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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CARLOS MORENO, individually, and on behalf of all others similarly situated,

Plaintiff,

v.

PRETIUM PACKAGING, L.L.C., a Delaware limited liability company, and DOES 1 through 10, inclusive,

Defendants.

Case No. 8:19-cv-02500-SB-DFM

[Hon. Stanley Blumenfeld, Jr.]

PLAINTIFF'S MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND CLASS REPRESENTATIVE SERVICE PAYMENT

Date: August 6, 2021
Time: 8:30 a.m.
Courtroom: 6C

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff Carlos Moreno seeks final approval of a proposed $1.6 million non-reversionary, class action settlement of this wage-and-hour class case with Defendant Pretium Packaging, L.L.C. ("Defendant" or "Pretium"). The Stipulation of Settlement ("Stipulation" or "Settlement") will provide substantial monetary payments to approximately 745 Class Members. And, as set forth more fully below, the proposed settlement satisfies all the criteria for settlement approval under Rule 23. The Settlement was reached after extensive discovery, investigation, and negotiations. The negotiations were at arms-length and were facilitated by an experienced neutral Hon. Peter Lichtman (Ret.) over the course of an in-person mediation session and the Settlement was finalized through several rounds of arms-length negotiations.

On March 12, 2021, the Court granted preliminary approval of the proposed class action settlement. ECF No. 54. Since preliminary approval, the Court-appointed Settlement Administrator, ILYM Group, Inc. ("ILYM"), issued the Court approved Notice to the settlement class members, using the most updated contact information held by the parties, as updated through data from the National Change of Address (NCOA) database and skip-trace databases. *See* Declaration of Madely Nava ("Nava Decl.") at ¶¶ 6, 8. Despite having an initial rate of 17.05% of the class notices being returned as "undeliverable," ILYM and Class Counsel were able to locate updated addresses, which significantly lowered the final rate of undeliverable class notices to only 6.17%. *Id*. at ¶ 8-10. In fact, to make sure that as many Class Members as possible received the class notice, Class Counsel's office also directly reached out to class members by telephone to get updated addresses from individuals in instances where the skip trace databases were unable to locate current addresses. Declaration of Justin F. Marquez ("Marquez Decl."), ¶ 17. Ultimately, Class Counsel's office was able to reach approximately 30 class

members directly by telephone to obtain updated addresses so they could receive the class notice. *Id.*; *see also* Declarations of Salvadora Dominguez and Suyap Madrid.

Class Members had sixty (60) days to object to the Settlement, raise disputes regarding the calculation of their awards, or opt-out of the Settlement. To date, not a single Class Member has objected to the Settlement or otherwise requested to be excluded from the Settlement. Nava Decl., ¶¶ 11-12. Similarly, no Class Member has disputed the information provided to them concerning their workweeks (from which the individual payment amounts are calculated), and none of the Class Members have sought to opt-out of the Settlement agreement. Nava Decl., ¶¶ 13-14. This tremendous support from the class further supports the final approval of the Settlement.

Aside from the widespread support from the class members themselves, the proposed Settlement satisfies all the criteria for settlement approval under Federal Rule of Civil Procedure 23. Indeed, as demonstrated in the motion for preliminary approval and again in the motion for attorneys' fees and costs, the proposed Settlement provides excellent benefits to the class, particularly considering the complexities and risks of the case. Accordingly, Plaintiff requests that the Court grant final approval of the proposed Settlement.[1]

II. SUMMARY OF THE LITIGATION AND SETTLEMENT

A. Plaintiff's Claims and Defendant's Defenses

This is a wage-and-hour class action and Private Attorneys General Act ("PAGA") representation action. Plaintiff and the Class Members worked in

[1] Plaintiff also has separately moved for an award of attorneys' fees and costs. ECF No. 57. Plaintiff filed this motion on July 9, 2021, about two weeks after the deadline for objections and opting-out for the initial round of the notices. The Court-approved Class Notice informed Class Members of Plaintiffs' motion for attorneys' fees and costs, and how to obtain a copy of it to review. No Class Member has objected to any portion of the attorneys' fees and costs sought. Accordingly, for the reasons discussed in those motions, Plaintiff also separately requests approval of his previously filed motion for attorneys' fees and costs.

1 California as hourly-paid, non-exempt employees for Pretium during the class
2 period. Pretium is a packaging solutions company based in Chesterfield, Missouri,
3 that operates numerous locations throughout the United States, including locations
4 in Anaheim, California and Escondido, California. Marquez Decl. at ¶ 3.

5 Plaintiff alleges that Defendant's payroll, timekeeping, and wage-and-hour
6 practices resulted in Labor Code violations. Specifically, Plaintiff alleges that
7 Defendant failed to provide employees with legally compliant meal and rest
8 periods, and failed to pay all required meal and rest period premiums for non-
9 compliant meal and rest periods. Plaintiff also alleges that Defendant failed to pay
10 required double overtime for all hours worked in excess of 12 hours per workday
11 and all worktime greater than 8 hours on the 7th consecutive day worked. Based
12 on these allegations, Plaintiff has included claims for failure to pay overtime
13 wages, failure to provide meal periods, failure to authorize and permit rest periods,
14 failure to provide accurate wage statements, unfair business practices, and civil
15 penalties under the PAGA, California Labor Code §§ 2698 *et seq*. Marquez Decl.,
16 ¶ 4.

17 Defendant denies Plaintiff's allegations and denies any liability to Plaintiff and
18 the Class Members. Specifically, Defendant contends that its wage and hour policies
19 and practices, including those regarding overtime pay, meal periods, rest periods,
20 record keeping, and pay stubs, are lawful and have been lawful throughout the entire
21 class period. Defendant also contends that class certification would be improper in
22 this case. Marquez Decl., ¶ 5.

