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SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ALAMEDA

EDUARDO YBARRA, an individual, on
behalf of himself and on behalf of all persons
similarly situated,

Plaintiffs,

vs.

HELZBERG’S DIAMOND SHOPS, LLC, a
Missouri Limited Liability Company; and
DOES 1-50, Inclusive;

Defendants.

Case No. 21CV003531

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF MOTION
FOR PRELIMINARY APPROVAL OF
CLASS ACTION AND PAGA
SETTLEMENT**

Date: October 4, 2022
Time: 3:00 p.m.
Reservation ID: 978588771577

Judge: Hon. Brad Seligman
Dept.: 23

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I. INTRODUCTION

Plaintiff EDUARDO YBARRA (“Plaintiff”) seeks preliminary approval of the Joint Stipulation of Class and Representative Action Settlement Agreement (“Agreement”),¹ which if approved, would provide valuable monetary relief for approximately 270 members of the Class and 163 PAGA Members. The basic terms of the Agreement provide for the following:

1. The “**Class Members**”, “**Participating Class Members**” and “**Settlement Class Period**” shall mean all persons who are or previously were employed by HELZBERG’S DIAMOND SHOPS, LLC (“Defendant”) in California and classified as non-exempt employees (“Class”) from December 3, 2017 to June 19, 2022 (“Class Period”). Agreement at ¶¶ 3 and 10. The Participating Class Members exclude any Class Member that submit a valid and timely request for exclusion. Agreement at ¶ 31.

2. The “**PAGA Members**” and “**PAGA Period**” means all of Defendant’s current and former non-exempt employees employed by and who performed work for Defendant in California (“PAGA Members”) between September 27, 2021 and June 19, 2022 (“PAGA Period”). Agreement at ¶¶ 29 and 30. PAGA Members do not have the ability to opt-out of the PAGA portion of the settlement.

3. The “**Gross Settlement Amount**” is six hundred and sixty thousand dollars (\$660,000). Agreement at ¶ 19. The Gross Settlement Amount is non-reversionary and includes the following:

a. A “**Class Representative Service Payment**” of no more than \$10,000 to Plaintiff for his services on behalf of the Class Members. Agreement at ¶ 50(a);

b. A “**Class Counsel Fees Payment**” of up to one-third of the Gross Settlement Amount for attorney’s fees, currently estimated to be \$220,000 *and* a “**Class Counsel Litigation Expenses Payment**” to reimburse Class Counsel for their litigation costs and expenses not to exceed \$25,000, to be paid to Class Counsel. Agreement at ¶ 50(b);

c. A “**PAGA Civil Penalty Payment**” of \$40,000 shall be allocated from the Gross Settlement Amount for settlement of claims for civil penalties under the Private Attorneys General Act of 2004. The Settlement Administrator shall pay 75% of the PAGA Civil Penalty Payment to the Labor

¹ The Agreement is attached as Ex “A” to the Declaration of Jean-Claude Lapuyade (“JCL Dec.”) at ¶ 3. All citations to the Agreement incorporate by this reference a citation to the JCL Dec., ¶ 3. Further, unless indicated otherwise, capitalized terms used herein have the same meaning as those defined by the Agreement.

and Workforce Development Agency (“LWDA Payment”). The Settlement Administrator shall distribute 25% of the PAGA Civil Penalty Payment proportionately to all PAGA Members (“Individual PAGA Payment”). Agreement at ¶ 50(c); and

d. “**Administration Expenses**” not to exceed \$10,000 payable to the Settlement Administrator, ILYM Group, Inc., for, *inter alia*, the administration of the Notice Packet and Individual Settlement Payments. Agreement at ¶ 50(d).

4. The “**Net Settlement Fund**” of approximately \$355,000 (Gross Settlement Amount minus the requested Class Representative Service Payment, Class Counsel Fees Payment, Class Counsel Litigation Expenses Payment, PAGA Civil Penalty Payment, and Administration Expenses) which will be allocated to all Participating Class Members on a pro-rata basis according to the number of Workweeks each Participating Class Member worked during the Class Period. The entire Net Settlement Amount will be paid to all Participating Class Members who do not opt out of the Settlement Class resulting in an average Individual Class Settlement Payment of **\$1,314.81**. Agreement at ¶ 23; JCL Dec., ¶ 6.

An objective evaluation of the Settlement confirms that the relief negotiated on behalf of the Class is fair, reasonable, and adequate. The Settlement was negotiated by the Parties at arm’s length. The Settlement confers substantial benefits to the Class. The relief offered by the Settlement is particularly impressive when viewed against the difficulties encountered by plaintiffs pursuing wage and hour cases (*see infra*). Indeed, by settling now rather than proceeding to trial, Class Members will not have to wait (possibly years) for relief, nor will they have to bear the risk of class certification being denied or of Defendant prevailing at trial. JCL Dec., ¶ 6.

As discussed below, the proposed Settlement satisfies all criteria for preliminary settlement approval and falls within the range of reasonableness. The average Individual Class Settlement Payment to the Participating Class Members meets or exceeds awards in similar wage and hour class actions. Moreover, the proposed Class is appropriate for provisional certification. Accordingly, Plaintiff respectfully requests the Court grant preliminary approval of the Settlement. JCL Dec., ¶ 7.

