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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

AGUSTIN A. ARELLANO AND  
ANDRES LARA, individuals on  
behalf of themselves and all others  
similarly situated,

Plaintiffs,

v.

KELLERMEYER BUILDING  
SERVICES, LLC,

Defendant.

Case No. 13-cv-00533-BAS(BGS)

**ORDER GRANTING  
PRELIMINARY APPROVAL OF  
CLASS ACTION SETTLEMENT**

(ECF No. 54)

On March 7, 2013, Plaintiff Agustin Arellano commenced this putative wage and hour class action against Defendant Kellermeyer Building Service, LLC (“Defendant”) alleging violations of California state labor laws and unlawful business practices. On June 12, 2013, Plaintiff Agustin Arellano filed a First Amended Complaint against Defendant. On July 24, 2013, Plaintiffs Agustin Arellano and Andres Lara filed a Second Amended Complaint against Defendant, which is the operative complaint. (ECF No. 9 (“SAC”).) On January 28, 2014, Venancia Portillo moved to intervene in this case as a plaintiff. Venancia Portillo’s motion to intervene was granted on September 15, 2014.

1 Now pending before the Court is a motion for preliminary approval of class  
2 action settlement filed by Agustin Arellano, Andres Lara, and Venancia Portillo  
3 (collectively “Plaintiffs”). (ECF No. 54.) After “years of contentious litigation,  
4 extensive discovery, and arm’s length negotiations,” Plaintiffs and Defendant  
5 (collectively the “Parties”) have reached a settlement which, upon final Court  
6 approval, Plaintiffs contend will resolve the claims of Plaintiffs and all putative class  
7 members. Plaintiffs seek an order granting preliminary approval of the proposed  
8 class action settlement upon the terms and conditions set forth in the Joint Stipulation  
9 of Class Action Settlement and Release Agreement (“Settlement”) submitted with  
10 Plaintiffs’ motion. (ECF No. 54-2 at Ex. 1.) Defendant has not filed an opposition.

11 The Court finds this motion suitable for determination on the papers submitted  
12 and without oral argument. *See* Civ. L.R. 7.1(d)(1). For the following reasons, the  
13 Court **GRANTS** Plaintiffs’ motion.

#### 14 **I. PROPOSED SETTLEMENT**

15 The Settlement, dated November 1, 2014, is intended to fully resolve all  
16 disputes in the following actions: *Portillo v. Kellermeyer Building Services, LLC*,  
17 Alameda County Superior Court, Case No. RG11 558695, filed on August 10, 2010,  
18 as amended on September 19, 2011 (“*Portillo*”); *Kellermeyer Building Services, LLC*  
19 *v. Portillo*, Los Angeles County Superior Court, Case No. BC488397, filed on July  
20 18, 2012 (“*KBS v. Portillo*”); and *Arellano v. Kellermeyer Building Services, LLC*,  
21 United States District Court for the Southern District of California, Case No. 13-cv-  
22 0533-BAS-BGS, filed on March 7, 2013, as amended on July 24, 2013 (“*Arellano*”).  
23 (Settlement at p. 3 and § 4(10).)

24 The Settlement applies to class members defined as “[a]ll persons employed  
25 by Kellermeyer Bergensons Services, LLC (formerly known as Kellermeyer  
26 Building Services, LLC) as janitors/housekeepers in the State of California at any  
27 time from August 10, 2006 to October 27, 2014” (“Settlement Class” or “Class  
28 Members”). (*Id.* at §§ I, II(5).) The Settlement Class includes members of the

1 *Portillo* class, as well as the two individuals who opted out of the *Portillo* class. (*Id.*  
2 at § I, IV(3).) According to Defendant’s records, there are approximately 13,413  
3 members in the Settlement Class. (*Id.* at § II(5).)

4 For purposes of the Settlement, the Parties agree that, subject to the Court’s  
5 approval, counsel for Portillo and Arellano will be appointed Class Counsel,  
6 Plaintiffs will be class representatives, and CPT Group will be appointed as the  
7 Settlement Administrator. (*Id.* at §§ I, II(4, 7-8).)

8 Under the Settlement, Defendant will pay up to a maximum amount of  
9 \$2,700,000 (“Gross Settlement Value”). (*Id.* at §§ I, II(13), IV(4).) Out of this  
10 amount, Defendant will pay at least \$1,000,000. (*Id.* at §§ I, II(14-15).) Members of  
11 the Settlement Class will only be paid if they submit a valid and timely claim form  
12 (“Participating Class Members”). (*Id.* at §§ I, IV(9)) The Settlement Class will not  
13 include those who timely request to opt out. (*Id.* at §§ IV(3), IV(16).) Opt-outs will  
14 not be held to release any claims for individual relief in any of the above-listed  
15 actions, nor may they participate in the Settlement. (*Id.*)

16 Subject to Court approval, Defendant has agreed to pay the following  
17 enhancement awards to the named Plaintiffs: \$10,000 to Ms. Portillo, \$2,500 to Mr.  
18 Arellano, and \$5,000 to Mr. Lara. (*Id.* at §§ I, II(12), IV(5).) CPT Group, as the  
19 Settlement Administrator, has agreed to administer the Settlement for a flat fee  
20 (including costs) of \$55,000. (*Id.* at §§ I, IV(6).) Further subject to Court approval,  
21 Defendant has agreed to pay Class Counsel’s attorneys’ fees in the amount of  
22 \$675,000, which represents 25% of the Gross Settlement Value, and costs in the  
23 amount of \$152,000. (*Id.* at §§ I, IV(7).) All of these amounts are to be paid out of  
24 the Gross Settlement Value. (*Id.*)

