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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
FRESNO DIVISION

HEATHER BOONE and ROXANNE RIVERA, on behalf of themselves and all others similarly situated,

Plaintiffs,

CRISTIAN BARRERA, individually,

Plaintiff,

v.

AMAZON.COM SERVICES, LLC,

Defendant.

Case No. 1:21-CV-00241-NODJ-BAM – LEAD
Case No. 1:22-CV-00146-NODJ-BAM-MEMBER

PLAINTIFFS' MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

Hearing Date: **March 29, 2024**
Time: **9:00 a.m.**
Courtroom: **8**
Floor: **6**
Judge: **Hon. Barbara A. McAuliffe**

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NOTICE OF MOTION

PLEASE TAKE NOTICE that on March 29, 2024 at 9:00 a.m., or as soon thereafter as the matter may be heard, in Courtroom 8, Sixth Floor, before the Honorable Barbara A. McAuliffe, Plaintiffs Heather Boone, Roxanne Rivera, and Christian Barrera ("Plaintiffs") will move this Court for an Order: (1) preliminarily approving a proposed settlement of this action (the "Settlement") and staying all other activity in this action; (2) approving the form and manner of giving notice to the Class ("Notice"); (3) approving the Parties' agreed-upon deadlines for Class Members to exercise their rights in connection with the proposed Settlement; and (4) scheduling a hearing before the Court to determine whether the proposed Settlement, Plaintiffs' Fees and Costs Application, and Service Award Application (as defined below) should be given final approval ("Preliminary Approval Order"). The proposed Settlement creates a fund of Five Million Five Hundred Thousand Dollars ($5,500,000.00) to be paid by Defendant for the benefit of the proposed Class Members. If approved, the proposed Settlement would resolve all of the claims raised in this lawsuit.

The grounds for this Motion are that: (1) the proposed Settlement is fair, reasonable, and adequate such that Notice should be disseminated to members of the Class; and (2) the proposed Notice adequately apprise the Class Members about the terms of the Settlement and their rights with respect to it.

This motion is based on the Memorandum of Points and Authorities submitted below, the Settlement Agreement (attached hereto as Exhibit "1") and the accompanying Declaration of Don Foty ("Foty Declaration") (attached hereto as Exhibit "2").

Respectfully submitted,

Dated: February 16, 2024

HODGES & FOTY, LLP

By: /s/ Don J. Foty
Don J. Foty *(Pro Hac Vice)*
David W. Hodges *(Pro Hac Vice)*
Attorneys for Lead Case Plaintiffs Heather Boone and Roxanne Rivera, and Putative Class Members

Dated: February 16, 2024

THE NOURMAND LAW FIRM, APC

By: /s/ James Desario
James Desario
Attorneys for Member Case Plaintiff Cristian Barrera

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiffs submit this motion for preliminary approval of the proposed class settlement that resolves all the claims in this lawsuit for $5,500,000.00. If the Court approves this settlement, the Class Members will each receive a monetary payment that is proportionally based on their dates of employment and weeks worked. It includes no claims procedure, and no reversion to Amazon for uncashed checks issued to the Class Members. A copy of the Settlement Agreement is attached as Exhibit 1. Plaintiffs seek: (1) preliminary approval of the terms of the Settlement and a stay of all non-settlement related activity in this case; (2) approval of the Notice to be sent to the Class Members: (3) approval of the Parties' agreed-upon deadlines for the Class Members to exercise their rights in connection with the proposed Settlement; and (4) entry of a Preliminary Approval Order setting a Final Approval Hearing and directing the Notice to be sent to the Class Members.

Plaintiffs believe that the proposed settlement is fair and reasonable and will provide a benefit to the Class Members. While the Parties have different views on the availability of class certification, the merits of the case, and any damages at issue, the Settlement provides monetary relief to each Class Member that does not properly exclude himself/herself from the Settlement. Indeed, the Settlement provides for a recovery that is, as calculated by Plaintiffs, approximately 100% of the amount of unpaid wages that in Plaintiffs' view is owed to the Class Members as a result of completing COVID-19 screenings off the clock at approximately one minute per shift. This recovery is significant given that Defendant Amazon.com Services, LLC, maintains that it complied with the law and that the amount of time associates spent off the clock because of COVID-19 screenings was a matter of seconds.