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II. FACTS AND PROCEDURE

A. Overview of the Litigation

Defendant is a Missouri limited liability company that owns and operates a chain of diamond and jewelry retail stores in California. This action asserts claims on behalf of Defendant's non-exempt employees working in California. Plaintiff worked for Defendant as a non-exempt employee in California between October of 2020 to July of 2021. At all times during his employment, Plaintiff earned hourly wage, including overtime, and performance-based incentive compensation, and was entitled to legally compliant meal and/or rest periods. Throughout his employment, Plaintiff was subject to Defendant's written policies and procedures. JCL Dec., ¶ 8; Declaration of Eduardo Ybarra ("Ybarra Dec.") at ¶¶ 1-5.

Generally, Plaintiff claims that Defendant failed to pay for all time worked, including, time spent waiting for and undergoing mandatory loss prevention security checks, failed to provide compliant meal and rest periods, failed to pay overtime, meal premiums, and sick pay, at the correct regular rate of pay, failed to furnish accurate itemized wage statements, failed to pay all wages when due and failed to reimburse employees for mandatory business expenses. Defendant forcefully denies liability for each of Plaintiff's claims. Further, Defendant asserts that it fully complied with all applicable employment laws and raised several other significant defenses to Plaintiff's claims, including but not limited to, facially compliant meal and rest period policies, compliant wage statements, and timely payment all wages due upon separation of employment. JCL Dec., ¶ 9.

On September 27, 2021, Plaintiff served Defendant and the Labor and Workforce Development Agency ("LWDA") with a Notice of Violations ("PAGA Notice"). Plaintiff's PAGA Notice set forth the facts and theories supporting Defendant's alleged violations of various provisions of the California Labor Code and applicable Industrial Welfare Commissions ("IWC") Wage Order and of his intent to pursue claims under California Labor Code Private Attorneys General Act, Cal. Lab. Code Sections 2698 et seq ("PAGA"). JCL Dec., ¶ 10.

On December 3, 2021, Plaintiff filed a class action complaint in the Alameda Superior Court, Case Number 21CV003531 ("Action"). The Action alleged nine causes of action against Defendant for: (1) Unfair Competition in Violation of California Business and Professions Code §§ 17200; (2)

1 Failure to Pay Minimum Wages in Violation of California Labor Code §§ 1194, 1197 and 1197.1; (3)
2 Failure to Pay Overtime Wages in Violation of California Labor Code §§ 510 *et seq.*; (4) Failure to
3 Provide Required Meal Periods in Violation of Cal. Lab. Code §§ 226.7 and 512; (5) Failure to Provide
4 Required Rest Periods in Violation of Cal. Lab. Code §§ 226.7 and 512; (6) Failure to Provide Accurate
5 Itemized Wage Statements in Violation of Cal. Lab. Code §226; (7) Failure to Provide Wages When
6 Due in Violation of Cal. Lab. Code §§ 201, 202 and 203; (8) Failure to Reimburse Employees for
7 Required Expenses in Violation of Cal. Lab. Code § 2802; and (9) Violation of the Private Attorneys
8 General Act [Labor Code §§ 2698 *et seq.*]. On February 2, 2022, Defendant removed the Action to the
9 United States District Court, Northern District of California. JCL Dec., ¶ 11.

10 On April 13, 2022, Plaintiff filed a second PAGA Notice with the LWDA alleging several
11 additional wage and hour claims, including a new suitable seating claim, and seeking civil penalties
12 and other relief provided by PAGA. JCL Dec., ¶ 12.

13 Plaintiff and Defendant agreed to mediate the Action with Tripper Ortman, Esq., an experienced
14 wage and hour mediator. In anticipation of mediation, the Parties agreed to stay formal discovery and
15 continue deadlines for class certification in the Action. To prepare for mediation, Defendant agreed to
16 informally produce documents and data points subject to the mediation privilege, including but not
17 limited to, the Class Members' time data and certain payroll data points. As discussed *infra*, Plaintiff's
18 counsel retained the forensic consultants at Berger Consulting Group ("BCG") to analyze Defendant's
19 time and payroll data. JCL Dec., ¶ 13.

20 On April 19, 2022, the Parties participated in a full day mediation with Mr. Ortman. After arms-
21 length negotiations and bargaining, the Parties reached an agreement to settle and signed a
22 Memorandum of Understanding. Subsequently, the Parties drafted and negotiated a long-form
23 settlement agreement, which is the subject of the instant motion. As part of the Agreement, the Parties
24 stipulated to remand the Action back to the Alameda Superior Court and Plaintiff filed a First Amended
25 Complaint adding the claims and causes of action included in both PAGA Notices and in the original
26 Complaint. The Parties now seek approval of the entire Agreement. JCL Dec., ¶ 14.

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B. Class Counsel Thoroughly Investigated the Factual and Legal Issues

Months before filing the Action, Class Counsel began its pre-filing investigation into Plaintiff's complaints. Class Counsel's investigation started with several lengthy interviews with Plaintiff. As part of the interview process, Plaintiff produced documents related to his employment, including correspondence with Defendant, and time and payroll records. At the conclusion of the interviews, Class Counsel determined that Plaintiff's complaints justified further inquiry. JCL Dec., ¶ 15.

Class Counsel subsequently requested Plaintiff's employee files from Defendant. In response, Defendant produced hundreds of pages of documents, including but not limited to, copies of Plaintiff's hiring documents, payroll and time records, various policies and separation documents. Class Counsel reviewed and analyzed the documents and determined the documents appeared to substantiate Plaintiff's claim that Defendant's failed to, among other things, pay for all time worked and to provide compliant meal and rest periods. JCL Dec., ¶ 16.