25 The Settlement estimates that approximately \$1,800,500 will be available for  
26 payments to the Settlement Class after deducting Class Counsel’s fees and costs,  
27 enhancement fees to the named plaintiffs, and the settlement administrator’s fee and  
28 expenses. (*Id.* at §§ I, II(17).) However, this amount may be further lowered by

1 payment of Defendant’s portion of federal, state, and local payroll taxes attributable  
2 to settlement payments to Participating Class Members. (*Id.* at § II(17).) The  
3 resulting number is referred to as the “Net Settlement Value.” (*Id.*)

4 The Net Settlement Value is proposed to be allocated to Class Members in two  
5 components: (1) a settlement payment for deductions related to non-slip work shoes,  
6 and (2) settlement payments for other claims. (*Id.* at § IV(8).) For the first  
7 component, each Class Member shall be allocated an amount equaling the higher of  
8 \$25 or 30% of his or her total Shoes For Crew Payroll Deductions. (*Id.*) For the  
9 second component, the balance of the Net Settlement Value, after subtracting  
10 amounts allocated in the first component, will be allocated to all Class Members  
11 based on their work year(s) during the class period. (*Id.*) If claims submitted by  
12 Participating Class Members are less than the Minimum Class Payout  
13 (approximately \$100,500), the difference between the Minimum Class Payout  
14 amount and the submitted claims will be distributed to the Participating Class  
15 Members proportionally based on their respective claim amounts. (*Id.*) The  
16 payment made to each Participating Class Member shall be allocated one-third to  
17 wages, one-third to penalties, and one-third to interest. (*Id.*)

18 Defendant has information regarding each Class Member in its files and will  
19 provide any information that the Settlement Administrator reasonably needs to  
20 administer the Settlement. (*Id.* at §IV(15).) The Settlement Administrator will  
21 update and correct any addresses provided and mail a notice of class settlement and  
22 customized claim form, as approved by the Court, in English and in Spanish, by first  
23 class mail to each of the Class Members (“Settlement Packet”). (*Id.*) The Settlement  
24 Packet will include a business return envelope or a prepaid envelope. (*Id.*) Class  
25 Members have 45 days from the original mailing to file a timely claim. (*Id.*) In  
26 addition to having the right to opt-out of the Settlement, Class Members also have 45  
27 days from the date of original mailing to file written objections. (*Id.* at § 16.) If  
28 more than 10% of Class Members opt out of the Settlement, at Defendant’s

1 discretion, the Settlement can be rendered null and void upon written notice. (*Id.*) If  
2 Class Members do not opt-out and do not file a claim, they will receive no money  
3 and are bound by the terms of the Settlement. (*Id.* at Ex. A at B(6).)

4 The Effective Date of the Settlement is the later of 30 calendar days after the  
5 judgment of the Court becomes final and no longer subject to appeal, or 30 calendar  
6 days after entry of judgment if there are no objections. (*Id.* at § IV(11).) Defendant  
7 must fund the settlement amounts required by the Settlement within 35 calendar days  
8 after the Effective Date. (*Id.* at § IV(18).) The parties in *Portillo* and *KBS v. Portillo*  
9 will stipulate to a stay of those actions during the settlement approval process and  
10 dismiss those actions with prejudice upon the occurrence of the Effective Date. (*Id.*  
11 at §§ I, IV(12).) Upon final approval by the Court of the Settlement, the class  
12 representatives and Class Members and their successors in interest fully release and  
13 discharge Defendant from any and all claims arising during the class period and  
14 asserted in the Second Amended Complaint in *Portillo* and the Second Amended  
15 Complaint in *Arellano*. (*Id.* at § IV(10).)

## 16 **II. ANALYSIS**

17 The Ninth Circuit maintains a “strong judicial policy” that favors the  
18 settlement of class actions. *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276  
19 (9th Cir. 1992). However, Federal Rule of Civil Procedure 23(e) first “require[s] the  
20 district court to determine whether a proposed settlement is fundamentally fair,  
21 adequate, and reasonable.” *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 458 (9th  
22 Cir. 2000) (citing *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998)).  
23 Where the “parties reach a settlement agreement prior to class certification, courts  
24 must peruse the proposed compromise to ratify both the propriety of the certification  
25 and the fairness of the settlement.” *Staton v. Boeing Co.*, 327 F.3d 938, 952 (9th Cir.  
26 2003). In these situations, settlement approval “requires a higher standard of fairness  
27 and a more probing inquiry than may normally be required under Rule 23(e).”  
28 *Dennis v. Kellogg Co.*, 697 F.3d 858, 864 (9th Cir. 2012) (internal quotation marks

1 omitted and citation omitted).

2 **A. Class Certification**

3 Before granting preliminary approval of a class-action settlement, the Court  
4 must first determine whether the proposed class can be certified. *Amchem Prods.,*  
5 *Inc. v. Windsor*, 521 U.S. 591, 620 (1997) (indicating that a district court must apply  
6 “undiluted, even heightened, attention [to class certification] in the settlement  
7 context” in order to protect absentees).