Under the Settlement, each Class Member who does not properly opt out will receive a settlement award that corresponds to his/her dates of employment and weeks worked. If approved by the Court, each Class Member will receive their proportionate share of the Net Settlement Fund. That is, hypothetically, if a putative Class Member worked 2% of the aggregate pay periods worked by all Class Members, his/her proportionate share of the settlement would be two percent (2%) of the Net Settlement Fund. The Settlement also resolves Plaintiffs' claims under the

1 California Labor Code Private Attorneys General Act ("PAGA"), including a payment to the State
2 of California.

3 The Court should grant this Motion because the Settlement complies with the requirements
4 for preliminary approval. At the preliminary approval stage, "the settlement need only be
5 potentially fair." *Kang v. Credit Bureau Conn., Inc.*, No. 1:18-cv-01359-SKO, 2023 U.S. Dist.
6 LEXIS 95641, at *15 (E.D. Cal. June 1, 2023) (quoting *Acosta v. Trans Union, LLC*, 243 F.R.D.
7 377, 386 (C.D. Cal. May 31, 2007)). "Preliminary approval of a settlement has both a procedural
8 and substantive component." *Martinez v. Knight Transp., Inc.*, No. 1:16-cv-01730-SKO, 2023
9 U.S. Dist. LEXIS 51757, at *27 (E.D. Cal. Mar. 24, 2023) (quotation omitted). Preliminary
10 approval is thus appropriate where the proposed settlement (1) appears to be the product of serious,
11 informed, non-collusive negotiations, and (2) falls within the range of possible approval, has no
12 obvious deficiencies, and does not improperly grant preferential treatment to class representatives
13 or segments of the class. *Id.*; *see also Cashon v. Encompass Health Rehab. Hosp. of Modesto,*
14 *LLC*, No. 1:19-cv-00671-SKO, 2023 U.S. Dist. LEXIS 169355, at *9-10 (E.D. Cal. Sep. 21, 2023)
15 ("Federal courts generally find preliminary approval of the settlement and notice to the
16 proposed class appropriate if "the proposed settlement appears to be the product of
17 serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly
18 grant preferential treatment to class representatives or segments of the class, and falls within the
19 range of possible approval.").

20 Here, the Settlement satisfies these requirements as (1) the release narrowly covers only
21 those claims asserted in this lawsuit; (2) the Parties have not agreed to any limit on a potential fee
22 award or litigation costs award;[1] (3) the Class Members can easily opt out; (4) there is no claims
23 process to receive a payment; (5) there is no reversion to Amazon; and (6) all Class Members who
24 do not timely opt-out will receive a payment. Furthermore, the Parties reached a settlement
25 following arm's-length negotiations with an experienced mediator, Lisa Klerman.
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[1] Class Counsel intends to later file Plaintiffs' Fees and Costs Application and Service Award Application.

Therefore, the Parties believe that the Settlement is fair, reasonable, and adequate and therefore, the Preliminary Approval Order should be entered and the Notice disseminated to Class Members.

II. FACTUAL BACKGROUND

Plaintiffs allege that following the outbreak of the COVID-19 pandemic, Amazon instituted a company-wide policy requiring its hourly, non-exempt employees at its fulfillment centers and distributions centers to undergo a COVID-19 screening prior to the start of their scheduled shifts. (Dkt. 1). The screenings were required by Amazon, were conducted on the premises of Amazon, and were controlled by Amazon. (*Id.*) Amazon did not automatically pay for the time spent by its employees completing the COVID-19 screenings. (*Id.*)

The process for conducting the screenings was similar across all Amazon fulfillment centers and distributions centers. Under Amazon's company-wide policy, every hourly employee was required to (1) report to a designated location at an Amazon facility, (2) wait in line standing six feet apart from other employees, (3) answer questions about whether they had any signs or symptoms of the Coronavirus, (4) have their temperature taken, (5) wear an Amazon approved mask, and (6) pass the health examination to work that day. (*Id.*)

After passing the screening, employees at Amazon were allowed to clock-in for the day. The time clocks at the Amazon facilities were located at different distances from the screening area. Additionally, some employees clocked-in on a mobile app before they began the screening process, and were thus on the clock during the screening process. During approximately 20% of the shifts, Amazon employees clocked-in before the screening process began.

Amazon maintains that its employees rarely, if ever, had to wait prior to completing the screening, particularly after it installed thermal scanners soon after it implemented COVID-19 screening procedures. Amazon asserts that with the introduction of the body scanners, workers spent at most a few seconds being screened.

