2,465,000	$5,000,000	$8,500,000
Total Number of Class Members	2,722	186	3,185
Total Class Members Sent Notice	2,722	186	3,185
Method of Notice	First class mail	First class mail; website	First class mail
# and % of Claim Forms Submitted	N/A (no claim form)	N/A (no claim form)	N/A (no claim form)
Average Recovery per Class Member	$672	$17,000	$1,888
Amounts Distributed to Cy Pres Recipients	$15,983.94 (allocated equally between Asian Law Caucus, Mujeres Unidas y Activas, and CA State Treasury Funds)	$7,700 (Legal Aid at Work)	$56,170 (Casa de Amigos)
Administrative Costs	$35,000	$15,000	$90,000
Attorneys' Fees	$571,445.80	$1,500,000	$2,125,000
Approved Costs	$25,226.89	$179,871	$140,000
PAGA Amount (including 75% to LWDA and 25% to Plaintiffs)	$50,000	$55,000	$100,000
Service Awards to Named Plaintiffs	$10,000 (to 2 Plaintiffs)	$10,000 (to 1 Plaintiff)	$10,000 (to 2 Plaintiffs)

[30] Feinberg Jackson Worthman & Wasow Class Counsel on the listed cases include Genevieve Casey (on *Rogers v. Kindred*) and Todd Jackson (lead counsel on *Gutierrez*; counsel in *Synthes*).
[31] Plaintiffs were also represented by co-counsel Legal Aid at Work (formerly The Legal Aid Society – Employment Law Center) and Women's Employment Rights Clinic, Golden Gate University School of Law.
[32] Plaintiffs were also represented by co-counsel Lang, Richert & Patch.
[33] Plaintiffs were also represented by co-counsel Sullivan Taketa LLP and the Mexican American Legal Defense and Educational Fund.

5. Plaintiffs Will Submit a Separate Application for the Requested Attorneys' Fees, Costs, and Expenses.

Prior to the Final Approval Hearing, Class Counsel will file a formal application for attorneys' fees and costs and expenses along with briefing and declarations in support. At this initial juncture, Plaintiff merely notes that attorneys' fee requests provided for in the Settlement are fully in accord with Ninth Circuit authority, and do not constitute the type of "obvious deficiency" that would prevent preliminary approval and notice to the Classes.

Plaintiffs' counsel will seek up to 25% of the gross settlement amount in fees, and actual litigation costs of up to $110,000. Plaintiffs' counsel will file a motion for reasonable attorneys' fees, costs, and expenses at least 35 calendar days prior to the opt-out/objection deadline so that Settlement Class Members will have an opportunity to review Plaintiffs' counsel's fee application prior to the deadline for submitting objections or requests for exclusion.

In requesting an award of attorneys' fees equal to 25% of the gross settlement amount, or $1,350,000, Plaintiffs' counsel are seeking significantly less than their lodestar, which is approximately $1,775,595, including 3,331 hours billed to date. Worthman Dec. ¶ 35; Pyle Dec. ¶ 27. This lodestar amount will continue to increase as Plaintiffs' counsel continues to perform work on this case. Given the value of the settlement and the reasonableness of the request, consistent with the Ninth Circuit's "benchmark" of 25% of the total fund in class action settlements, Plaintiffs' proposed requested attorneys' fees are appropriate for preliminary approval. *See In re Bluetooth* 654 F.3d at 941–43 (9th Cir. 2011); *Hopwood*, 2015 WL 12941896, at *2.

6. The Settlement Provides Reasonable Service Awards for the Class Representatives.[34]

The proposed Service Awards also do not present an "obvious deficiency" that would prevent preliminary approval. The Court has discretion to award service awards to compensate

[34] Plaintiffs are aware that the Court will not make a determination on incentive awards until final approval, but include this information pursuant to the Nov. 1, 2018 Procedural Guidance for Class Action Settlements, section (7).

plaintiffs and class members for work done on behalf of the class and in consideration of the risk undertaken in bringing the action. *Rodriguez*, 563 F.3d at 958-59. Courts often assess the reasonableness of the award by considering: "(1) the risk to the class representative in commencing a 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." *Van Vranken v. Atl. Richfield Co.*, 901 F. Supp. 294, 299-300 (N.D. Cal. 1995) (approving $50,000 service award); *see also del Toro Lopez v. Uber Techs., Inc.*, No. 17-CV-06255-YGR, 2018 WL 5982506, at *3 (N.D. Cal. Nov. 14, 2018) (approving service awards of $30,000 and $50,000).

The above factors support the Service Awards requested here. Both Named Plaintiffs have committed substantial time and effort to their representation of the classes thus far, including time spent responding to discovery, testifying at full-day depositions, and otherwise assisting counsel with the investigation and evaluation of the cell phone claims. ECF No. 31 at 17-18; Pyle Dec. at ¶ 26; Worthman Dec. at ¶ 36. The Court should therefore preliminarily approve the Settlement with the requested Service Awards.

7. The Settlement Was the Product of Informed, Non-Collusive, Arms-Length Negotiations Between Experienced Counsel Who Support the Settlement.