8 The class action is “an exception to the usual rule that litigation is conducted  
9 by and on behalf of the individual named parties only.” *Wal-Mart Stores, Inc. v.*  
10 *Dukes*, 131 S.Ct. 2541, 2550 (2011) (quoting *Califano v. Yamasaki*, 442 U.S. 682,  
11 700-01 (1979)). In order to justify departing from that rule, “a class representative  
12 must be part of the class and ‘possess the same interest and suffer the same injury’ as  
13 the class members.” *Id.* (citing *E. Tex. Motor Freight Sys., Inc. v. Rodriguez*, 431  
14 U.S. 395, 403 (1977)). In this regard, Rule 23 contains two sets of class-certification  
15 requirements set forth in Rule 23(a) and (b). *United Steel, Paper & Forestry,*  
16 *Rubber, Mfg. Energy, Allied Indus. & Serv. Workers Int’l Union, AFL-CIO, CLC v.*  
17 *ConocoPhillips Co.*, 593 F.3d 802, 806 (9th Cir. 2010). “A court may certify a class  
18 if a plaintiff demonstrates that all of the prerequisites of Rule 23(a) have been met,  
19 and that at least one of the requirements of Rule 23(b) have been met.” *Otsuka v.*  
20 *Polo Ralph Lauren Corp.*, 251 F.R.D. 439, 443 (N.D. Cal. 2008).

21 “Rule 23(a) provides four prerequisites that must be satisfied for class  
22 certification: (1) the class must be so numerous that joinder of all members is  
23 impracticable; (2) questions of law or fact exist that are common to the class; (3) the  
24 claims or defenses of the representative parties are typical of the claims or defenses  
25 of the class; and (4) the representative parties will fairly and adequately protect the  
26 interests of the class.” *Otsuka*, 251 F.R.D. at 443 (citing Fed. R. Civ. P. 23(a)). “A  
27 plaintiff must also establish that one or more of the grounds for maintaining the suit  
28 are met under Rule 23(b), including: (1) that there is a risk of substantial prejudice

1 from separate actions; (2) that declaratory or injunctive relief benefitting the class as  
2 a whole would be appropriate; or (3) that common questions of law or fact  
3 predominate and the class action is superior to other available methods of  
4 adjudication.” *Id.* (citing Fed. R. Civ. P. 23(b)). Plaintiffs seek class certification  
5 under Rule 23(b)(3).

6 1. Numerosity – Rule 23(a)(1)

7 Rule 23(a)(1) requires that the class be “so numerous that joinder of all  
8 members is impracticable.” Fed. R. Civ. P. 23(a)(1). “[C]ourts generally find that  
9 the numerosity factor is satisfied if the class comprises 40 or more members and will  
10 find that it has not been satisfied when the class comprises 21 or fewer.” *Celano v.*  
11 *Marriott Int’l, Inc.*, 242 F.R.D. 544, 549 (N.D. Cal. 2007).

12 According to Defendant’s records, there are approximately 13,413 members in  
13 the Settlement Class. (Settlement at § II(5); ECF No. 54-2 (“Jusuf Decl.”) at ¶ 40.)  
14 Thus, joinder of all members is impracticable for the purpose of Rule 23(a)(1) and  
15 Rule 23(a)(1) is satisfied.

16 2. Commonality – Rule 23(a)(2)

17 Under Rule 23(a)(2), the named plaintiff must demonstrate that there are  
18 “questions of law or fact common to the class.” Fed. R. Civ. P. 23(a)(2).  
19 “Commonality requires the plaintiff to demonstrate that the class members ‘have  
20 suffered the same injury[.]’” *Dukes*, 131 S. Ct. at 2551 (quoting *Gen. Tel. Co. of Sw.*  
21 *v. Falcon*, 457 U.S. 147, 157 (1982)). However, “[a]ll questions of fact and law  
22 need not be common to satisfy this rule.” *Hanlon*, 150 F.3d at 1019. “The existence  
23 of shared legal issues with divergent factual predicates is sufficient, as is a common  
24 core of salient facts coupled with disparate legal remedies within the class.” *Id.*

25 Plaintiffs allege several claims in the SAC. Plaintiff’s motion for preliminary  
26 approval of the Settlement specifically addresses the following claims: (1) time  
27 rounding claim; (2) non-slip work shoes expense reimbursement claim; (3) meal  
28 break claim; (4) rest break claim; (5) waiting time penalties claim; and (6) derivative

1 claims (e.g., violation of Cal. Bus. and Prof. Code §§ 17200, *et seq.*) (See Mot. at  
2 pp. 12-16.) As discussed below, each claim involves common questions of law and  
3 fact. Thus, Rule 23(a)(2) is satisfied.

4 a. *Time Rounding Claim*

5 Plaintiffs' time rounding claim relates to Defendant's practice of rounding off  
6 up to seven minutes of each employee's recorded hours worked for each time punch.  
7 (Mot. at p. 12; *see also* SAC at ¶¶ 21-29.) The Parties dispute the legality of this  
8 practice. (Mot. at p. 12.) Whether Defendant's time rounding practice is legal and  
9 whether it has resulted in the failure to pay wages for all hours worked are legal and  
10 factual questions common to all putative class members.

11 b. *Non-Slip Work Shoes Expense Reimbursement Claim*

12 Plaintiffs' work shoes claim relates to Defendant's practice of requiring its  
13 janitorial/housekeeping employees to buy a new pair of slip-resistant work shoes  
14 every year. (Mot. at p. 12; *see also* SAC at ¶¶ 80-85.) Under Defendant's practice,  
15 employees may buy shoes from an approved vendor, Shoes For Crew, through  
16 payroll deductions, or from another store provided that the shoes meet the company's  
17 requirements. (Mot. at pp. 12-13.) Plaintiffs argue that California Labor Code  
18 section 2802 requires Defendant to reimburse its employees for buying non-slip  
19 shoes, and Defendant disagrees. (*Id.* at p. 13.) Whether Defendant is required to  
20 reimburse its employees for buying non-slip shoes is a legal question common to all  
21 putative class members.