Considering the many anticipated factual disputes, the Parties agreed, relatively early in the litigation, that it would be in the best interest of both Parties to mediate the matter. To prepare for mediation, Class Counsel requested documents and data points to further evaluate Plaintiff's claims and Defendant's liability exposure to the Class Members. In response to Class Counsel's request, Defendant produced the time records for the Class Members, aggregate workweek and pay period data for the Class Members, average hourly rate for the Class Members, and copies of applicable handbooks, policies, and agreements containing, *inter alia*, compensation, timekeeping and meal and rest period policies. In total, Defendant produced nearly 500 pages of pertinent policy documents and more than 1.1 million unique cells of time and payroll data for Class Counsel to analyze. JCL Dec., ¶ 17.

Class Counsel then retained the statisticians and economists at BCG to evaluate the Class Members' payroll and time data. BCG provides data analysis and damage modeling consulting services specializing in wage and hour class actions. BCG's team of financial and data analysts are credentialed and experienced experts in their fields and have provided their expertise on thousands of cases. Stated differently, the BCG is uniquely qualified to analyze Defendant's time and payroll data. JCL Dec., ¶ 18.

BCG analyzed Defendant's time and payroll data to assist in the development of various damage

models. Among other things, BCG determined the approximate number of work shifts, workweeks, pay periods, average length of shift and average number of hours worked per week and pay periods during the Class Period. BCG also estimated the number of missed, late or truncated meal and rest periods, the amount of paid missed meal period premiums paid during the Class Period, the amount of underpayment of overtime, premiums, and sick time resulting from miscalculation of the regular rate of pay, and the amount of off-the-clock work performed by the Class Members during the Class Period. JCL Dec., ¶ 19.

In advance of mediation, Class Counsel created a damage model predicated on the BCG analysis. Class Counsel's model calculated Defendant's potential liability exposure while accounting for the uncertainties of continued litigation. This damage model informed and guided Class Counsel during the mediated settlement discussions. JCL Dec., ¶ 20.

Overall, Class Counsel thoroughly investigated the claims at issue, including: (1) determining Plaintiff's suitability as a putative class representative through interviews, background investigations, and analysis of his employment files; (2) evaluating all of Plaintiff's potential claims; (3) researching similar wage and hour class actions as to the claims brought, the nature of the positions, and the type of employer; (4) analyzing the Settlement Class' time and payroll records; (5) analyzing Defendant's labor policies and practices; (6) researching settlements in similar cases as well as outstanding issues which could affect settlement approval; (7) evaluating Plaintiff's claims and estimating Defendant's liability for purposes of settlement; (8) drafting the mediation brief; and (9) participating in the mediation. This investigation allowed Class Counsel to fully assess the nature and magnitude of the claims being settled, as well as the impediments to recovery, such as to make an independent assessment of the reasonableness of the terms to which the Parties have agreed. JCL Dec., ¶ 21.

C. The Parties Settled at Mediation

On April 19, 2022, the Parties conducted a full day of mediation with Tripper Ortman, Esq., a highly regarded wage and hour mediator. Mediator Ortman helped manage the Parties' expectations and provided a useful, neutral analysis of the issues and risks to both sides. The Parties made substantial progress with Mediator Ortman's assistance. Namely, the Parties exchanged information regarding their respective claims and defense, including their respective evaluation of the damages. After a full

day of arm's length and adversarial negotiations, the mediation concluded in a settlement. The complete and final terms of the Parties' settlement are now set forth in the Agreement. Class Counsel submits that the Settlement constitutes a fair, adequate, and reasonable compromise of the claims at issue. JCL Dec., ¶¶ 22-23.

D. The Proposed Settlement Fully Resolves Plaintiff's Claims

1. The Composition of the Settlement Class Members

The proposed Settlement Class consists of all persons who are or previously were employed by Defendant in California and classified as non-exempt employees from December 3, 2017 and June 19, 2022. The Settlement Class excludes any person who submits a timely and valid request for exclusion. In the data exchanged prior to the Mediation, there were approximately 270 Class Members that worked an estimated 21,064 workweeks through January 15, 2022. Through the conclusion of the Class Period, there are approximately 270 Class Members that worked an estimated 23,242 Workweeks during the Class Period. Agreement at ¶ 49.

2. The Settlement Consideration

The Parties agreed to settle the underlying class claims in exchange for the Gross Settlement Amount of \$660,000. The Gross Settlement Amount includes: (1) Individual Class Settlement Payments to the Settlement Class; (2) a Class Representative Service Payment of \$10,000 to Plaintiff for his services on behalf of the Settlement Class; (3) a PAGA Civil Penalty Payment in the amount of \$40,000; (4) Administration Expenses estimated at \$10,000; (5) Class Counsel Fees Payment in the amount equal to one-third of the Gross Settlement Amount estimated to be \$220,000; and (6) Class Counsel Litigation Expenses estimated at \$25,000 for actually incurred litigation expenses. See generally Agreement at ¶ 50.

Subject to the Court approving the Class Representative Service Payment, Class Counsel Fees Payment, Class Counsel Litigation Expenses, PAGA Civil Penalty Payment, and the Administration Expenses, the Net Settlement Amount will be distributed to each participating member of the Settlement Class. Agreement at ¶ 46². There is no reversion to Defendant and Defendant must

² Due to a typographical error, there are duplicate paragraph numbers in the Agreement. This citation refers to ¶ 46 located on page 8 of the Agreement.

separately pay for its share of the employer payroll taxes. Agreement at ¶ 48.

3. The Funding Date

Assuming there are no objectors, and no appeal is filed, Defendant will fund the \$660,000 Gross Settlement Amount no later than thirty (30) calendar days after the Judgment becomes final. Agreement at ¶ 56.