23 **B. <u>Procedural History</u>**

24 Plaintiff initiated this action on behalf of himself and a putative class in the
25 Orange County Superior Court on November 26, 2019. The initial Complaint
26 alleged the following claims for relief: (1) failure to pay overtime wages (Cal. Lab.
27 Code §§ 510, 1194 and 1198); (2) failure to provide meal periods (Cal. Lab. Code
28 §§ 226.7, 512); (3) failure to authorize and permit rest periods (Cal. Lab. Code §

226.7); (4) failure to provide accurate itemized wage statements (Cal. Lab. Code § 226); and (5) unfair business practices (Cal. Bus. & Prof. Code §§ 17200 *et seq*.). ECF 1-2.

On December 27, 2019, Defendant removed this action to federal court pursuant to the Class Action Fairness Act of 2005 ("CAFA"), 28 U.S.C. §§ 1332, 1441, 1446, 1453. ECF 1. On January 27, 2020, Plaintiff filed a Motion to Remand on the grounds that Defendant had failed to show that the amount in controversy exceeded $5 million, as required under CAFA. ECF 15. On March 9, 2020, the Court denied Plaintiff's Motion to Remand. ECF 31.

On February 10, 2020, Plaintiff filed a First Amended Complaint, which provided additional information and facts regarding Plaintiff's allegations. ECF 16. Defendant subsequently filed a Motion to Strike Allegations from Plaintiff's First Amended Complaint, which the Court later vacated following a joint stipulation by the Parties for Plaintiff to file a Second Amended Complaint. ECF 27, 35, 36.

On April 10, 2020, Plaintiff filed a Second Amended Complaint to modify portions of the allegations and to add an additional cause of action seeking civil penalties under PAGA. ECF 35-1. Prior to filing this action, Plaintiff sent notice of alleged Labor Code violations to the Labor Workforce Development Agency ("LWDA"), pursuant to California Labor Code § 2699.3(1).

On April 27, 2020, Defendant filed its Answer to Plaintiff's Second Amended Complaint, and, on June 1, 2020, Defendant filed a First Amended Answer. ECF 37, 40. On June 15, 2020, Plaintiff filed a Motion to Strike Affirmative Defenses. ECF 41. On July 17, 2020, the Court granted in part and denied in part Plaintiff's Motion to Strike, which prompted Defendant's filing of its Second Amended Answer on August 6, 2020. ECF 47, 48.

On December 16, 2020, the Parties participated in a full-day mediation session with Hon. Peter D. Lichtman (Ret.). Through the mediation, the Parties

1 reached a settlement of all class and representative claims against Pretium.
2 Marquez Decl., ¶¶ 6 to 8.

3 **C. Discovery and Investigation**

4 The Parties have engaged in extensive discovery. Plaintiff served written
5 discovery, including Requests for Production of Documents and Interrogatories,
6 on Defendant. The discovery sought information and documents related to, *inter*
7 *alia*, Defendant's policies and procedures for compensating its employees,
8 recording its employees' worktime, providing meal periods, authorizing and
9 permitting rest periods, and furnishing wage statements. The discovery also sought
10 information and documents pertaining to the identification of the class members.
11 Marquez Decl., ¶ 9.

12 Defendant provided written responses to Plaintiff's discovery and produced
13 more than 8,300 pages of documents in response to the written discovery. The
14 documents produced by Defendant pertained to Defendant's wage-and-hour
15 policies and procedures, including employee handbooks and other policy
16 documents, personnel files, job descriptions, contact information for the putative
17 class members, and a sampling of putative class member pay and time records.
18 Marquez Decl., ¶ 10.

19 The Class Counsel reviewed and analyzed these records and hired an expert
20 to conduct an analysis of the Class Members' pay and time records and to prepare
21 a damages model. The expert analyzed the time and pay records for the Class
22 Members at both the Anaheim and Escondido locations to determine whether
23 Defendant paid overtime correctly, paid double overtime correctly, provided
24 timely and compliant meal periods, and provided any premiums for noncompliant
25 meal and rest periods. Plaintiff's expert also calculated the total amount of unpaid
26 double overtime, unpaid overtime, late meal periods, short meal periods, and
27 missed meal periods. Moreover, Plaintiff's expert conducted a detailed analysis
28 of the frequency and severity of the recorded late, short, and missed meal periods

based on the time and pay records throughout the class period. In addition to their factual investigation, Plaintiff's counsel investigated the applicable law regarding the claims and defenses to the claims asserted in the litigation. Thus, Plaintiff and the Class Counsel are familiar with the facts of the case and the legal issues raised by the pleadings and were able to act intelligently in negotiating the Settlement. Marquez Decl., ¶ 11.

D. Settlement Negotiations

The Parties engaged in a significant amount of investigation, class-wide discovery, and analysis prior to reaching the proposed settlement. Defendant responded to Plaintiff's written discovery, provided extensive information on the company's wage and hour policies and practices, provided the contact information for the Class Members, and produced over 8,300 pages of relevant documents. It was only after the exchange of a substantial amount of data and information that the Parties participated in a full-day mediation session and ultimately reached settlement of the case. Marquez Decl., ¶ 12.

On December 16, 2020, the Parties participated in private mediation with the experienced neutral Hon. Peter D. Lichtman (Ret.). Judge Lichtman (Ret.) was the former head of the Los Angeles Superior Court Mandatory Settlement Program and served as a chair of the county's Complex Civil Litigation Department. After extensive negotiations and discussions regarding the strengths and weakness of Plaintiff's claims and Defendant's defenses, the Parties were able to reach an agreement at the mediation regarding the key terms and provisions of the settlement. Ultimately, the Parties agreed to a settlement through multiple arm's length negotiations. Marquez Decl., ¶ 13.

E. Key Terms of the Proposed Settlement

Under the Settlement Agreement, Pretium will pay $1,600,000 to resolve this litigation. Marquez Decl., ¶ 14. The key terms include:

1. Settlement Participating Class: The Participating Class includes "all persons who worked for Defendant in California as an hourly paid or non-exempt employee at any time" "from November 26, 2015 through the date when the Stipulating of Settlement is fully executed" (i.e., February 9, 2021) and "who do[] not submit a valid and timely Opt-Out Request to be excluded from the Settlement," excluding any person who, by the time the Court grants preliminary approval of the Stipulation, has separately released Defendant of the claims as defined in Section 2.29 of the Settlement. *See* Settlement at ¶¶ 2.4, 2.6, 2.25, 2.29, 2.34.