22 c. *Meal Break Claim*

23 Plaintiffs' meal break claim relates to Defendant's alleged failure to provide  
24 duty-free meal breaks for those employees who work "locked-in" shifts, in which  
25 they are physically locked in the store during their shift and cannot leave, and failure  
26 to provide meal breaks within the first five hours of work. (*Id.* at pp. 13-14; *see also*  
27 SAC at ¶¶ 18-19, 40-51.) Plaintiffs claim the practices violate California Labor  
28 Code section 226.7. (Mot. at pp. 13-14) Whether Defendant's meal break policies



1 and practices violate California Labor Code section 226.7 is a common legal  
2 question suitable for class treatment.

3 d. *Rest Break Claim*

4 Plaintiffs' rest break claim relates to the legal sufficiency of Defendant's  
5 policy on rest breaks. (*Id.* at p. 14; *see also* SAC at ¶¶ 18-19, 40-51.) Plaintiffs  
6 claim Defendant's policy is facially deficient because it provides for a 10 minute  
7 break every 4 hours, whereas California law requires 10 minute breaks for shifts  
8 from 3.5 to 6 hours in length, and 30 minutes for shifts of more than 10 hours up to  
9 14 hours. (Mot. at p. 14.) Whether Defendant's policy is facially deficient requires  
10 resolution of a common legal question.

11 e. *Waiting Time Penalties Claim*

12 Plaintiffs' waiting time claim relates to whether Defendant owes waiting time  
13 penalties under California Labor Code section 203 for Defendant's alleged willful  
14 failure to pay wages owed, including missed meal and rest break premiums, pursuant  
15 to California Labor Code sections 201 and 202. (*Id.* at p. 15; *see also* SAC at ¶¶ 57-  
16 61.) Whether Defendant's conduct in failing to pay all earned wages was willful will  
17 require resolution of certain common legal and factual questions. (Mot. at p. 15.)

18 f. *Derivative Claims*

19 Plaintiffs have also alleged derivative claims for restitution of wrongfully  
20 withheld wages under California Business and Professions Code §§ 17200, *et seq.*,  
21 based on the foregoing violations. (*Id.*; SAC at ¶¶ 62-71.) These claims raise the  
22 same common legal and factual questions discussed above.

23 3. Typicality – Rule 23(a)(3)

24 To satisfy Rule 23(a)(3), the named plaintiff's claims must be "typical of the  
25 claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). The typicality requirement  
26 is "permissive" and requires only that the named plaintiff's claims "are reasonably  
27 coextensive with those of absent class members." *Hanlon*, 150 F.3d at 1020. "The  
28 test of typicality 'is whether other members have the same or similar injury, whether

1 the action is based on conduct which is not unique to the named plaintiffs, and  
2 whether other class members have been injured by the same course of conduct.”  
3 *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992) (quoting *Schwartz*  
4 *v. Harp*, 108 F.R.D. 279, 282 (C.D. Cal. 1985)). “[C]lass certification should not be  
5 granted if ‘there is a danger that absent class members will suffer if their  
6 representative is preoccupied with defenses unique to it.’” *Id.* (quoting *Gary Plastic*  
7 *Packaging Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 903 F.2d 176, 180  
8 (2d Cir. 1990)).

9 Plaintiffs were employed by Defendant during the class period as  
10 janitors/house cleaners. (ECF No. 54-3 (“Portillo Decl.”) at ¶ 2; SAC at ¶¶ 6-7.)  
11 Plaintiffs’ claims are based on Defendant’s policies and practices. Thus, the alleged  
12 conduct at issue is not unique to the named Plaintiffs, and other Class Members, who  
13 were similarly employed by Defendant as janitors/house cleaners during the class  
14 period, will have been injured by the same course of conduct and have suffered a  
15 similar injury. Accordingly, Plaintiffs’ claims are typical of the claims of the Class  
16 Members, satisfying Rule 23(a)(3).

17 4. Adequacy – Rule 23(a)(4)

18 Rule 23(a)(4) requires that the representative plaintiff “will fairly and  
19 adequately protect the interest of the class.” Fed. R. Civ. P. 23(a)(4). “To satisfy  
20 constitutional due process concerns, absent class members must be afforded adequate  
21 representation before entry of a judgment which binds them.” *Hanlon*, 150 F.3d at  
22 1020 (citing *Hansberry v. Lee*, 311 U.S. 32, 42-43 (1940)). “Resolution of two  
23 questions determines legal adequacy: (1) do the named plaintiffs and their counsel  
24 have any conflicts of interest with other class members and (2) will the named  
25 plaintiffs and their counsel prosecute the action vigorously on behalf of the class?”  
26 *Id.* (citing *Lerwill v. Inflight Motion Pictures, Inc.*, 582 F.2d 507, 512 (9th Cir.  
27 1978)).

28 There is no apparent conflict of interest between the named Plaintiffs and their

1 counsel and the proposed Settlement Class. The interests of Plaintiffs and the Class  
2 Members appear to be aligned. The Court also has no reason to doubt that the named  
3 Plaintiffs and their counsel will prosecute the action vigorously on behalf of the  
4 Settlement Class. While the named Plaintiffs and their counsel previously disputed  
5 the handling of this class action, they have since demonstrated an ability to work  
6 together for the benefit of the Class Members. (See Clark Decl. at ¶¶ 22-25.)  
7 Additionally, Plaintiffs’ counsel are qualified in wage and hour class action  
8 litigation, including having served as lead or co-counsel for plaintiffs in class actions  
9 in California state and federal court. (Jusuf Decl. at ¶ 3; Clark Decl. at ¶¶ 4-5.)  
10 Therefore, Plaintiffs and their counsel adequately represent the Class Members,  
11 satisfying Rule 23(a)(4)’s adequacy requirement.