4. Formula for Calculating Individual Class Settlement Payments

Each Participating Class Member will receive an Individual Class Settlement Payment. The Individual Class Settlement Payment will be proportional to the number of Workweeks each Participating Class Member worked for Defendant in California during the Class Period. The Class Data provided by Defendant to the Settlement Administrator will include the number of Workweeks for each Class Member and the number of Pay Periods worked during the relevant periods. Agreement at ¶ 7. Each Participating Class Member's final Individual Class Settlement Payment for purposes of payment will be calculated by using a fraction, the numerator of which is the Participating Class Member's total number of Workweeks, and the denominator of which is the total number of Workweeks of all Class Members. Each Individual Class Settlement Payment will be reduced by any legally mandated employee tax withholdings (e.g., employee payroll taxes, etc.). Individual Class Settlement Payments for members of the Settlement Class who submit valid and timely requests for exclusion will be redistributed to Class Members who do not submit valid and timely requests for exclusion on a pro rata basis. Agreement at ¶ 46³.

Given that there are approximately 270 Class Members, the average gross recovery is approximately \$1,314.81 (Net Settlement Amount divided by Class Members). JCL Dec., ¶ 6.

5. Release by Participating Class Members

Generally, as of the Effective Date, Plaintiff and the Participating Class Members will agree to release the Released Parties from the Released Class Claims (those that were asserted in the Action, or could have been asserted in the Action, based on the facts, claims and theories plead in the operative complaint) that accrued during the Class Period. Agreement at ¶¶ 33 and 59(a).

³ Due to a typographical error, there are duplicate paragraph numbers in the Agreement. This citation refers to ¶ 46 located on page 8 of the Agreement.

6. PAGA Release by the State of California on behalf of the PAGA Members

Generally, upon the Effective Date, Plaintiff, acting as the representative of the State of California, on behalf of the PAGA Members, will release the Released Parties from any all claims or causes of action *for civil penalties* arising under PAGA based on the facts and allegations contained in either of the PAGA Notices and the operative complaint in the Action that accrued during the PAGA Period. Agreement at ¶¶ 34 and 59(b).

III. ARGUMENT

A. The Court Should Preliminarily Approve the Proposed Class Action Settlement

The proposed Settlement, including a Gross Settlement Amount of \$660,000 meets the standards for preliminary approval. Pre-trial settlement of complex class actions is a judicially favored remedy. (*Officers for Justice v. Civil Serv. Comm'n* (9th Cir. 1982) 688 F.2d 615, 625 (“Voluntary conciliation and settlement are the preferred means of dispute resolution.”).) Class action settlement approval requires an early “preliminary” review by the trial court and a subsequent “final” review after notice of the settlement has been distributed to class members for their comments and objections. (C.R.C. 3.769(c)-(g); *Cellphone Termination Fee Cases*, 180 Cal. App. 4th 1110, 1118 (2010) (the court first “preliminarily approves the settlement” and later “conducts a final approval hearing to inquire into the fairness of the proposed settlement”).)

Although Rule of Court Rule 3.769 does not provide detail as to the scope of review of the proposed settlement, preliminary approval is warranted if the settlement falls within a “reasonable range.” (*See North County Contractor’s Assn., Inc. v. Touchstone Ins. Services* (1994) 27 Cal.App.4th 1085, 1089-90; Conte & Newberg, *Newberg on Class Actions*, §§ 11.26 (4th ed. 2002).) Reasonableness and fairness are presumed where: (1) the settlement is reached through “arms-length bargaining;” (2) investigation and discovery are “sufficient to allow counsel and the court to act intelligently;” (3) counsel is “experienced in similar litigation. . . .” (*Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1802.) The presumption of fairness is consistent with California’s public policy goal of favoring settlements. (*Stambaugh v. Super. Ct* (1976) 62 Cal.App.3d 231, 236 (“the law wisely favors settlements”); *Cellphone Termination Fee Cases* (2009) 180 Cal.App.4th 1110, 1118 (“public policy generally favors the compromise of complex class action litigation”); *7-Eleven Owners for Fair*

1 *Franchising v. Southland Corp.* (2000) 85 Cal.App.4th 1135, 1151 (“voluntary conciliation and
2 settlement are the preferred means of dispute resolution ... [t]his is especially true in complex class
3 action litigation”).)

4 Additionally, in reviewing the fairness of a class action settlement, due regard should be given
5 to what is “otherwise a private consensual agreement between the parties.” (*Cellphone Termination*
6 *Fee Cases* (2010) 186 Cal.App.4th 1380, 1389.) The inquiry “must be limited to the extent necessary
7 to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or
8 collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable
9 and adequate to all concerned.” (*Id.*)

10 1. The Parties Reached the Settlement Through Arm’s-Length Bargaining Led by
11 Experienced Counsel.

12 “[W]hat transpires in settlement negotiations is highly relevant to the assessment of a proposed
13 settlement’s fairness.” (*State v. Levi Strauss & Co.* (1986) 41 Cal.3d 460, 482.) Courts presume the
14 absence of fraud or collusion in the negotiation of a settlement, unless evidence to the contrary is
15 offered; thus, there is a presumption that settlement negotiations are conducted in good faith. (Newberg,
16 § 11.51.)