III. PROCEDURAL HISTORY

On February 23, 2021, Plaintiffs Heather Boone and Roxanne Rivera filed the lead case in these consolidated actions alleging that Amazon (1) failed to pay them for all hours worked, (2)

failed to pay them overtime wages, (3) provided to them invalid wage statements, and (4) a derivative violation of California Business & Professions Code §§ 17200 *et seq.* (through violation of California Labor Code § 2802 and/or California Labor Code § 226). (*See* Dkt. 1.). Boone and Rivera filed this lawsuit as a collective action under the Fair Labor Standards Act, 29 U.S.C. § 201, et seq. and as a Rule 23 Class Action under the California Labor Code. *Id.* They sought damages on their own behalf and on behalf of a putative class. *Id.* Boone and Rivera later added to their lawsuit representative claims under PAGA. On November 12, 2021, Plaintiff Cristian Barrera filed a class action against Defendant in California state court based on the same allegations, which was later removed to federal court and consolidated with *Boone*. *Barrera v. Amazon.com Services LLC*, Case No. 1:22-cv-00146 (E.D. Cal.) (*Barrera I*). On January 25, 2022, Barrera filed a separate action under PAGA in Orange County Superior Court, also based on the same allegations. *Barrera v. Amazon.com Services LLC* (Orange County Sup. Ct. Case No. 30-2022-01242167-CU-OE-CXC) (*Barrera II*) (collectively with *Boone* and *Barrera I*, the "Actions").

Since the inception of this case, Amazon disputed all liability. In June 2021, Amazon filed a Motion to Dismiss arguing that the time spent undergoing Covid screenings is not compensable under the law. (Dkt. 24). On March 11, 2022, the Court granted in part and denied in part Amazon's Motion to Dismiss. (Dkt. 39). In the decision, the Court held that the facts as pled by the Plaintiffs establish that the time spent in the COVID-19 screenings are compensable under both the California Labor Code and the Fair Labor Standards Act ("FLSA"). (*See id.*) Afterwards, Amazon sought an interlocutory appeal under section 1292(b) (Dkt. 44), which the parties have fully briefed and is pending. Boone and Rivera's Counsel also moved to be appointed by the Court as interim class counsel. (Dkt. 62). Findings and Recommendations recommending that the Court grant the motion for appointment as interim class counsel were issued on May 30, 2023. (Dkt. 74). On October 18, 2023, the Court adopted that recommendation in full and granted the *Boone* plaintiffs' motion to appoint their counsel as interim class counsel. (Dkt. 80).

Along with this motion practice, the Parties engaged in informal merits-based and class discovery for settlement purposes. Amazon produced substantial visual evidence of the COVID-

19 screenings collected by security cameras at several facilities in California. (Ex. "2" – Declaration of Don Foty at ¶ 15). Additionally, Amazon produced the payroll data and time clock data for the California Class. (*Id.*) Plaintiffs retained three experts: (1) Chad Staller (economist), (2) Nichols Briscoe (economist), and (3) Richard Drogin, Ph.D. (*Id.*) Plaintiffs then produced to Amazon two expert reports and a damages analysis. (*Id.*) The expert reports provide an evaluation of the surveillance data and the amount of time spent undergoing the COVID-19 screenings. (*Id.*) This procedural history demonstrates that significant issues pertaining to liability, damages, and class certification were fully developed and explored prior to reaching this Settlement.

IV. MEDIATION

On April 6, 2023, the Parties attended a full-day mediation with experienced mediator Lisa Klerman. Ms. Klerman is a well-regarded mediator who has mediated hundreds of class action cases involving claims under the California Labor Code. Based on the discovery and investigation undertaken, Plaintiffs were able to engage in well-informed settlement negotiations with Defendant. Negotiations between the Parties were rigorous and conducted at arms-length. Indeed, the mediation on April 6, 2023 was unsuccessful. Nevertheless, the Parties continued to negotiate with the assistance of Ms. Klerman. Ms. Klerman played an active role in the settlement negotiations, including identifying each side's strengths, weaknesses, and risks. Ms. Klerman also had the benefit of detailed briefs, dozens of exhibits (including statistical modeling), and hours of in-person discussions with the Parties and their counsel. This process culminated in a tentative settlement at the end of August 2023.

V. SETTLEMENT TERMS

The Settlement provides for significant monetary relief to the Class Members. The Settlement is for $5,500,000.00. After deductions discussed below, the remaining amount of the Settlement is to be divided amongst the Class Members proportionally based on their dates of employment and weeks worked. Defendant also agrees to pay the employer's share of the applicable payroll taxes in addition to the gross settlement amount. There will be no claims process because the Claims Administrator will process checks for everyone who does not properly request to be excluded.