12           5.     Predominance – Rule 23(b)(3)

13           “The predominance inquiry focuses on ‘the relationship between the common  
14 and individual issues’ and ‘tests whether proposed classes are sufficiently cohesive  
15 to warrant adjudication by representation.’” *Vinole v. Countrywide Home Loans,*  
16 *Inc.*, 571 F.3d 935, 944 (9th Cir. 2009) (quoting *Hanlon*, 150 F.3d at 1022).

17           Rule 23(b)(3)’s predominance and superiority requirements were added  
18 to cover cases in which a class action would achieve economies of time,  
19 effort, and expense, and promote . . . uniformity of decision as to  
20 persons similarly situated, without sacrificing procedural fairness or  
21 bringing about other undesirable results. Accordingly, a central  
concern of the Rule 23(b)(3) predominance test is whether adjudication  
of common issues will help achieve judicial economy.

22 *Id.* (internal quotation marks and citations omitted).

23           Here, as discussed above, common issues predominate over any individual  
24 issues—specifically, whether Defendant’s practices and policies violate California  
25 labor laws. Given that the alleged improper conduct is not specific to a named  
26 Plaintiff or a particular employee, the Settlement Class is sufficiently cohesive in  
27 order to satisfy Rule 23(b)(3)’s predominance requirement.

28 ///

1                   6.     Superiority – Rule 23(b)(3)

2                   “Plaintiffs must also demonstrate that a class action is ‘superior to other  
3 available methods for fairly and efficiently adjudicating the controversy.’” *Otsuka*,  
4 251 F.R.D. at 448 (citing Fed. R. Civ. P. 23(b)(3)). “Where classwide litigation of  
5 common issues will reduce litigation costs and promote greater efficiency, a class  
6 action may be superior to other methods of litigation,” and it is superior “if no  
7 realistic alternative exists.” *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234-  
8 35 (9th Cir. 1996). The following factors are pertinent to this analysis:

- 9                   (A) the class members’ interest in individually controlling the  
10 prosecution or defense of separate actions;  
11                   (B) the extent and nature of any litigation concerning the controversy  
12 already begun by or against class members;  
13                   (C) the desirability or undesirability of concentrating the litigation of  
14 the claims in the particular forum; and  
15                   (D) the likely difficulties in managing a class action.

16 Fed. R. Civ. P. 23(b)(3).

17                   The alternative to a class action would be to have the individual Class  
18 Members, which amount to approximately 13,413 individuals, file separate lawsuits.  
19 Requiring Class Members to pursue individual actions would potentially produce  
20 lawsuits numbering in the thousands. That would be both impractical and  
21 inefficient. Such individual litigation would consume judicial resources, impose  
22 additional burdens and expenses on the litigants, and present a risk of inconsistent  
23 rulings. Therefore, Rule 23(b)(3)’s superiority requirement is also satisfied.

24                   **B. Preliminary Fairness Determination**

25                   Having certified the class, the Court must next make a preliminary  
26 determination of whether the class-action settlement is “fundamentally fair,  
27 adequate, and reasonable” pursuant to Rule 23(e). *Hanlon*, 150 F.3d at 1026. “It is  
28 the settlement taken as a whole, rather than the individual component parts, that must  
be examined for overall fairness.” *Id.* A court may not “delete, modify or substitute

1 certain provisions” of the settlement; rather, “[t]he settlement must stand or fall in its  
2 entirety.” *Id.* (citation omitted).

3 “[S]ettlement approval that takes place prior to formal class certification  
4 requires a higher standard of fairness.” *Id.* Consequently, a district court “must be  
5 particularly vigilant not only for explicit collusion, but also for more subtle signs that  
6 class counsel have allowed pursuit of their own self-interests and that of certain class  
7 members to infect the negotiations.” *In re Bluetooth Headset Prods. Liab. Litig.*,  
8 654 F.3d 935, 947 (9th Cir. 2011). Other relevant factors to this determination  
9 include, among others, “the strength of the plaintiffs’ case; the risk, expense,  
10 complexity, and likely duration of further litigation; the risk of maintaining class  
11 action status throughout the trial; the amount offered in settlement; the extent of  
12 discovery completed and the stage of the proceedings; the experience and views of  
13 counsel; the presence of a governmental participant; and the reaction of the class  
14 members to the proposed settlement.” *Hanlon*, 150 F.3d at 1026.

15 Preliminary approval of a settlement and notice to the proposed class is  
16 appropriate if “the proposed settlement appears to be the product of serious,  
17 informed, non-collusive negotiations, has no obvious deficiencies, does not  
18 improperly grant preferential treatment to class representatives or segments of the  
19 class, and falls within the range of possible approval.” *In re Tableware Antitrust*  
20 *Litig.*, 484 F. Supp. 2d 1078, 1079 (N.D. Cal. 2007) (internal quotation marks and  
21 citations omitted).

22 Here, the Parties’ Settlement complies with all of these requirements. The  
23 Court will address the relevant factors in further detail below.

24 1. Strength of Plaintiff’s Case and Risk of Further Litigation

25 “[T]he very essence of a settlement is compromise, a yielding of absolutes and  
26 an abandoning of highest hopes.” *Officers for Justice v. Civil Serv. Comm’n of the*  
27 *City & Cnty. of San Francisco*, 688 F.2d 615, 624 (9th Cir. 1982) (internal quotation  
28 marks and citation omitted). As explained by the Supreme Court, “[n]aturally, the

1 agreement reached normally embodies a compromise; in exchange for the saving of  
2 cost and elimination of risk, the parties each give up something they might have won  
3 had they proceeded with litigation.” *United States v. Armour & Co.*, 402 U.S. 673,  
4 681 (1971). “In most situations, unless the settlement is clearly inadequate, its  
5 acceptance and approval are preferable to lengthy and expensive litigation with  
6 uncertain results.” *Nat’l Rural Telecomm. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523,  
7 526 (C.D. Cal. 2004) (citation omitted).