17 The Parties participated in mediation the highly respected mediator Tripper Ortman, Esq.
18 Mediator Ortman managed the Parties’ expectations and provided a useful, neutral analysis of the issues
19 and risks to both sides. (*In re Apple Computer, Inc. Derivative Litig.* No. C 06-4128 JF (HRL), 2008
20 U.S. Dist. LEXIS 108195 (N.D. Cal. Nov. 5, 2008) (mediator’s participation weighs considerably
21 against any inference of a collusive settlement); *D’Amato v. Deutsche Bank* (2d. Cir. 2001) 236 F.3d
22 78, 85 (a “mediator’s involvement in pre-certification settlement negotiations helps to ensure that the
23 proceedings were free of collusion and undue pressure.”).) At all times, the Parties’ negotiations were
24 at an arm’s length, adversarial and non-collusive. The matter resolved only after a full day of mediated
25 negotiations managed by Mediator Ortman who heard arguments, reviewed evidence and evaluated the
26 Parties’ respective claims and defenses. JCL Dec., ¶ 22.

27 Once the Parties reached a settlement, the Parties engaged in protracted negotiations regarding
28 the written terms of the class action settlement. The Parties maintained the arm’s length, non-collusive

and adversarial negotiations while arriving at the final terms of the Settlement. The Agreement is the final product of these mediated negotiations. Objectively, the Settlement terms are fair, adequate and represent a reasonable compromise of the claims at issue. JCL Dec., ¶ 23.

2. The Settlement Falls Within the Recognized Range of Reasonableness.

The Total Settlement Amount of \$660,000 is within the range of reasonableness. To determine whether a settlement is fair and reasonable, the court should “consider enough information about the nature and magnitude of the claims being settled, as well as the impediments to recovery, to make an independent assessment of the reasonableness of the terms to which the parties have agreed.” (*Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 133.) In making this determination, the court is “not to try the case” but rather “satisfy itself that the class action settlement is within the ‘ballpark of reasonableness.’ ” (*Id.* (emphasis added).) For this analysis, courts do “not require any such explicit statement of value; [they] require[] a record which allows an understanding of the amount that is in controversy and the realistic range of outcomes of the litigation.” (*Munoz v. BCI Coca-Cola Bottling Co.* (2010) 186 Cal.App.4th 399, 409 (internal citation omitted).) The reasonableness of a settlement is not dependent upon its actual value approaching the potential recovery plaintiffs might have received if they had succeeded at trial.⁴ Indeed, “[t]he determination whether a settlement is reasonable does not involve the use of a ‘mathematical equation yielding a particularized sum.’ ” (*Frank v. Eastman Kodak Co.* (W.D.N.Y. 2005) 228 FRD. 174, 186 (quoting *In re Michael Milken and Assoc. Sec. Litig.* (S.D.N.Y. 1993) 150 F.R.D. 57, 66).)

a. **The Gross Settlement Amount Meets the Recognized Range of Reasonableness.**

The Gross Settlement Amount of \$660,000 is fair and reasonable considering the nature and

⁴ Federal district courts recognize that there is an inherent “range of reasonableness” in determining whether to approve a settlement “which recognizes the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion.” *Newman v. Stein* (2d. Cir. 2002) 464 F.2d 689, 693; see *In re Omnivision Tech, Inc.* (N.D. Cal. 2008) 559 F.Supp.2d 1036; see also *Nat’l Rural Telecomm. Coop. v. Directv. Inc.* (C.D. Cal. 2004) 221 F.R.D. 523, 527 (“well settled law that a proposed settlement may be acceptable even though it amounts to only a fraction of the potential recovery”); *In re Global Crossing Sec. and ERISA Litig.* (S.D.N.Y 2004) 225 F.R.D. 436, 460 (“settlement amount’s ratio to the maximum potential recovery need not be the sole, or even dominant, consideration when assessing settlements fairness”); *In re IKON Office Solutions, Inc Sec Litig.* (E.D. Pa. 2000) 194 F.R.D. 166, 184 (“the fact that a proposed settlement constitutes a relatively small percentage of the most optimistic estimate does not, in itself, weigh against the settlement; rather the percentage should be considered in light of strength of the claims”); *Officers for Justice v. Civil Serv. Comm.* (9th Cir. 1982) 688 F.2d 615, 628 (it is “the complete package, taken as a whole rather than the individual component parts, that must be examined for overall fairness”).

magnitude of the claims being settled and the various potential impediments to recovery. Prior to mediation, Class Counsel retained BCG to develop economic a damage model measuring Defendant's liability exposure while accounting for the uncertainties of continued litigation. The model was informed by Class Counsel's investigation, including the analysis of a significant sample of time and payroll data. Class Counsel projected Defendant's liability exposure for *class claims* (excluding PAGA Penalties) at approximately \$1,628,169 for actual damages (excluding interest and penalties), and \$2,256,271 when also including interest and statutory penalties, if successful at trial. Thus, the Gross Settlement Amount of \$660,000 represents approximately 40% of Defendant's liability for damages, and 29% of Defendant's *class-wide* liability exposure, as estimated by Class Counsel at the time of mediation. The following summarizes Defendant's estimated exposure. JCL Dec., ¶ 24.

(1) Estimated Exposure for Off-the-Clock Loss Prevention Security Checks

One of Plaintiff's primary claims in the Action was that Defendant failed to pay for all hours worked. Specifically, Plaintiff asserted that Defendant failed to pay for all time spent waiting for and undergoing mandatory loss prevention security checks. Recently, the California Supreme Court in *Frlekin v. Apple, Inc.* 8 Cal.5th 1038 (2020) concluded that "[the] plaintiffs' time spent on [the defendant's] premises waiting for, and undergoing, mandatory exit searches ... is compensable as 'hours worked.' " (*Id.* at 1058.) Plaintiff contends that Defendant maintained a similar policy at all of its retail store locations in California during the Class Period. JCL Dec., ¶ 25.