2. $1.6 Million Non-Reversionary Settlement Fund: This Settlement provides for a $1.6 million payment to provide for Class Member settlement payments, attorneys' fees and costs, a $37,500.00 payment to the Labor & Workforce Development Agency ("LWDA") for the State's share of penalties under PAGA, an incentive award of $10,000 to the class representative, and $15,000 for the costs of settlement administration. Settlement at ¶ 5.2.

3. Distribution of Settlement Payments: Participating Class Member distributions shall be divided among all Participating Class Members on a pro rata basis, based on the ratio of number of weeks worked by each Participating Class member during the Class Period, to the total number of weeks worked by all Participating Class Members from November 26, 2015 through the date when the Stipulation of Settlement is fully executed" (i.e., February 9, 2021). Settlement at ¶¶ 2.7, 5.7.1.

4. Releases: The Class Member release is coextensive with those claims that were or could have been brought in the operative Second Amended Complaint (ECF No. 35-1). Settlement at ¶ 7.4. Class Members' claims will be released through the date when the judgment becomes final judgment. Settlement at ¶ 2.13, 2.16, 5.8.1. In addition, in consideration for his incentive awards, the Class Representative

will also provide a general release of claims and a waiver of unknown claims. Settlement at ¶ 2.9.

5. Tax Allocation: For tax reporting purposes, payment to the Participating Class Members shall be allocated as 40% penalties, 40% interest, and 20% wages. Settlement at ¶ 5.7.2.

6. Attorneys' Fees and Costs: The Settlement provides that Class Counsel may seek up to one-third of the $1.6 million gross settlement fund for attorneys' fees, and their actual litigation expenses incurred. Settlement at ¶ 5.4. Even if the gross settlement fund is increased based on an increase in the class size, Class Counsel's attorneys' fees are capped at one-third of $1.6 million, or $533,333.33. Settlement at ¶ 5.4. Class Counsel may seek an amount not to exceed $20,000.00 in litigation expenses from the gross settlement fund. Settlement at ¶ 5.4. Plaintiffs filed a separate motion for attorneys' fees and costs under Rule 23(h) on June 3, 2021, seeking attorney's fees $533,333.33 and costs of $14,053.28. ECF No. 57.

7. Incentive Award to Class Representatives: The Settlement provides for an incentive award of $10,000 to the class representative Carlos Moreno, in recognition of his efforts on behalf of the Class. Settlement at ¶ 5.3.

8. Settlement Administrative Costs: The Parties have agreed to use ILYM Group, Inc. as the settlement administrator. Settlement at ¶ 2.3. Settlement administration costs are capped at $15,000.00. Settlement at ¶ 5.6.

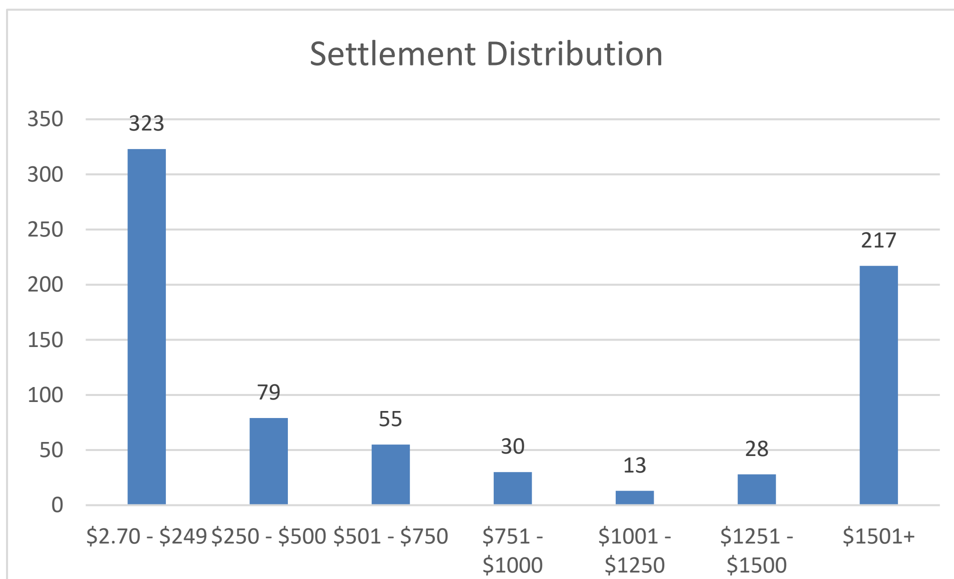
F. Preliminary Approval and Overwhelming Support for the Settlement

The Court granted Plaintiff's Motion for Preliminary Approval of the Settlement on March 12, 2021. ECF 54. The initial order granting preliminary approval required Plaintiff to file a motion requesting attorneys' fees and costs by July 16, 2021, which would have taken place after the initially anticipated deadline for the Class Members to object to or opt-out of the Settlement. Accordingly, the Parties jointly moved to the Court to modify the Order to advance the filing

deadline for the motion for attorneys' fees and costs so that the filing papers could be available for Class Members to review *before* deciding whether to object or opt-out of the Settlement, in light of the Ninth Circuit's ruling in *In re Mercury Interactive Corp. Securities Litigation*, 618 F.3d 988, 993 (9th Cir. 2010). ECF 55; Marquez Decl., ¶ 16. On March 25, 2021, the Court entered an Amended Order Granting Motion for Preliminary Approval of Class Action Settlement. ECF 56; Marquez Decl., ¶ 16.

Notice went out to 745 Class Members on April 26, 2021. The initial deadline for Class Members to opt out or object was June 25, 2021. Marquez Decl., ¶ 17.