The fees and costs associated with retaining a third-party administrator to administer the terms of the Settlement will be deducted from the Settlement. (Ex. "1"). Plaintiffs have obtained settlement administration quotes from several vendors and ultimately selected Rust Consulting to administer the Settlement because it provided the lowest bid. (Ex. "2" at ¶ 18). In administering the Settlement, the Parties have agreed to use their best efforts to keep the costs as low as possible, including by sending the Notice via electronic mail where possible. (*Id.*)

The Settlement provides for an enhancement award of $10,000 each to the three named Plaintiffs, which if approved will be deducted from the Settlement. The award is to compensate the named Plaintiffs for the time, expense, and risks they incurred in litigating this action on behalf of the Class Members. Plaintiffs will file an application for the service award in connection with moving for final approval of the Settlement.

Further, Plaintiffs' Counsel will move the Court for an award of reasonable attorneys' fees of up to one-third of the Settlement as well as reimbursement of litigation costs. Plaintiffs will file an application for approval of the attorneys' fees and costs in connection with moving for final approval of the Settlement. *See, e.g.*, *Hudson v. Libre Tech., Inc.*, 2019 U.S. Dist. LEXIS 196964, *34 (S.D. Cal. Nov. 13, 2019) ("At the preliminary approval stage, the Court does not need to determine attorney's fees."). Any amount of the requested fees and costs award not approved by the Court will be included in the distribution to the Class.

In consideration for the above relief, the Class Members who do not opt out of the Settlement will release all claims, actions, demands, causes of action, suits, debts, obligations, demands, rights, liabilities, or legal theories of relief, that are based on the facts and legal theories asserted in the operative complaints of the Actions, or which relate to the primary rights asserted in the operative complaints, including without limitation claims for (1) failure to pay all wages in violation of Labor Code §§ 204, 1194, 1194.2, 1197, 1197.1, 1198, (2) failure to pay overtime wages in violation of Labor Code §§ 510, 558, and IWC Wage Order 42001, (3) failure to provide accurate itemized wage statements in violation of Labor Code § 226, (4) failure to maintain accurate records in violation of Labor Code §§ 226 and 1174, (5) failure to pay wages upon separation of employment in violation of Labor Code §§ 201-203, 218, (6) engaging in unlawful,

unfair and/or fraudulent business practices in violation of Business & Professions Code §§ 17200 *et seq.*, and (7) failure to pay overtime wages in violation of 29 U.S.C. § 207. Notwithstanding the above, the Released Class Claims shall only include claims related to or arising from COVID-19 screenings. The period of the Released Class Claims shall extend to the limits of the period from April 1, 2020 through July 17, 2021 for Class Members who did not work at the facility known as OAK4 in Tracy, California, and from April 1, 2020 through February 23, 2022 for Class Members who worked at the facility known as OAK4 in Tracy, California. The *res judicata* effect of the Judgment will be the same as that of the Release.[2]

The Settlement also allocates $100,000.00 to the California Labor and Workforce Development Agency ("LWDA") and members of the Class, including any individuals who opt out of the class-action settlement ("PAGA Settlement Members"), in connection with resolution of the PAGA claims in the Actions ("PAGA Settlement Amount"). As required by PAGA, Seventy-Five Percent (75%) of the PAGA Settlement Amount will be paid to the LWDA and Twenty-Five Percent (25%) of the PAGA Settlement Amount will be distributed to PAGA Settlement Members proportionally based on their dates of employment and weeks worked.

In addition, there are four individuals who worked for Defendant outside California and underwent COVID-19 screening who joined this case under the FLSA. Payments of $50.00 to each of these four individuals, for a total of $200, will be deducted from the Settlement. These individuals will release all claims, actions, demands, causes of action, suits, debts, obligations, demands, rights, liabilities, or legal theories of relief, that are based on the facts and legal theories asserted in the Second Amended Complaint in *Boone*, or which relate to the primary rights asserted in the Second Amended Complaint in *Boone*, including without limitation claims for failure to pay

[2] The Release at issue also covers Plaintiffs' claims under California Labor Code 226 for invalid wage statements. This claim was based primarily on the assertion that Amazon identified the hours worked inaccurately on the wage statements by not including the amount of time spent in the COVID screenings. The Settlement at issue takes into consideration the fact that this wage statement claim is a derivative claim from the underlying wage claim and that there were risks to pursuing this claim given that Amazon argued that there was a good faith dispute as to whether the additional time was worked by the Class Members and should have been listed on the wage statements at all.