Defendant vigorously denied liability for claim. Defendant asserted that its written policies and procedures directed its California retail store managers to conduct all loss prevention security checks while on-the-clock. Defendant asserted that any deviation from these written policies were employee specific and, thus, created individualized issues of liability unsuitable for class treatment. JCL Dec., ¶ 26.

Notwithstanding Defendant's arguments, Plaintiff perceived the off-the-clock as a strong claim in the Action. Assuming fifteen (15) minutes of unpaid compensable time per shift worked by the Class Members during the Class Period, made up of loss prevention security checks and other off-the-clock tasks, BCG estimated Defendant's exposure for this claim at \$534,892, including interest. JCL Dec., ¶ 27.

(2) Estimated Damages for Meal Period Violations

Plaintiff also alleges that Defendant failed to provide compliant meal periods. Specifically, Plaintiff contends that because of their rigorous work requirements and understaffing, the Class Members were often denied complaint meal periods. JCL Dec., ¶ 28.

Conversely, Defendant asserted that it maintained facially compliant meal period policies and practices throughout the Class Period. Thus, Defendant argued that there was no potential liability for Plaintiff's alleged meal period violations. JCL Dec., ¶ 29.

Based on BCG's review of the Class Members' time records, Plaintiff estimated the damages for this claim at approximately \$498,139, including interest. JCL Dec., ¶ 30.

(3) Estimated Damages for Rest Period Violations

Plaintiff also alleged that Defendant failed to provide compliant rest periods. Specifically, Plaintiff alleged that because of their rigorous work schedule, Class Members were not able to take timely and duty-free rest periods. JCL Dec., ¶ 31.

Again, Defendant denied liability and asserted that it maintained legally compliant rest period policies and practices throughout the Class Period. Moreover, Plaintiff recognizes the evidentiary burdens establishing this claim. Establishing Plaintiff's rest period claim would rely, almost entirely, on Class Member testimony, making it a riskier claim at class certification and liability stages. Defendant likely would have argued that only a small number of Class Members missed their rest breaks. Certification likely would have required depositions of Class Members who provided declarations, and Defendant surely would have obtained opposing declarations stating either rest breaks were taken, or rest breaks were voluntarily waived. *See, e.g., Ordonez v. Radio Shack, Inc.* (C.D. Cal. Jan. 17, 2013) 2013 WL 210223, at *11 ("Because of the competing testimony before the Court, plaintiff's evidence that defendant may have an illegal, written rest break policy is insufficient for this Court to find that common issues predominate."); *Villa v. United Site Servs. of California, Inc.* (N.D. Cal. Nov. 13, 2012) 2012 WL 5503550, at *8 ("Indeed, Plaintiff's own evidence confirms that the written policy does not generate uniform practices."). Accordingly, the rest break claim was heavily discounted in Plaintiff's valuation of the case at approximately \$528,977, including interest. JCL Dec., ¶ 32.

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(4) Exposure for Regular Rate Violations

Plaintiff alleges that Defendant failed to include certain non-discretionary bonuses and commissions when calculating the regular rate of pay when paying overtime wages, meal period premiums and sick pay. Specifically, Defendant paid Class Members non-discretionary incentive compensation in the form of “Commission,” “Spiffs,” and “TSI Team Incentive” payments, and had in place the non-discretionary incentive programs, which were not properly calculated into the regular rate of pay for purposes of overtime, meal period premiums, and sick pay. JCL Dec., ¶ 33. The regular rate of pay, which can change from pay period to pay period, includes adjustments to the straight time rate, reflecting, among other things, non-discretionary bonuses and awards, shift differentials and the per-hour value of any non-hourly compensation the employee has earned. *Alvarado v. Dart Container Corp. of California* (2018) 4 Cal.5th 542, 552-554. For overtime work, “an employee must receive a 50 percent premium on top of his or her regular rate of pay[.]” *Id.* at 553. California law also requires meal period premiums and rest period premiums to be paid at an employee’s regular rate of pay. See *Ferra v. Lowes Hollywood Hotel, LLC* (2021) 11 Cal.5th 858.) Further, California Labor Code section 246(1)(1) expressly mandates that sick pay for non-exempt employees be based on either “the regular rate of pay for the workweek in which the employee uses paid sick time” or the regular rate of pay in the 90 days preceding the use of the sick leave.

Conversely, Defendant denied liability and asserted it paid Class Members at the correct rate of pay for purposes of overtime wages, meal period premiums, and sick pay. Plaintiff estimated Defendant’s exposure for this claim at approximately \$55,713, including interest. JCL Dec., ¶ 34.

(5) Exposure for Failure to Reimburse for Mandatory Business Expenses

Plaintiff alleges that Defendant failed to reimburse its employees for mandatory business expenses. Specifically, Plaintiff and Class Members, as business expenses, were required by Defendant to use their own personal cellular phones and their personal vehicles as a result of and in furtherance of their job duties as employees for Defendant but were not reimbursed or indemnified by Defendant for the cost associated with the use of their personal cellular phones or personal vehicles for Defendant’s benefit. JCL Dec., ¶ 35. California employers who require employees to use a personal cellular device and vehicle for work purposes must reimburse the employee for the cost incurred in furnishing the

1 device, costs associated with such use, and the appropriate mileage expenses. *See* Cal. Labor Code §
2 2802, providing that “[a]n employer shall indemnify his or her employee for all necessary expenditures
3 or losses incurred by the employee in direct consequence of the discharge of his or her duties, or of his
4 or her obedience to the directions of the employer...”

5 Plaintiff estimated Defendant’s exposure for this claim at approximately \$370,458, including
6 interest. JCL Dec., ¶ 36.