The reaction of the Class to the Settlement has been overwhelmingly positive. Indeed, so far, no Class Member has opted out of the settlement, and no Class Member has objected to the Settlement. Marquez Decl., ¶ 20. Even after deducting attorneys' fees and costs, administration costs, and the service awards to the Class Representative, Class Members will receive **approximately $1,321.03 on average** and 74 Class Members will receive the **maximum amount of $5,240.85**. *Id*. at ¶ 21. The chart below is a frequency distribution of each Class Members' net settlement share:



Id.

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G. Class Counsel Has Expended Additional Work to Ensure As Many Class Members As Possible Receive the Class Notice.

Since drafting the Motion for Attorneys' Fees and Costs, Class Counsel has expended significant time and resources to ensure that Class Members with otherwise untraceable addresses were given an opportunity to provide updated addresses so they could receive the class notice and participate in the class settlement. Among the 745 Class Members that were sent class notices based on addresses provided by Defendant, 79 were initially considered untraceable because the addresses provided by Defendant or otherwise updated by ILYM through the NCOA or various skip trace databases were deemed "undeliverable." Nava Decl. ¶¶ 6-8. In light of these undeliverable class notices, Class Counsel took it upon themselves to actively reach out to every Class Member with an "undeliverable" address by calling and texting them using telephone numbers obtained through formal discovery. Marquez Decl., ¶ 17. This process ultimately led to an additional approximately 30 Class Members providing updated addresses so they could receive the class notices. *Id*. Many of these Class Members likely would not have received the class notices if not for Class Counsel's efforts in directly reaching out to them. *Id*.; *see also* Declarations of Salvadora Dominguez, Suyap Madrid.

Based on Class Counsel's efforts in locating Class Members with "undeliverable" addresses, the approximately 30 Class Members that were able to provide updated addresses stand to make $42,527.48 based on the estimated Settlement payouts (or an average of $1,417.58 per individual). Marquez Decl., ¶ 17. By contrast, the remaining 46 Class Members with "undeliverable" addresses stand to make $21,043.31 based on the estimated Settlement payouts (or an average

of $457.46 per individual).[2] Nava Decl. ¶ 10; *see also* Marquez Decl., ¶ 17. Indeed, Class Counsel's efforts in contacting Class Members and obtaining updated addresses led to a higher participation rate among the Class Members, and a significantly increased likelihood that more Class Members will be able to receive their Settlement portions.

H. Plaintiff's Motion for Attorneys' Fees and Costs.

Since the filing of Plaintiff's Motion for Attorneys' Fees and Costs on June 3, 2021, Class Counsel has expended additional time related to drafting the Motion for Final Approval and supporting documents, communicating with ILYM regarding the class notices, and contacting Class Members to get updated addresses for purposes of sending them class notice. Plaintiff's Counsel incurred an additional 46.7 hours in those efforts. Marquez Decl. ¶ 55. Attached to Mr. Marquez's Declaration filed with this Motion, Plaintiff has provided supplemental timesheets accounting for the additional work that Plaintiff's Counsel expended for this case, which was not reported in Plaintiff's Motion for Attorneys' Fees and Costs.

These supplemental timesheets will show that the lodestar for Plaintiff's Counsel increased to $207,395, and the multiplier reduced to 2.57. Marquez Decl. ¶¶ 53-55. This multiplier is fair and reasonable because of the reasons stated in Plaintiff's Motion for Attorneys' Fees and Costs. For these reasons, Plaintiff respectfully requests that the Court grant Plaintiff's Motion for Attorney's Fees and Costs.

III. ARGUMENT

The Court determined in its preliminary approval order that the settlement "appears fair, reasonable, and appropriate" under Rule 23(e). ECF No. 56, at 4-5.

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[2] The "undeliverable" notices represent 6.17% of the Class Members, but account for only 2.13% of the net settlement amount to be paid to the Class Members. Marquez Decl., ¶ 18.

1 When Plaintiff filed his motion for preliminary approval on February 12, 2021,
2 Plaintiff estimated that the class size would be approximately 749 employees and
3 that the Settlement amount of $1.6 million represents 32% of the realistic maximum
4 recovery. ECF No. 53-1, at 12. The finalized class size is 745 employees so there is
5 no substantial change to the class size or the Settlement fund. Marquez Decl., ¶ 24.
6 The Court must now consider whether the proposed Settlement merits final approval.
7 A final class settlement will be approved only if the parties show that (1) that
8 **reasonable** notice was given to all Class Members who would be bound by the
9 settlement, (2) that members were provided the opportunity to object to the
10 settlement, and (3) that the settlement is fair, reasonable, and adequate. Fed. R. Civ.
11 P. 23(e). As discussed below, all of these requirements are met.
12 **A. Reasonable Notice Was Given to All Class Members**
13 Before final approval of a class action can issue, notice of the settlement
14 must be provided to the class. Fed. R. Civ. P. 23(e)(1). Rule 23 requires that the
15 class receive "the best notice practicable under the circumstances, including
16 individual notice to all members who can be identified through reasonable effort."
17 Fed. R. Civ. P. 23(c)(2)(B). "Although Rule 23 requires that reasonable efforts be
18 made to reach all class members, it does not require that each class member
19 actually receive notice." *Der-Hacopian v. DarkTrace, Inc.*, No. 18-CV-06726-
20 HSG, 2020 WL 7260054, at *4 (N.D. Cal. Dec. 10, 2020), *citing Silber v. Mabon,*
21 18 F.3d 1449, 1454 (9th Cir. 1994) (noting that the standard for class notice is
22 "best practicable" notice, not "actually received" notice). The trial court there
23 found that the process in which the settlement administrator verified the addresses
24 through the National Change of Address Database and conducted an additional
25 address trace to locate undeliverable members, which resulted in a 93.4%
26 presumed actual receipt rate, sufficiently provided the best practicable notice to
27 the class members. *Id.* at *5. In the Court's March 25, 2020 Amended Order
28 granting preliminary approval of this proposed Settlement, this Court found that

the notice requirements under Rule 23(c)(2)(B) are met. ECF No. 56, at 7.