8       Upon review of the pleadings and history of this case and related litigation, it  
9 appears that any motion for class certification filed in this matter would be strongly  
10 contested and all further litigation contentious. Notably, there have been several  
11 class actions filed against Defendant in recent years. (Mot. at pp. 5-7.) While class  
12 certification was granted in *Portillo*, Defendant has successfully defeated three  
13 motions for class certification on many of the same issues. (*Id.*; Jusuf Decl. at ¶ 9;  
14 Clark Decl. at ¶ 7.)

15       Furthermore, the *Portillo* action has been heavily litigated since the beginning.  
16 (Jusuf Decl. at ¶ 8.) In addition to litigating and re-litigating a motion for class  
17 certification, Defendant filed multiple motions for judgment on the pleadings, one  
18 arguing that the claim for slip-resistant work shoes expense reimbursement is  
19 preempted by federal OSHA. (*Id.* at ¶¶ 9, 25; Clark Decl. at ¶ 18.) While the motion  
20 was ultimately denied by the Alameda County Superior Court, the motion was  
21 premised on a ruling by a district court judge in the Southern District of California in  
22 a different case finding that California Labor Code section 2802 claims for  
23 reimbursement of slip-resistant shoes are preempted by OSHA. (Jusuf Decl. at ¶ 25;  
24 Clark Decl. at ¶ 18.)

25       In addition, in *Portillo*, Defendant filed a cross-complaint against plaintiff  
26 Portillo alleging equitable indemnity for Defendant’s damages and attorney’s fees  
27 incurred in the action. (Jusuf Decl. at ¶ 15.) The parties in *Portillo* have also  
28 engaged in multiple private mediations, none of which led to settlement (*id.* at ¶¶ 11-

1 12), and engaged in extensive discovery, involving multiple motions to compel (*id.*  
2 at ¶ 13).

3 Given the foregoing, not only does the litigation risk, expense, and complexity  
4 for Plaintiffs appear to be high, but so does the likelihood of additional lengthy  
5 litigation. Accordingly, this factor favors approval.

6 2. Amount of the Proposed Settlement

7 Here, the Gross Settlement Value amount represents approximately 19.70% of  
8 the class damages for the underlying claims, which Plaintiffs have estimated as being  
9 approximately \$13,699,000. (Jusuf Decl. at ¶ 45; Clark Decl. at ¶ 7.) Though the  
10 proposed settlement is a compromise amount and would be considerably less than  
11 the total estimated damages, “[t]he fact that a proposed settlement may only amount  
12 to a fraction of the potential recovery does not, in and of itself, mean that the  
13 proposed settlement is grossly inadequate and should be disapproved.” *Linney v.*  
14 *Cellular Alaska P’ship*, 151 F.3d 1234, 1242 (9th Cir. 1998) (citation omitted); *see*  
15 *also Wershba v. Apple Computer, Inc.*, 91 Cal.App.4th 224, 250 (2001).

16 Plaintiffs argue that the compromised amount is an “excellent” result given the  
17 past history of other class actions filed against Defendant over the past 8 years in that  
18 Defendant has defeated three class certification motions on many of the same issues,  
19 and given that the status of the law in the area of unreimbursed expenses, rounding  
20 time, and meal and rest breaks is “somewhat unsettled.” (Mot. at pp. 19-21; Clark  
21 Decl. at ¶ 7; Jusuf Decl. at ¶¶ 44, 50-51.) Plaintiffs further argue that the proposed  
22 Settlement “provides the additional benefits of a swift and certain payment of  
23 overdue overtime pay to all members of the Class.” (Jusuf Decl. at ¶ 37.) Therefore,  
24 under the circumstances, the Court concludes that the amount offered in the  
25 Settlement weighs in favor of approval.

26 3. Extent of Discovery Completed and Stage of the Proceedings

27 “A settlement following sufficient discovery and genuine arms-length  
28 negotiation is presumed fair.” *DIRECTV, Inc.*, 221 F.R.D. at 528. While the Parties

1 only conducted informal discovery in the present case, the parties engaged in  
2 extensive discovery, involving multiple motions to compel, in *Portillo*. (Jusuf Decl.  
3 at ¶ 13; Clark Decl. at ¶ 40.) The *Portillo* action, which commenced nearly three  
4 years before the filing of this action, has been heavily litigated with the parties  
5 engaging in extensive motion practice, as previously noted. (*Id.* at ¶¶ 7-19.)

6 In both the *Portillo* matter and the present case, the parties have also engaged  
7 in multiple mediations. In *Portillo*, the parties participated in private mediations in  
8 March and May 2012, as well as in August 2013, but did not reach a settlement.  
9 (Jusuf Decl. at ¶¶ 11-12, 21.) On August 22, 2014, the parties in the present case and  
10 *Portillo* participated in another full day private mediation. (*Id.* at ¶ 36.)

11 The Parties reached the current proposed “global” Settlement after continuing  
12 to engage in “numerous and extensive discussions” post-mediation. (*Id.* at ¶¶ 39-  
13 40.) Plaintiffs contend that the Settlement did not occur until they “possessed  
14 sufficient information to make an informed judgment regarding the likelihood of  
15 success on the merits and the results that could be obtained through further  
16 litigation.” (Clark Decl. at ¶ 40.)