overtime in violation of 29 U.S.C. §§ 201 *et seq*. Notwithstanding the above, the Released Non-California Claims shall only include claims related to or arising from COVID-19 screenings. The period of the Released Non-California Claims shall extend to the limits of the period from April 1, 2020 through March 31, 2022. The *res judicata* effect of the Judgment will be the same as that of the Release.[3]

All Class Members will receive a Notice of the proposed Settlement in the form attached as Exhibit A to the Settlement Agreement. (*See* Ex. "1-A"). Individuals who wish to opt out of the Settlement may mail a Request for Exclusion to the Settlement administrator within 60 days from the initial email or mailing of the Class Notice (the "Response Deadline"). Further, individuals who wish to object to the Settlement are to submit the objection within the Response Deadline identifying (i) the objector's full name, address, and signature, (ii) the case name and case number, (iii) a written statement of the grounds for the objection, and (iv) a statement whether the objector intends to appear at the Final Approval Hearing. The procedures for opting out of, and objecting to, the Settlement are clearly and simply explained in the Notice. Finally, any Class Member may submit a dispute as to the number of workweeks identified in Amazon's records by the Response Deadline as well. Therefore, the Class Members' rights are fully protected by the Settlement. They can seek to be excluded from the Settlement, can object to the Settlement, or dispute the number of workweeks that forms the basis of their individual recovery.

VI. THE COURT SHOULD PRELIMINARILY APPROVE THE SETTLEMENT

Approval of a proposed class settlement is within the broad authority of the district court. *See Hanlon v. Chrysler Corp*., 150 F.3d 1011, 1025 (9th Cir. 1998); *City P'ship Co. v. Atlantic Acquisition Ltd. P'ship*, 100 F.3d 1041, 1044 (1st Cir. 1996) ("Great deference is given to the trial court [regarding its decision to approve a class action settlement]."). The district court's decision,

[3] The Settlement at issue resolves the FLSA claims of the non-California opt-in plaintiffs. The Settlement takes into consideration that Amazon argued that its hourly employees who worked outside of California did not regularly work overtime. Under the FLSA, a cause of action only exists when an employee works more than 40 hours in a week or was not paid at least $7.25 per hour. Additionally, some courts have found that there is no viable claim for COVID-19 screening time under the FLSA. *See, e.g., Pipich v. O'Reilly Auto Enters*., No. Civ. A. 21-CV-1120-L-LL, 2022 WL 788671 (S.D. Cal. Mar. 15, 2022).

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however, is "restrained by ''the clear policy in favor of encouraging settlements.'" *Durrett v. Housing Auth. of Providence*, 896 F.2d 600, 604 (1st Cir. 1990) (citation omitted). Indeed, "there is a strong judicial policy that favors settlements, particularly where complex class action litigation is concerned." *Allen v. Bedolla*, 787 F.3d 1218, 1223 (9th Cir. 2015) (citation omitted).

"A district court may approve a proposed settlement in a class action only if the compromise is fundamentally fair, adequate, and reasonable." *In re Heritage Bond Litig*., 546 F.3d 667, 674-75 (9th Cir. 2008) (citing Fed. R. Civ. P. 23(e)). In determining whether a proposed settlement should be preliminarily approved, the court considers both procedural and substantive factors:

> As noted in the Manual for Complex Litigation, Second, [sic] "[i]f the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class, and falls within the range of possible approval, then the court should direct that the notice be given to the class members of a formal fairness hearing * * *." Manual for Complex Litigation, Second §30.44 (1985). In addition, "[t]he court may find that the settlement proposal contains some merit, is within the range of reasonableness required for a settlement offer, or is presumptively valid.' Newberg on Class Actions §11.25 (1992)."

In re Portal Software, Inc. Sec. Litig., No. C-03-5138 VRW, 2007 WL 1991529, at *5 (N.D. Cal. June 30, 2007) (quoting *Schwartz v. Dallas Cowboys Football Club Ltd*., 157 F. Supp. 2d 561, 570 n.12 (E.D. Pa. 2001)).

Under these criteria, Plaintiffs respectfully submit that preliminary approval of the proposed Settlement should be granted and dissemination of the Notice should be ordered.