The notice plan, as approved by the Court, has been fully implemented by ILYM. On April 12, 2021, ILYM received the Class List from Pretium and updated the addresses for the Class Members. Nava Decl., ¶ 5. On April 26, 2021, ILYM caused the Court-approved notices to be mailed to the 745 Class Members. *Id*. at ¶ 7. Of the 745 class notices mailed, 127 were returned as "undeliverable," of which two had forwarding addresses and 72 were promptly re-mailed after ILYM conducted address searches and located updated addresses for those Class Members. *Id*. at ¶ 8.

After ILYM sent out the second round of notices based on skip tracing databases, Class Counsel took the unprecedented step to actively reach out to those members with still "undeliverable" addresses to obtain updated addresses. Marquez Decl., ¶ 17. Class Counsel's office made phone calls and sent text messages to the "undeliverable" class members to get updated addresses. *Id*. These efforts allowed ILYM to send additional class notices to approximately 30 Class Members, who otherwise would have been deemed untraceable despite the contact information by Defendant and the efforts by ILYM to obtain updated addresses using the NCOA and various skip trace databases. *Id*. These efforts by Class Counsel, ILYM and Pretium to provide the class members with notice of the underlying class Settlement were substantial and sufficiently conforms with the best practicable standard. These efforts ensured an actual receipt rate of 93.83%.

As of July 9, 2021, no Class Member has objected to the Settlement, and no Class Member has requested exclusion from the Settlement. Nava Decl., ¶¶ 11-12.

B. <u>The Court Should Grant Final Approval</u>

1. The Settlement Meets the Standard for Court Approval

When faced with a motion for final approval of a class action settlement under Rule 23 of the Federal Rules of Civil Procedure, a court's inquiry is whether the settlement is "fair, adequate, and reasonable." *Staton v. Boeing Co.*, 327 F.3d

1 938, 959 (9th Cir. 2003). A settlement merits final approval when "the interests
2 of the class as a whole are better served by the settlement than by further
3 litigation." *Manual for Complex Litigation* (Fourth) § 21.61, at 480 (2010).
4 The law favors the compromise and settlement of class-action suits. *See,*
5 *e.g., Churchill Vill. L.L.C. v. Gen. Elec.*, 361 F.3d 566, 576 (9th Cir. 2004); *Class*
6 *Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992); *Officers for*
7 *Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 625 (9th Cir. 1982). Indeed, the
8 Ninth Circuit recognizes the "overriding public interest in settling and quieting
9 litigation … particularly … in class action suits …" *Van Brokhorst v. Safeco*
10 *Corp.*, 529 F.2d 943, 950 (9th Cir. 1976); *see also Weeks v. Kellogg Co.*, 2013 WL
11 6531177, at *10 (C.D. Cal. Nov. 23, 2013) (quoting *In re Synocor ERISA Litig.*,
12 516 F.3d 1095, 1101 (9th Cir. 2008)) ("'[T]here is a strong judicial policy that
13 favors settlements, particularly where complex class action litigation is
14 concerned.'").
15 "[T]he decision to approve or reject a settlement is committed to the sound
16 discretion of the trial judge because he is exposed to the litigants and their
17 strategies, positions, and proof." *Hanlon*, 150 F.3d at 1026 (internal citations and
18 quotations omitted). In exercising such discretion, the courts balance several
19 factors, including: "the strength of plaintiffs' case; the risk, expense, complexity,
20 and likely duration of further litigation; the risk of maintaining class action status
21 throughout the trial; the amount offered in settlement; [and] the extent of discovery
22 completed'" among other factors. *Chun-Hoon v. McKee Foods Corp.*, 716 F. Supp.
23 2d 848, 850-51 (N.D. Cal. 2010) (quoting *Class Plaintiffs*, 955 F.2d at 1291). The
24 courts also give "proper deference to the private consensual decision of the parties
25 … [T]he court's intrusion upon what is otherwise a private consensual agreement
26 negotiated between the parties to a lawsuit must be limited to the extent necessary
27 to reach a reasoned judgment that the agreement is not the product of fraud or
28 overreaching by, or collusion between, the negotiating parties, and that the

settlement, taken as a whole, is fair, reasonable and adequate to all concerned." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1027 (9th Cir. 1998) (internal citations omitted); Fed. R. Civ. P. 23(e).

The Ninth Circuit has "long deferred to the private consensual decision of the parties." *See Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 965 (9th Cir. 2003) (citing *Hanlon*, 150 F.3d at 1027). "[I]n evaluating whether the settlement is fair and adequate, the Court's function is not to second guess the settlement's terms." *Garner v. State Farm Auto Ins. Co.,* 2010 U.S. Dist. LEXIS 49477, *21 (N.D. Cal. April 22, 2010). In the end, "[s]ettlement is the offspring of compromise; the question we address is not whether the final product could be prettier, smarter or snazzier, but whether it is fair, adequate and free from collusion." *Hanlon*, 150 F.3d at 1027.

The Court previously analyzed the majority of these factors when it preliminarily approved the Settlement. ECF No. 56. As the Court previously noted, the Court found the settlement "appears fair, reasonable, and appropriate" and the parties reached the settlement after significant arm's length negotiations. *Id*. at 5.

2. The Settlement is Entitled to a Presumption of Fairness

"Settlements that follow sufficient discovery and genuine arms-length negotiation are presumed fair." *In re Wireless Facilities, Inc. Sec. Litig. II*, 253 F.R.D. 607, 610 (S.D. Cal. 2008) (citations omitted); *see also Garner*, *35 ("Where a settlement is the product of arms-length negotiations conducted by capable and experienced counsel, the court begins its analysis with a presumption that the settlement is fair and reasonable."). Thus, where a settlement is the product of arms-length negotiations conducted by experienced class counsel and follows sufficient discovery, the Court begins its analysis with a presumption that the settlement is fair and reasonable. *See* 4 *Newberg on Class Actions* § 11.41 (4th ed. 2002); *Brown v. Hain Celestial Grp., Inc.*, 2016 WL 631880, at *5 (N.D. Cal. Feb.