Finally, courts routinely presume a settlement is fair where it is reached through arm's-length bargaining, as here. *See Hanlon*, 150 F.3d at 1027 (affirming trial court's approval of class action settlement where parties reached agreement after several months of negotiation and the record contained no evidence of collusion); *Wren v. RGIS Inventory Specialists*, No. C–06–05778 JCS, 2011 WL 1230826, at *14 (N.D. Cal. April 1, 2011) (finding that settlement reached after mediation before an experienced and retired judge was reached in a "procedurally sound manner and that it was not the result of collusion or bad faith by the parties or counsel"); *see also Satchell v. Fed. Exp. Corp.*, No. C 03-2659 SI, 2007 WL 1114010, at *4 (N.D. Cal. Apr. 13, 2007) ("The assistance of an experienced mediator in the settlement process confirms that the

settlement is non-collusive."). Further, where counsel are well-qualified to represent the proposed class in a settlement based on their extensive class action experience and familiarity with the strengths and weakness of the action, courts find this factor supports a finding of fairness. *Wren*, 2011 WL 1230826, at *9-10; *Carter v. Anderson Merchandisers, LP*, No. EDCV 07-0025-VAP, 2010 WL 1946784, at *8 (C.D. Cal. May 11, 2010).

The Settlement was a product of non-collusive, arm's-length negotiations. On October 15, 2018, the Parties participated in a full-day mediation facilitated by Mark Rudy, a skilled and experienced mediator with extensive knowledge of employment matters, including wage and hour class actions. Pyle Dec. ¶ 19; Worthman Dec. ¶ 28. This mediation resulted in a written memorandum of understanding that memorialized the core terms of the proposed settlement herein. Pyle Dec. ¶ 19; Worthman Dec. ¶ 28. The Parties have spent over two months following the mediation negotiating the written Settlement Agreement, including several telephonic meetings regarding substantive terms. Pyle Dec. ¶ 19; Worthman Dec. ¶ 28. In addition, the Parties are represented by skilled and experienced counsel who have extensive background litigating and settling similar wage and hour class actions. *See supra* at § IV.B.1.d.

In sum, all factors support a finding that the Settlement is fair, reasonable, and adequate.

D. The Court Should Approve the Notice to the Settlement Class.

Rule 23(c)(2)(B) provides that, in any case certified under Rule 23(b)(3), the court must direct to class members the "best notice practicable" under the circumstances. Rule 23(c)(2)(B) does not require "actual notice" or that a notice be "actually received." *Silber v. Mabon*, 18 F.3d 1449, 1454 (9th Cir. 1994). Notice need only be given in a manner "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

Here, the parties have agreed on a notice plan that will provide Settlement Class Members with the best notice practicable. The proposed Notice is clear and detailed, providing

Settlement Class Members with all necessary information about the terms of the settlement as well as personalized information about their anticipated settlement award and how it was calculated. *See supra* at § III.E. The Notice includes simple written and online methods by which Settlement Class Members can challenge their estimated awards (such as by providing an alternate cell phone number they may have used for work, or by providing other information regarding the number of Qualifying Months used to calculate their awards). Notice at § 6; Settlement Agreement at ¶ 60(d). It also provides detailed information about how Settlement Class Members can learn more about the settlement, opt out, or object to its terms, and informs them of the Final Approval Hearing date and that Plaintiffs' motion for fees and costs will be available for their review 35 days before the Final Approval Hearing. Notice at §§ 3, 7-8, 10, 15.

The Notice will be mailed, in English and Spanish, to all Settlement Class Members by U.S. Mail, and appropriate steps will be taken to follow up regarding returned notices. Settlement Agreement at ¶ 60(a). The notice plan is designed to ensure that as many Settlement Class Members as possible receive the Court-approved Notice and are well informed of all pertinent terms of the settlement. The proposed Notice and notice plan should therefore be approved.

E. The Court Should Set a Fairness Hearing.

Once a class action settlement is preliminarily approved, the Court may schedule a final fairness hearing at which arguments for and against the settlement may be heard. *See* 4 *Newberg on Class Actions* § 13:42 (5th ed.). The following schedule sets forth a proposed schedule, assuming the Settlement is preliminarily approved on February 12, 2019:

Event	**Event Date**
Defendants to provide Settlement Class data to Claims Administrator and Class Counsel	April 12, 2019
Claims Administrator to mail Settlement Notice to the Settlement Class	May 3, 2019
Class Counsel to file Motion for Attorneys' Fees and Named Plaintiffs' Service Payments	May 28, 2019

Deadline for Settlement Class Members to object or opt-out of the settlement	July 2, 2019
Class Counsel to file Motion for Final Approval	July 16, 2019
Claims Administrator to provide declaration of due diligence and report on opt outs (to be filed with Court by Class Counsel)	July 30, 2019
Final Approval Hearing and Hearing on Motion for Attorneys' Fees and Named Plaintiffs' Service Payments	August 20, 2019

V. CONCLUSION

For the foregoing reasons, the Court should (1) conditionally certify the proposed Settlement Class and Subclasses for settlement purposes under Rules 23(b)(3) and 23(e) of the Federal Rules of Civil Procedure; (2) preliminarily approve the settlement as fair, adequate, and reasonable under Rule 23(e) based upon the terms set forth in the Settlement Agreement; (3) appoint Plaintiffs Marley Castro and Lucia Marmolejo as Class Representatives; (4) appoint Hunter Pyle Law and Feinberg, Jackson, Worthman & Wasow LLP as Class Counsel; (5) approve and direct the mailing of the Settlement Notice pursuant to the proposed notice plan; (6) approve RG/2 Claims Administration LLC as the Claims Administrator; and (7) schedule a fairness hearing for final approval of the Settlement, entry of a proposed final judgment, Class Counsel's Motion for Attorneys' Fees, and the Class Representatives' Service Awards, all as set forth in the accompanying proposed order.

Dated: January 4, 2019

Respectfully submitted,
FEINBERG, JACKSON, WORTHMAN & WASOW LLP
HUNTER PYLE LAW

/s/ Genevieve Casey
Genevieve Casey

Attorneys for Plaintiffs and the Putative Class