A. The Settlement Agreement Resulted from Arm's-Length Negotiations and Is Not the Product of Collusion.

The Court should look to whether the proposed settlement appears to be the product of collusion among the negotiating parties. *In re Mego Fin. Corp. Sec. Litig*., 213 F.3d 454, 458 (9th Cir. 2000), as amended (June 19, 2000). In applying this factor, courts give substantial weight to the experience of the attorneys who prosecuted the case and negotiated the settlement. *See In re Tableware Antitrust Litig*., 484 F. Supp. 2d 1078, 1080 (N.D. Cal. 2007); *see also Hanlon*, 150 F.3d at 1027 (courts are deferential "to the private consensual decisions of the parties.") (citing

1 *Officers for Justice v. Civil Serv. Comm 'n.*, 688 F.2d 615, 625 (9th Cir. 1982)). Indeed, when a
2 settlement is negotiated at arm's-length by experienced counsel, there is a presumption that it is
3 fair and reasonable. *See Tableware*, 484 F. Supp. 2d at 1080; *City P'ship*, 100 F.3d at 1043 ("When
4 sufficient discovery has been provided and the parties have bargained at arm's-length, there is a
5 presumption in favor of the settlement.").

6 To that end, the courts have recognized "[t]he assistance of an experienced mediator in the
7 settlement process confirms that the settlement is non-collusive." *Satchell v. Fed. Express Corp.*,
8 No. C03-cv-2659 SI, 2007 WL 1114010, at *4 (N.D. Cal. Apr. 13, 2007); *In re Immune Response*
9 *Sec. Litig.*, 497 F. Supp. 2d 1166, 1171 (S.D. Cal. 2007.

10 Here, the Parties only attended mediation after the Court decided Amazon's Motion to
11 Dismiss, after sufficient information had been exchanged, and Plaintiffs' expert reports were
12 prepared. By that point in time, the record had been well-developed through fact and expert
13 analysis. The proposed Settlement here is the product of extensive, arm's-length negotiations,
14 which included an all-day mediation session with Lisa Klerman -- a private mediator experienced
15 in class action matters. (Ex. "2" at ¶ 16). The Parties attended mediation in April 2023. (*Id.*)
16 However, the mediation was initially unsuccessful. (*Id.*) Ms. Klerman then assisted the Parties
17 during the next four months and an agreement was finally reached. (*Id.*)

18 The negotiations were lengthy and in-depth. (*See id.*) The Parties discussed the merits of
19 the case, class certification, and damages. (*See id.*) Counsel were thus able to make informed
20 assessments regarding the merits of their claims and defenses. *See In re Charles Schwab Corp.*
21 *Sec. Litig.*, No. C 08-01510 WHA, 2011 WL 1481424, at *5 (N.D. Cal. Apr. 19, 2011) ("the class
22 settlements were reached on the eve of trial when class counsel had completed discovery and had
23 conducted extensive motion practice and were thus well aware of the issues and attendant risks
24 involved in going to trial as well as the adequacy of the amount of the class settlement."). The
25 negotiations were informed by the knowledge Plaintiffs' Counsel gained through informal
26 discovery, with the aid of a statistics expert who calculated an estimate of the amount owed. Based
27 on their familiarity with the factual and legal issues, and armed with a thorough understanding of
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the strength and weaknesses of the claims at issue, the Parties were able to negotiate a fair settlement, taking into account the costs and risks of continued litigation. The negotiations were at all times hard-fought and have produced a result that the Parties believe to be in their respective interests. (Ex. "2" at ¶¶ 16, 24). In fact, when it appeared that the Parties were unable to reach an agreement, Ms. Klerman continued working with the Parties to try to bridge the gap between their respective positions. (*Id.* at ¶¶ 16, 24); *see also Zynga, Inc.*, 2015 WL 6471171, at *9 ("The use of a mediator and the presence of discovery 'support the conclusion that the Plaintiff was appropriately informed in negotiating a settlement.'").

Additionally, Plaintiffs' Counsel carefully evaluated the merits of the case, but recognize that there exist challenges in this litigation that could pose significant risks regarding their ability to prevail and the scope of damages if the case were to proceed to trial, and thereafter, an appeal before the Ninth Circuit. Even if Plaintiffs emerged victorious after appeal, there can be no doubt that the appeal would be lengthy and costly for all sides. *Charles Schwab Corp. Sec. Litig.*, 2011 WL 1481424, *5 (approving settlement; "prosecuting these claims through trial and subsequent appeals would have involved significant risk, expense, and delay to any potential recovery"). As such, Plaintiffs' Counsel believes the Settlement is fair and reasonable. (Ex. "2" at ¶¶ 21 - 24). *See, e.g.*, *In re NVIDIA Corp. Derivative Litig.*, No. C-06-06110-SBA (JCS), 2008 WL 5382544, at *4 (N.D. Cal. Dec. 22, 2008) ("[S]ignificant weight should be attributed to counsel's belief that settlement is in the best interest of those affected by the settlement."); *In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1043 (N.D. Cal. 2008) (counsel's recommendation weighed in favor of settlement, given counsel's familiarity with the dispute and significant experience in securities litigation).