1 17, 2016); *see also Fernandez v. Victoria Secret Stores*, LLC, 2008 WL 8150856,
2 at *4 (C.D. Cal. July 21, 2008). This is certainly the case here.

3 First, the Settlement is the product of a mediation session with the assistance
4 of a highly experienced neutral Hon. Peter D. Lichtman (Ret.). Judge Lichtman
5 (Ret.) was the former head of the Los Angeles Superior Court Mandatory
6 Settlement Program and served as a chair of the county's Complex Civil Litigation
7 Department. *In re Apple Computer, Inc. Derivative Litig.*, No. C 06-4128 JF
8 (HRL), 2008 U.S. Dist. LEXIS 108195 (N.D. Cal. Nov. 5, 2008) (mediator's
9 participation weighs considerably against any inference of a collusive settlement);
10 *D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001) (a "mediator's
11 involvement in pre-certification settlement negotiations helps to ensure that the
12 proceedings were free of collusion and undue pressure"). At all times, the Parties'
13 negotiations were adversarial and non-collusive.

14 Second, Class Counsel here have extensive experience litigating and settling
15 complex wage and hour class actions. Marquez Decl., ¶¶ 39-52; *see also* ECF No.
16 57-2. They have investigated the factual and legal issues raised in this action, and
17 diligently litigated the class members' claims. Therefore, this factor strongly
18 supports final approval. *See, e.g., Gribble v. Cool Transports Inc.*, No. CV 06-
19 04863 GAF SHx, 2008 WL5281665, at *9 (C.D. Cal. Dec. 15, 2008) ("Great
20 weight is accorded to the recommendation of counsel, who are most closely
21 acquainted with the facts of the underlying litigation.").

22 **3. The Overwhelmingly Positive Reaction from the Class**
23 **Further Supports Settlement Approval**

24 Reaction to the Settlement from the Class has been overwhelmingly positive.
25 As shown by the Declaration of the Settlement Administrator, no Class Members
26 have objected to or raised any disputes with the Settlement, and no Class Members
27 requested exclusion from the Settlement. This is strong evidence of the fairness
28 of the Settlement. *See Rodriguez*, 563 F.3d at 967; *Hanlon*, 150 F.3d at 1027

1 (“[T]he fact that the overwhelming majority of the class willingly approved the
2 offer and stayed in the class presents at least some objective positive commentary
3 as to its fairness”). The fact that there are no objections is indicative of the
4 excellent value and fairness of the Settlement here.

5 **4. The Settlement is Fair Given the Settlement Benefits and the**
6 **Risks Associated with Continued Litigation**

7 A proposed settlement is not to be measured against a hypothetical ideal
8 result that might have been achieved. *See*, *e.g.*, *In re Heritage Bond Litig.*, 2005
9 WL 1594403, at * 2 (C.D. Cal. June 10, 2005) (quoting *Officers for Justice*, 688
10 F.2d at 625) (a proposed settlement should not “’be judged against a hypothetical
11 or speculative measure of what might have been achieved.’”); *Nat’l Rural*
12 *Telecomm’s Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 527 (C.D. Cal. 2004) (“[I]t
13 is well-settled law that a proposed settlement may be acceptable even though it
14 amounts to only a fraction of the potential recovery that might be available to the
15 class members at trial.”).

16 The Settlement represents a very strong result for the Class. As discussed
17 above, even after estimated attorneys’ fees and costs, proposed service awards, the
18 PAGA allocation, and the estimated costs of settlement administration, Class
19 Members will receive an average share of over $1,321.03 per person. Marquez
20 Decl., ¶ 21. 74 class members will receive the maximum amount of $5,240.85. *Id*.
21 This will bring substantial relief to the Class, which is largely composed of low-
22 wage workers who, as a practical matter, lack the means to bring individual suits
23 to assert their rights.

24 The potential risks attending further litigation also support preliminary
25 approval. Courts have long recognized the inherent risks and “vagaries of
26 litigation,” and emphasized the comparative benefits of “immediate recovery by
27 way of the compromise to the mere possibility of relief in the future, after
28 protracted and expensive litigation.” *Nat’l Rural Telecomm’s Coop.*, 221 F.R.D.

at 526. Indeed, although he steadfastly maintains that his claims are meritorious, Plaintiff acknowledges that Defendant possessed legitimate defenses to liability and certification. Even if Plaintiff prevailed at certification, Pretium could successfully assert defenses to Plaintiff's overtime, meal period, and rest period claims that are based on legal and factual defenses including those that could be established through further discovery.

By the same token, Pretium possessed strong defenses to the derivative waiting time and wage statement penalties, since there existed a "good-faith" dispute that any wages were due, thereby precluding the imposition of waiting time penalties. *See* 8 Cal. Code Regs. § 13520 (a "good-faith" dispute exists to waiting time penalties "when an employer presents a defense, based in law or fact which, if successful, would preclude any recovery on the part of the employee. The fact that a defense is ultimately unsuccessful will not preclude a finding that a good faith dispute did exist.").

Moreover, because Plaintiff's claims for civil penalties under PAGA were wholly derivative of the underlying Labor Code claims, Pretium asserted that the PAGA claims would rise or fall with such claims. *See*, *e.g.*, *Elliot v. Spherion Pacific Work, LLC*, 572 F.Supp.2d 1169, 1181-82 (C.D. Cal. 2008) ("Plaintiff's claim under the Private Attorneys General Act is wholly dependent upon her other claims. Because all of Plaintiff's other claims fail as a matter of law, so does her PAGA claim.").

In short, Plaintiff's ability to certify, and prevail on the claims was far from guaranteed. Indeed, "[i]n most situations, unless the settlement is clearly inadequate, its acceptance and approval are preferable to lengthy and expensive litigation with uncertain results." *Nat'l Rural Telecomm's Coop.*, 221 F.R.D. at 526 (internal quotations omitted). Thus, this factor supports final approval.

And given that the Class Members in this case are primarily low wage workers for whom receiving speedy remuneration is particularly important, the

potential for years of delayed recovery is a significant concern. Considered against the risks of continued litigation, and the importance of the employment rights and a speedy recovery to Plaintiff and Class Members, the totality of relief provided under the proposed Settlement is more than adequate and well within the range of reasonableness.