7 (6) Exposure for Wage Statement Violations and Waiting Time Penalties

8 Plaintiff alleges that Defendant’s alleged violations resulted in derivative violations of Labor
9 Code sections 203 and 226(a). Class Counsel considered these penalties and weighed the potential
10 recoveries against probable defenses. Specifically, Defendant could argue that Plaintiff could not prove
11 the “willful” prong needed to obtain waiting time penalties under Labor Code section 203. Additionally,
12 Defendant could argue that Plaintiff could not show that Class Members suffered an “injury” because
13 of wage statement violations, as required by Labor Code section 226. Plaintiff would have to overcome
14 precedent to prove the Class deserved the penalties. *See, e.g., Howard v. CVS Caremark Corp.*, 2014
15 U.S. Dist. LEXIS 172406 (C.D. Cal. Dec. 9, 2014) (denying class certification for the same penalty
16 claims); *Alonzo v. Maximus, Inc.*, 832 F. Supp. 2d 1122, 1134-1137 (C.D. Cal. 2011) (finding
17 insufficient evidence of bad faith or actual injury). Notwithstanding the uncertain nature of the claims,
18 Plaintiff estimated Defendant’s *maxim* exposure for these claims at approximately \$772,667
19 (approximately \$479,817 for waiting time and \$292,850 for wage statement). JCL Dec., ¶ 37.

20 (7) Defendant’s PAGA Exposure

21 Class Counsel’s damage models also estimated Defendant’s exposure for PAGA penalties. At
22 the time of mediation, Plaintiff estimated Defendant’s PAGA exposure was approximately \$2,378,900.
23 JCL Dec., ¶ 38.

24 Under PAGA, Courts have considerable discretion to reduce the penalty award. In *Fleming v.*
25 *Covidien*, 2011 U.S. Dist. LEXIS 154590 (C.D. Cal. 2011), a federal court reduced PAGA penalties
26 from \$2,800,000 to \$500,000, a reduction of 82.2%, because the court found maximum penalties
27 “unjust” because the employees had suffered no injuries. Some trial courts have actually awarded no
28 civil penalties, even when Labor Code violations are established. *See In re Nordstrom Com. Cases*, 186

Cal.App.4th 576, 589 (2010) (affirming an award of \$0 in PAGA penalties in a wage and hour class action); *In re Taco Bell Wage & Hour Actions*, 2016 U.S. Dist. LEXIS 48557, *40-43 (E.D. Cal. Apr. 6, 2016) (PAGA penalties denied after trial).

In order to recover any PAGA penalties, Plaintiff would be required at trial to prove each of the underlying Labor Code violations. See *Cardenas v. McLane Foodservice, Inc.*, 2011 U.S. Dist. LEXIS 13126, *10 (C.D. Cal. 2011) (“Given the statutory language [of PAGA], a plaintiff cannot recover on behalf of individuals whom the plaintiff has not proven suffered a violation of the Labor Code by the defendant.”). Here, Plaintiff would need to prove that each PAGA Member suffered a violation for each pay period the employee worked. Again, Defendant raised several defenses that presented serious threats to the claims of the Plaintiff and the PAGA Members. In addition to those arguments discussed *supra*, Defendant also argued that the Court of Appeals decision in *Cacho v. Eurostar, Inc.* (2019) 43 Cal.App.5th 885, weakened Plaintiff’s claims, on liability, value, and manageability as to the rest period claims. In all, Plaintiff’s PAGA liability exposure is hotly contested. JCL Dec., ¶ 39.

Carrington v. Starbucks Corp., 30 Cal. App. 5th 504 (2018), illustrates the risk of PAGA claims. In *Carrington*, while the plaintiff prevailed on his PAGA claim upon trial, the trial court reduced the maximum PAGA penalty amount by 90%, citing the employer's good faith attempt at complying with the law. *Id.* at 517. Upon review, the Court of Appeal found such reduction to be proper. *Id.* at 539. Again, the *Carrington* decision was after Plaintiff actually prevailed at trial, and even then, the PAGA penalties were reduced by 90%.

b. Inherent Risks of Continued Litigation Support Preliminary Approval.

“It can be difficult to ascertain with precision the likelihood of success at trial. The Court cannot and need not determine the merits of the contested facts and legal issues at this stage, [Citation], and to the extent courts assess this factor, it is to ‘determine whether the decision to settle is a good value for a relatively weak case or a sell-out of an extraordinary strong case.’” (*Misra v. Decision One Mortg. Co.* (C.D. Cal. 2009) 2009 WL 4581276, at *7.)

With respect to the most immediate challenge, i.e., class certification, the risks attendant to the certification of similar wage and hour claims are demonstrated by *Magadia v. Wal-Mart Associates, Inc.* (9th Cir. 2021) 999 F.3d 668. There, the Ninth Circuit, vacated reversed and remanded a \$110

million judgement against an employer for, *inter alia*, inaccurately paying overtime, and directed the trial court to enter judgement in favor of the employer. *See also O’Conner v. Uber Technologies, Inc.* (9th Cir. 2018) 904 F.3d 1087 (decertification of wage and hour misclassification action); *see also Duran v. U.S. Bank National Association* (2014) 59 Cal.4th 1, 31 (reversing a trial verdict in favor plaintiffs in a wage and hour class action)); *Tien v. Tenet Healthcare Corp.* (2012) 209 Cal.App.4th 1077, 1088 (“[T]he reason, if any, that employees might not take their breaks were predominantly individualized questions of fact not susceptible to class treatment.”); *Ali v. U.S.A. Cab Ltd.* (2009) 176 Cal.App.4th 1333, 1341 (affirming denial of certification because employees’ declarations attesting to having taken meal and rest breaks demonstrated that individualized inquiries were required to show harm); *Campbell v. Best Buy Stores, L.P.*, (C.D. Cal. 2013) 2013 WL 5302217 at *11-13 (following *Brinker* and denying certification of proposed off-the-clock and rest and meal break classes due to lack of uniform policy); *Brown v. Fed Express Corp.* (C.D. Cal. 2008) 249 F.R.D. 580, 587-88 (denying certification of driver meal and rest period claims based on the predominance of individual issues). Collectively, the examples cited above illustrate the uncertain nature of class litigation. Consequently, the uncertainty of obtaining certification through a contested motion is a significant risk factor favoring settlement. JCL Dec., ¶¶ 40-41.