B. The Settlement Has No Obvious Deficiencies and Falls Well Within the Range for Approval.

When evaluating the adequacy of a settlement, courts balance a plaintiff's expected recovery against the value of the offer. *Tableware*, 484 F. Supp. 2d at 1080; *Portal Software*, 2007 WL 1991529, at *6. This case involves a range of disputed issues including the merits of Plaintiffs'

1 claims, how much time was spent waiting in line and completing the screening, how much time
2 was spent walking to the time clocks following the screening, the number of shifts when screenings
3 occurred, the number of instances when Amazon employees clocked-in before the start of the
4 screening process, and whether the time spent walking to the time clocks at Amazon facilities is
5 compensable. While Plaintiffs believe that the Class Members have meritorious claims, Defendant
6 denies, and continues to deny, each and all of the claims and contentions asserted by Plaintiffs.
7 Likewise, Defendant disputes Plaintiffs' damages calculation.

8 The Settlement is fair and reasonable because it provides for a recovery that is, as calculated
9 by Plaintiffs, approximately 100% of the amount of unpaid wages that in Plaintiffs' view is owed
10 to the Class Members for spending approximately on minute off-the-clock as a result of the
11 COVID-19 screenings. (Ex. "2" at ¶¶ 22, 23). Based upon a review the surveillance data produced
12 by Amazon, Plaintiffs believe that the reasonable range of time spent waiting-in line and being
13 screened was between 58 seconds and one minute and nine seconds. The median amount of time
14 was identified by Plaintiffs' expert at 48 seconds and the average amount of time was identified at
15 one minute and three seconds. The settlement provides a recovery of approximately one minute
16 of screening time. Ultimately, the Settlement provides an excellent result for the Class Members,
17 particularly considering the risk of no recovery if Plaintiffs and the Class Members were
18 unsuccessful through trial and appeal.

19 **C. The Settlement Meets the Requirements for Preliminary Approval.**

20 In evaluating the fairness of a settlement award, "the settlement's benefits must be
21 considered by comparison to what the class actually gave up by settling." *Martinez v. Knight*
22 *Transp*., 2023 U.S. Dist. LEXIS 51757, at *30 (quoting *Campbell v. Facebook, Inc*., 951 F.3d
23 1106, 1123 (9th Cir. 2020)). To determine whether a settlement "falls within the range of possible
24 approval," a court must focus on "substantive fairness and adequacy" and "consider plaintiffs'
25 expected recovery balanced against the value of the settlement offer." *Martinez v. Knight Transp*.,
26 2023 U.S. Dist. LEXIS 51757, at *30 (quotation omitted); *see also Harris*, 2011 U.S. Dist. LEXIS
27 48878, at *11 (noting that courts "must estimate the maximum amount of damages recoverable in
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1 a successful litigation and compare that with the settlement amount" in determining "the value of
2 the settlement against the expected recovery at trial").
3 But the court "need not reach any ultimate conclusions on the contested issues of fact and
4 law which underlie the merits of the dispute." *Cashon*, 2023 U.S. Dist. LEXIS 169355, at *10
5 (quoting *Chem. Bank v. City of Seattle*, 955 F.2d 1268, 1291 (9th Cir. 1992)). Rather, the court
6 should weigh, among other factors, the strength of a plaintiff's case; the risk, expense, complexity,
7 and likely duration of further litigation; the extent of discovery completed; and the value of the
8 settlement offer. *Id*.
9 Here, the amount of the Settlement is fair and adequate when viewed in light of the risks
10 and delays associated with continued litigation. Here, the Settlement allocates approximately one
11 minute of additional pay per shift to each Class Member, which falls within the range of estimated
12 amount of time worked off the clock. (*See* Ex. "2" at ¶¶ 22, 23).
13 Additionally, the Settlement "does not improperly grant preferential treatment to the
14 [Plaintiffs] or segments of the class." *Portal Software*, 2007 WL 1991529, at *5. Plaintiffs will be
15 receiving their proportionate share of the Class Damages according the same formula is the rest of
16 the Class Members. *See NASDAQ*, 176 F.R.D. at 102 (settlement may be approved preliminarily
17 where it does not improperly grant preferential treatment to class representatives or segments of
18 the class"). While the Settlement anticipates the possibility that Plaintiffs' Counsel will apply for
19 a service award for Plaintiffs, the Settlement is in no way conditioned on them receiving this award.
20 This demonstrates that the Settlement is fair and reasonable to all.
21 Moreover, the Settlement resolves the claims raised by Plaintiffs under PAGA and
22 allocates a fair amount to the State of California. The amount allocated to the State of California
23 is fair and reasonable because had this case proceeded to trial, the Court could exercise its
24 discretion to award a minimal PAGA penalty given the small amount of time allegedly at issue
25 and Amazon's efforts to pay for the time.
26 **D. The Proposed Notice Plan Meets All Requirements.**
27 The proposed form of the Notice fully complies with the requirements of Rule 23, due
28 process, and is substantially similar to the prior notice of class certification approved by California