Indeed, a highly analogous case settled for less. For example, in *Lopez v. Delta Airlines, Inc.,* U.S. Dist. Ct. C.D. Cal. No. 2:15-cv-07302-SVW-SS ("*Lopez*"), this District granted final approval of a wage-and-hour class action settlement with similar claims as in this case. *Lopez,* Dkt. 156. *Lopez* was heavily litigated as it involved a motion for class certification and trial court decision granting and denying certification in part (*Lopez,* Dkt. 118), and a motion for summary judgment (*Lopez,* Dkt. 131) before settling on a class-wide basis for $4.75 million. The *Lopez* settlement covered a class period from July 1, 2011 to June 30, 2017, meaning a maximum of 313 workweeks. *Lopez,* Dkt. 156, at ¶ 4. The largest class member settlement payment in *Lopez* was $1,634.12 (*Lopez,* Dkt., 144-3, ¶ 13), which is equivalent to $5.22 per workweek assuming that class member worked during the entire *Lopez* class period. Here, in contrast, the largest Class Member Settlement award is $5,240.85 for Class Members who worked during the entire class period from November 26, 2015 to February 9, 2021, covering 271.71 workweeks; this is equivalent to $19.29 per workweek, which is 369% higher than the amount obtained in *Lopez*. Marquez Decl., ¶ 21.

C. The Service Award to the Class Representative Is Fair and Reasonable

Plaintiff requests that this Court approve a service award of $10,000 to Class Representative Carlos Moreno for his important and substantial contributions to the Class in both the litigation and settlement of this matter. He expended substantial time and effort conferring with counsel, reviewing pleadings and other documents, participating in settlement negotiations, and reviewing the Settlement

1 Agreement that, if finally approved by this Court, will bring substantial relief to
2 the Class. *See* Declaration of Carlos Moreno ("Moreno Decl.") at ¶¶ 7-11. The
3 requested service award is also warranted in light of the Plaintiff's personal risks
4 associated with bringing this lawsuit, and the important public policies underlying
5 the Plaintiff's claims.

6 **1. Legal Standard**

7 Service awards are common in class action cases. *Rodriguez*, 563 F.3d at p.
8 958 (service awards "are fairly typical in class action cases."); *see also Staton*, 327
9 F.3d at 977 ("named plaintiffs … are eligible for reasonable incentive payments.").
10 The purpose of such awards is "to compensate class representatives for work done
11 on behalf of the class [and] make up for financial or reputational risk undertaken
12 in bringing the action…." *Rodriguez*, 563 F.3d at 958-59; *Staton*, 327 F.3d at 977.

13 Numerous courts in the Ninth Circuit have approved service awards of
14 $10,000 or more. *See, e.g.*, *Hightower v. JP Morgan Chase Bank, NA*, No. CV 11-
15 1802 PSG, 2015 WL 9664959, at *12 (C.D. Cal. Aug. 4, 2015) (approving $10,000
16 incentive awards to each of seven lead plaintiffs in $12 million wage and hour
17 settlement); *LaFleur v. Med. Mgmt. Int'l, Inc.*, No. EDCV 13–00398–VAP (OPx),
18 2014 WL 2967475, at *8 (C.D. Cal. June 5, 2014) (approving incentive awards of
19 $15,000 each to two class representatives from $535,000 wage and hour class
20 action settlement); *Singer v. Becton Dickinson & Co.*, 2009 WL 4809646, at *9
21 (S.D. Cal. Dec. 9, 2009) (approving $25,000 service award in two-and-a-half-year
22 litigation in part because plaintiff spent considerable time on the action, conducted
23 extensive informal discovery and engaged in day-long mediation); *Curtis-Bauer v.*
24 *Morgan Stanley & Co., Inc.*, 2008 WL 7863877, at *1 (N.D. Cal. Oct. 22, 2008)
25 (approving $25,000 service award because plaintiff took risks in her career by
26 coming forward and for effort she devoted to case); *Glass v. UBS Fin. Servs., Inc.*,
27 2007 WL 221862, at * 17 (N.D. Cal. Jan. 26, 2007) (approving $25,000 service
28 award to each of four class representatives because of risk incurred by putting their

1 names on complaint and engaging in extensive informal discovery).
2 In evaluating the appropriateness of service awards, courts consider "the
3 actions the plaintiff has taken to protect the interests of the class, the degree to
4 which the class has benefitted from those actions, . . . the amount of time and effort
5 the plaintiff expended in pursuing the litigation . . . and reasonabl[e] fear[s of]
6 workplace retaliation." *Staton*, 327 F.3d at 977. Courts also compare the incentive
7 awards to the total settlement by looking at "the number of named plaintiffs
8 receiving incentive payments, the proportion of the payments relative to the
9 settlement amount, and the size of each payment." *In re Online DVD-Rental*
10 *Antitrust Litig.*, 779 F.3d 934, 947 (9th Cir. 2015) (quoting *Staton*, 327 F.3d at
11 977). Incentive awards "are particularly appropriate in wage-and-hour class
12 actions where plaintiffs undertake a significant 'reputational risk' by bringing suit
13 against their former employers." *Bellinghausen v. Tractor Supply Co.*, 306 F.R.D.
14 245, 267 (N.D. Cal. 2015). They "typically range from $2,000 to $10,000." *Id.*
15 As discussed below, application of these factors demonstrates that the
16 relatively modest service award requested in the Settlement for the Class
17 Representative is warranted here.
18 **2. The Class Representative Devoted Substantial Time and**
19 **Effort to this Litigation**
20 "An incentive award is appropriate where…the 'class representatives
21 remained fully involved and expended considerable time and energy during the
22 course of the litigation.'" *Schaffer v. Litton Loan Servicing*, LP, 2012 WL
23 10274679, *19 (C.D. Cal. Nov. 13, 2012) (internal citation omitted). Mr.
24 Moreno's involvement included participating in the informal discovery process;
25 conducting interviews with Counsel; participating in the preparation of pleadings
26 filed on behalf of the class; soliciting updates on the status of the litigation; and
27 participating in settlement decisions; and reviewing key documents including the
28 settlement-related documents, among other tasks. Moreno Decl. at ¶¶ 7-11.