17 Based on the foregoing, the Court concludes that this factor favors approval.

#### 18 4. Experience and Views of Counsel

19 The declarations Plaintiffs’ counsel provided in support of the motion  
20 highlights Plaintiffs’ counsel’s experience in class actions, including being appointed  
21 as lead or co-lead class counsel in several certified class actions in state and federal  
22 courts. (Jusuf Decl. at ¶ 3; Clark Decl. at ¶¶ 4-5, Ex. 1.) Class counsel declares that  
23 in their opinion, “the settlement is fair, reasonable and adequate” and an “excellent”  
24 result. (Clark Decl. at ¶ 6; Jusuf Decl. at ¶¶ 44, 51.) Class counsel further declares  
25 that “under the circumstances, th[e] method of allocation is fair and equitable, taking  
26 into account the relative strengths of the different claims asserted in the Actions,  
27 accrued interest, and bears a reasonable correlation to the Settlement Class members’  
28 relative size of their claims.” (Jusuf Decl. at ¶ 51.)



1           “The recommendations of plaintiffs’ counsel should be given a presumption of  
2 reasonableness.” *Boyd v. Bechtel Corp.*, 485 F. Supp. 610, 622 (N.D. Cal. 1979)  
3 (citation omitted). Accordingly, giving the appropriate weight to Plaintiffs’  
4 counsel’s recommendation, the Court concludes that this factor also weighs in favor  
5 of approval.

6           **C. Proposed Class Notice**

7           Under Rule 23(c)(2)(B), “the court must direct to class members the best  
8 notice that is practicable under the circumstances, including individual notice to all  
9 members who can be identified through reasonable effort.” Fed. R. Civ. P.  
10 23(c)(2)(B).

11           The notice must clearly and concisely state in plain, easily understood  
12 language: (i) the nature of the action; (ii) the definition of the class  
13 certified; (iii) the class claims, issues, or defenses; (iv) that a class  
14 member may enter an appearance through an attorney if the member  
15 so desires; (v) that the court will exclude from the class any member  
16 who requests exclusion; (vi) the time and manner for requesting  
17 exclusion; and (vii) the binding effect of a class judgment on members  
18 under Rule 23(c)(3).

19           *Id.* “[T]he mechanics of the notice process are left to the discretion of the court  
20 subject only to the broad ‘reasonableness’ standards imposed by due process.”  
21 *Grunin v. Int’l House of Pancakes*, 513 F.2d 114, 120 (8th Cir. 1975) (citation  
22 omitted).

23           The Settlement provides that within 10 court days of the Court’s order  
24 granting preliminary approval, Defendant must provide the Settlement Administrator  
25 an Excel file containing the following information: each Class Member’s full name,  
26 last known address, last known phone number (if in the database), Social Security  
27 Number, the total amount deducted from his or her paychecks during the Class  
28 Period for buying slip-resistant work shoes, and his or her work years. (Settlement at  
§ IV(15).) Defendant will also provide “any other information regarding the Class  
Members that the Settlement Administrator reasonably needs to administer the

1 Settlement.” (*Id.*)

2 After receiving the information, the Settlement Administrator will perform a  
3 search and update any change of address using the National Change of Address  
4 Database. (*Id.*) Within 10 days of receiving the information from Defendant, the  
5 Settlement Administrator will mail the proposed notice of class settlement and a  
6 customized claim form in both English and Spanish, by first class mail, to each of the  
7 Class Members. (*Id.*) A business return envelope (or with pre-paid postage) will  
8 accompany each mailing. (*Id.*) For any returned mail, the Settlement Administrator  
9 will perform reasonable “skip tracing” and re-mail the Settlement Packets. (*Id.*) The  
10 Class Members will have 45 days from the original mailing to file a claim. (*Id.*)

11 Plaintiffs contend that the proposed notice procedure set forth in the  
12 Settlement “provides the best practicable notice to members of the Settlement Class,  
13 both in the manner of dissemination and in terms of content, and provides the most  
14 direct way of apprising Class members of the Settlement.” (Mot at pp. 22-23.) They  
15 also contend that the “notice materials will allow Settlement Class members to make  
16 an informed judgment whether to remain in the Settlement Class and receive benefit  
17 under the Settlement, opt out of the Settlement, or object to the terms of the  
18 Settlement.” (Mot. at p. 23.)

19 The proposed notice, attached as Exhibit A to the Settlement (“Notice”),  
20 complies with Rule 23(c)(2)(B) and provides information on the terms and  
21 provisions of the Settlement, the benefits that Settlement provides for Class  
22 Members, the date, time and place of the final settlement approval hearing, and the  
23 procedure and deadlines for opting out and objecting. (Clark Decl. at ¶ 39; Jusuf  
24 Decl. at Settlement, Ex. 1.) The Notice also lays out the scope of the release, and  
25 explains what will occur if a Class Member does nothing. (Notice at ¶¶ 5-6.) The  
26 proposed customized claim form, attached as Exhibit B to the Settlement (“Claim  
27 Form”), reiterates the release of claims, the deadline to submit the form, and each  
28 individual Class Member’s proposed share of the Settlement.

1           Having reviewed the proposed Notice and Claim Form, the Court finds that  
2 the methods and contents comply with due process and Rule 23. However, the Court  
3 directs the Parties to make one modification: the “Your Right to Object to the  
4 Settlement” section of the Notice (§ 7) should be modified to eliminate the  
5 requirement that any objection must be filed electronically with the Court.  
6 Otherwise, the Court approves of the Notice and Claim Form.