Courts. The Notice apprises the Class Members of the nature of this case, the definition of the Classes and the claims that will be released. Additionally, the Notice provides: (1) information regarding the nature and claims raised in this lawsuit; (2) a summary of the Settlement Agreement's principal terms; (3) the Settlement Class definition; (4) the total number of workweeks each respective Settlement Class Member worked for Amazon during the Class Period; (5) the dates which comprise the Class Period and the PAGA Period; (6) instructions on how to submit Requests for Exclusion, Notices of Objection, and workweeks disputes; (7) the deadlines by which the Settlement Class Member must postmark or fax Requests for Exclusion, Notices of Objection, and workweeks disputes; (8) the claims to be released; and (9) the Settlement Administrator's contact information, including the website address where the electronic versions of the materials in the Notice Packet will be available; and (10) states the date, time and location of the Final Approval Hearing and advises Class Members to check the Court's PACER site. These disclosures are thorough and should be approved.

E. CAFA Notice.

Under the Class Action Fairness Act (CAFA), 28 U.S.C. § 1715, "[n]ot later than 10 days after a proposed settlement of a class action is filed in court, each defendant that is participating in the proposed settlement shall serve upon the appropriate State official of each State in which a class member resides and the appropriate Federal official, a notice of the proposed settlement[.]" Defendant has agreed to separately prepare and mail the notice required by 28 U.S.C. § 1715 (b).

F. Schedule for Final Approval Proceedings.

As set forth in the Settlement Agreement, the following is the proposed schedule for the remaining deadlines in the preliminary and final approval proceedings:

ACTION	DEADLINE
Deadline for Mailing CAFA Notice, 28 U.S.C. § 1715 (b)	10 days after filing Motion for Preliminary Approval
Deadline for Production of Class List to Settlement Administrator	30 days after entry of Preliminary Approval Order
Deadline for Sending Notice	60 days after entry of Preliminary Approval Order

Deadline to Opt-Out	120 days after entry of Preliminary Approval Order
Filing Deadline for Objections	120 days after entry of Preliminary Approval Order
Final Approval Hearing	After deadline for following objections and opt-out requests but in no event, sooner than 90 days after entry of Preliminary Approval Order

VII. CONDITIONAL CLASS CERTIFICATION IS APPROPRIATE

Plaintiffs request conditional certification under Rule 23 for settlement purposes only. In sum, this class should be certified because liability in this case primarily involves the resolution of one central issue: whether the time spent waiting in line and completing the screening is compensable under California law. Resolution of this issue can be resolved on a class basis because the policies and procedures for the screening were the same for all Class Members and there is common proof that is applicable to all Class Members. Additionally, any question concerning damages are irrelevant to class certification. The fact that class members may have been affected by uniform policies/practices to varying degrees or have suffered varying damages is not a bar to certification. *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)."). For these reasons, the requirements for class certification under Rule 23(a) and (b)(3) have been satisfied.

CONCLUSION

Accordingly, Plaintiffs respectfully request that the Court grant preliminary approval of the proposed Settlement, approve the Notice, and enter the proposed Preliminary Approval Order submitted herewith.

Respectfully submitted,

Dated: February 16, 2024

HODGES & FOTY, LLP

By: /s/ Don J. Foty
Don J. Foty *(Pro Hac Vice)*
Attorneys for Lead Case Plaintiffs Heather Boone and Roxanne Rivera, and Putative Class Members

1
2 Dated: February 16, 2024 **THE NOURMAND LAW FIRM, APC**
3
By: /s/ James Desario
4 James Desario
5 *Attorneys for Member Case Plaintiff Cristian Barrera*
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8
9
10

CERTIFICATE OF SERVICE

11 This is to certify that on February 16, 2024, a true and correct copy of the foregoing
12 instrument was served via the Court's electronic filing system.
13
14 /s/ Don J. Foty
15 Don J. Foty
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