Here, Mr. Moreno has expended significant hours assisting in the prosecution of the case. Moreno Decl., ¶¶ 7-11, 15 (at least 25-30 hours). Mr. Moreno has maintained close contact with Class Counsel for the entire duration of his involvement with the case. He worked with his attorneys to assist in case strategy and settlement negotiations. Moreno Decl., ¶¶ 7-11. Mr. Moreno provided Class Counsel with documents related to his employment and provided valuable insight about his prior work experience with Defendant. Moreno Decl., ¶ 8. Throughout this case, Mr. Moreno kept in regular contact with Class Counsel at all stages, including settlement negotiations, preliminary approval, and final approval. Moreno Decl., ¶¶ 7-11. These discussions with the Class Representative were pivotal in formulating case strategy and were extremely helpful in resolving this case. Marquez Decl., ¶¶ 36-38.

In sum, the involvement and dedication of the Class Representative has been a fundamental and essential element of this case. There would be no case, and no proposed settlement, without the contributions of Mr. Moreno.

3. The Class Representative's Efforts Resulted in Substantial Benefits to the Class

In addition to weighing the amount of time and effort expended by the class representative, courts also consider the degree to which class representative's efforts benefitted the class. *Staton*, 327 F.3d at 977 (internal citation omitted). The Class Representative's contribution to this litigation will have a lasting impact on a class of approximately 745 persons. As discussed above, the average Class Member will receive an estimated award of $1,321.03 under the proposed settlement, and many Class Members will earn approximately $5,240.85. Marquez Decl., ¶ 21. These awards will provide real and substantial monetary relief to these hardworking employees who have performed difficult physical labor for modest wages. For these reasons, the "substantial benefit" factor weighs heavily in favor of awarding the relatively modest service awards requested herein.

4. The Class Representative Faced Personal Difficulties and Risks Due to Their Involvement in the Litigation

Another factor that supports the awarding of service awards is whether the class representative's service resulted in notoriety or other personal difficulties. *See, e.g., Schaffer*, 2012 WL 10274679, at *18. The California Supreme Court has recognized that "retaliation against employees for asserting statutory rights under the Labor Code is widespread," despite anti-retaliation statutes designed to protect employees. *Gentry v. Superior Court*, 42 Cal.4th 443, 460-61 (2007). In this context, class representatives should be rewarded for assuming the risk of retaliation for the sake of class members. *See Frank v. Eastman Kodak Co.*, 228 F.R.D. 174, 187 (W.D.N.Y. 2005).

The Class Representative lent his name to this case and thus subjected himself to public attention. When a class representative shoulders some degree of personal risk in joining the litigation, such as workplace retaliation or financial liability, an incentive award is especially important. *See Staton,* 327 F.3d at 977; *Weeks*, 2013 WL 6531177, at *36. Examples of risks to the plaintiff in commencing the litigation "includ[e] reasonable fears of workplace retaliation, personal difficulties, and financial risks." *Wren v. RGIS Inventory Specialists*, 2011 WL 1230826, at *32 (N.D. Cal. Apr. 1, 2011). Here, Mr. Moreno's risk in bringing and maintaining this lawsuit was further heightened due to the fact that he has remained **fully employed** with Defendant during the pendency of the lawsuit. Moreno Decl., ¶¶ 14-15.

The Class Representative has also subjected himself to substantial personal risks by participating in this case. He has risked his reputation in the community and with regard to future employment opportunities as a result of stepping forward publicly in a class action. Moreno Decl., ¶ 14. Mr. Moreno has been subject to the rigors of litigation and has had to devote his own time and expenses in participating in the case. Moreno Decl., ¶¶ 6-16.

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5. The Service Award Is a Small Fraction of the Settlement Amount

Here, the total $10,000 proposed incentive award comprises a mere 0.625% of the gross settlement amount of $1.6 million, and is therefore well within the range of reasonableness. *See*, *e.g.*, *In re On-Line DVD Rental Antitrust Litig.*, 779 F.3d 934, 937-38 (9th Cir. 2015) (approving incentive awards that comprised in the aggregate less than 1% of gross settlement value).

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

6. The Class Representative Has Acted in the Best Interests of the Class

The possibility of receiving a service award has not created a conflict between the Class Representative and the class. Mr. Moreno understands that as a Class Representative he has been obligated to act in the best interests of the Class. Moreno Decl. ¶ 5. Moreover, when he accepted the proposed Settlement on behalf of the Class, the Plaintiff was fully aware that this Court may reduce his requested

service award, or deny it altogether. His support for the proposed Settlement is in no way conditioned upon the promise of a service award.

7. The Requested Service Award Promotes the Public Policies Underlying the Labor Code

Approving the requested service award will promote important public policies underlying Plaintiff's wage-and-hour claims. Plaintiff's claims are brought under the California Labor Code, a remedial statute reflecting a strong public policy of robust employee rights. *Murphy v. Kenneth Cole Prods. Inc.*, 40 Cal.4th 1094, 1103 (2007). Furthermore, the State's strong public policy in favor of strict enforcement of minimum wage and overtime laws is well-established and fundamental to the Labor Code's protective purpose. *See Sav-On v. Superior Court*, 34 Cal. 4th 319, 340 (2004).

Here, the Class Representative has vindicated the important public policies underlying the State's wage and hours laws. Mr. Moreno felt strongly that Pretium violated California labor law, and he devoted significant hours to this case and made substantial sacrifices to see it through to a result that serves to vindicate California public policy. Accordingly, this factor weighs heavily in favor of the requested service awards.

IV. CONCLUSION

For the foregoing reasons, Plaintiff, through his counsel, respectfully requests that the Court grant final approval of the proposed class action settlement.

Dated: July 9, 2021

Respectfully submitted,

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