### 7 **III. CONCLUSION & ORDER**

8           In light of the foregoing, the Court **GRANTS** Plaintiffs’ motion for  
9 preliminary approval of the class action settlement. Accordingly, the Court hereby  
10 **ORDERS** the following:

11           1. The Court hereby conditionally certifies the following class for  
12 settlement purposes only: “All persons employed by Kellermeyer Bergensons  
13 Services, LLC (formerly known as Kellermeyer Building Services, LLC) as  
14 janitors/housekeepers in the State of California at any time from August 10, 2006 to  
15 October 27, 2014.” The Settlement Class encompasses the *Portillo* Class, certified  
16 by the Alameda County Superior Court on March 26, 2013, including those  
17 individuals who previously opted out of the *Portillo* Class.

18           2. The Court hereby finds, for settlement purposes only, that the Class  
19 meets the requirements for certification under Federal Rules of Civil Procedure 23(a)  
20 and 23(b)(3).

21           3. The Court hereby preliminarily finds that the Settlement was the  
22 product of serious, informed, non-collusive negotiations conducted at arms’ length  
23 by the Parties. In making this preliminary finding, the Court considered the Gross  
24 Settlement Value, Class Counsel’s assessment of potential class claims, the monetary  
25 benefit available to the Settlement Class members, the allocation of Net Settlement  
26 Value to the Settlement Class members, Defendant’s potential liability, and the fact  
27 that a settlement represents a compromise of the Parties’ respective positions rather  
28 than the result of a finding of liability at trial. The Court further preliminarily finds

1 that the terms of the Settlement have no obvious deficiencies and do not improperly  
2 grant preferential treatment to the named Plaintiffs, or any member of the Settlement  
3 Class.

4 4. The Court hereby appoints named Plaintiffs, Agustin Arellano, Andres  
5 Lara, and Venancia Portillo, as Class Representatives.

6 5. The Court hereby appoints Counsel for Portillo and Counsel for  
7 Arellano, as defined in the Settlement, as Class Counsel.

8 6. The Court hereby approves the selection of CPT Group, Inc. to serve as  
9 the Settlement Administrator.

10 7. The Court hereby approves the Notice of Class Action Settlement  
11 attached to the Settlement as Exhibit A with the following modification: the “Your  
12 Right to Object to the Settlement” section (§ 7) should be modified to eliminate the  
13 requirement that any objection be filed *electronically* with the Court.

14 8. The Court hereby approves the Claim Form attached to the Settlement  
15 as Exhibit B.

16 9. The Court finds that the Notice constitutes the best notice practicable  
17 under the circumstances and is in full compliance with federal and California law  
18 and, to the extent applicable, the United States Constitution and the requirements of  
19 due process. The Court further finds that the Notice fully and accurately informs  
20 Settlement Class members of all material elements of the proposed Settlement,  
21 including each Class member’s right and opportunity to object to the proposed  
22 Settlement. The Court further finds that the Notice fully and accurately informs  
23 Settlement Class Members of each Class member’s right to be excluded from the  
24 Settlement Class.

25 10. The Court hereby orders that the Parties effectuate the terms of the  
26 Settlement, including dissemination of the Notice and Claim Form to the Settlement  
27 Class members in the manner provided in the Settlement.

28 ///

1           11. Any Settlement Class member who wishes to object to the Settlement  
2 shall submit the objection in writing and file it with the Court with copies mailed to  
3 Class Counsel and Counsel for Defendant no later than forty-five (45) calendar days  
4 after the date of the initial mailing of the Notice.

5           12. Any member of the Settlement Class who wishes to opt out of the  
6 Settlement Class must mail or fax to the Settlement Administrator at the address set  
7 forth in the Notice, a signed request for exclusion from the Class, postmarked or  
8 faxed no later than forty-five (45) calendar days after the date of the initial mailing of  
9 the Notice.

10           13. Members of the Settlement Class must mail or fax the signed Claim  
11 Form no later than forty-five (45) calendar days after the date of the initial mailing of  
12 the Notice. Any Settlement Class member who does not timely opt out or submit a  
13 Claim Form will not receive payment under the Settlement, but will nonetheless be  
14 subject to the release set forth in the Settlement.

15           14. Within 10 (ten) court days of the Court's order granting preliminary  
16 approval, Defendant shall provide the Settlement Administrator an Excel file  
17 containing the following information from its records: Each Settlement Class  
18 Member's full name, last known address, last known phone number, if contained in  
19 Defendant's payroll database, Social Security Number, the total amount deducted  
20 from his/her paychecks during the Class Period for buying slip-resistant work shoes,  
21 and his/her Work Year(s). ("Settlement Class Members' Information"). Defendant  
22 will provide other information regarding the class members that the Settlement  
23 Administrator reasonably needs to administer the Settlement.

24           15. The Settlement Administrator shall then administer the Settlement  
25 consistent with the Settlement and this Order.

26 ///

27 ///


28 ///

1           16. The Court hereby schedules a Final Approval Hearing to consider  
2 whether to grant final approval of the proposed class action settlement, the requests  
3 for Enhancement Awards, and the requests for attorneys' fees and reimbursement of  
4 costs and expenses to Class Counsel, for April 13, 2015 at 10:30 a.m. in  
5 Courtroom 4B.

6           17. Named Plaintiffs' motion for final approval and supporting documents  
7 shall be filed pursuant to the Federal Rules of Civil Procedure and Local Rules.

8           **IT IS SO ORDERED.**

9  
10 **DATED: December 5, 2014**

  
**Hon. Cynthia Bashant**  
**United States District Judge**