“The Settlement eliminates these and other risks of continued litigation, including the very real risk of no recovery after several years of litigation.” (*In re Nvidia Derivs. Litig.* (N.D. Cal. 2008) 2008 WL 5382544, at *3.) Indeed, potential appeals aside, litigating a complex case through trial is inherently perilous regardless of the strengths of merits of the claims:

[N]othing is assured when litigating against commercial giants with vast litigative resources, particular in such complex litigation as this, which would strain the cognitive capacities of any jury. Defense judgments were hardly beyond the realm of possibility. Accordingly, this factor weighs in favor of preliminary approval.

(*Rebney v. Wells Fargo Bank* (1990) 220 Cal.App.3d 1117, 1140, *opinion modified* (June 18, 1990).)

Finally, continuing to litigate this action would require continued and extensive resources coupled with significant Court time to proceed through trial and post-trial motions; which can often

1 take years. Furthermore, wage and hour litigation is complex and expensive, as it often necessitates
2 extensive expert testimony, particularly with regards to damages. But even if Plaintiff is successful at
3 trial, Plaintiff is acutely aware that a judgment does not end the litigation. Plaintiff fully expects that
4 Defendant would appeal any favorable judgment. JCL Dec., ¶ 42. As demonstrated by *Magadia*,
5 *supra*, 999 F.3d 668, the risk of an appeal and subsequent reversal is real. “Avoiding such a trial and
6 the subsequent appeals in this complex case strongly militates in favor of settlement rather than further
7 protracted and uncertain litigation.” (*Nat’l Rural Telecomms. Coop v. DirecTV* (C.D. Cal. 2004) 221
8 F.R.D. 523, 527.) Thus, “unless the settlement is clearly inadequate, its acceptance and approval are
9 preferable to lengthy and expensive litigation with uncertain results.” (*Id.* at 526.)

10 In this matter, Class Counsel negotiated a Gross Settlement Amount of \$660,000 that is roughly
11 29%-40% of Defendant’s maximum class wide liability exposure. Given the amount of the settlement
12 here, as compared to potential value of the claims, offset by the various inherent risks to continued
13 litigation, the settlement is fair and reasonable. JCL Dec., ¶ 43.

14 **B. The Proposed Notice Informs the Class about the Case and Settlement**

15 The Settlement Class is entitled to the best practical notice under the circumstances. (*Kass v.*
16 *Young* (1977) 67 Cal.App.3d 100, 106.) The purpose of the notice is to give class members sufficient
17 information to decide whether they should accept the benefits offered, opt out and pursue their own
18 remedies, or object to the settlement. (*Trotsky v. Los Angeles Fed Savings & Loan Assn.* (1975) 48 Cal.
19 App. 3d 143, 151-52.) The notice must advise class members “that they may be excluded from the class
20 if they so request and that they will be bound by the judgment, whether favorable or not, if they do not
21 request exclusion.” (*Kass*, 67 Cal.App.3d at 106.) Authorities generally require service of the class
22 notice by mail or similar reliable means. (*Chance v. Super. Ct.* (1962) 58 Cal.2d 275, 290; *Cart v.*
23 *Super. Ct.* (1975) 50 Cal.App.3d 960, 972.)⁵

24 The Parties jointly drafted the Class Notice which fairly and neutrally informs the Class
25 Members of their rights and remedies. The Settlement Administrator will first verify addresses, then
26

27 ⁵ Due process does not require that each class member actually receive a notice, but rather a procedure reasonably certain
28 to reach class members. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 1789, at 253 (2d ed. 1986). If
appropriate notice is given, class members will be bound by the judgment even if they never actually receive the notice.
Fontana v. Elrod (7th Cir. 1987) 826 F.2d 729, 732.

1 mail the proposed Class Notice to all Class Members. The Notice will include information regarding
2 the nature of the lawsuit, a summary of the substance of the Settlement's terms, the class definition, the
3 procedure and time period within which to request for exclusion or to object to the Settlement, the date
4 for the final approval hearing, the formula used to calculate settlement payments, and the terms and
5 scope of the Released Claims. This method was negotiated by the Parties to ensure delivering the most
6 reasonable method of notice to the Class Members while ensuring cost effective administration of the
7 Settlement. JCL Dec., ¶¶ 44-45.

8 Accordingly, both the method of disseminating the Class Notice and content of the Class Notice
9 satisfy due process. (*See* C.R.C. 3.776(e)-(f); *State of Cal. v. Levi Strauss* (1986) 41 Cal.3d 460,485
10 (the class notice must "fairly apprise the class members of the terms of the proposed compromise and
11 of the options open to dissenting class members.").)

12 **C. The Court Should Preliminarily Approve the Class Representative Service Payment**

13 Enhancement payments "are fairly typical in class action cases." (*Cellphone Termination Fee*
14 *Cases* (2010) 186 Cal.App.4th 1380, 1393 (affirming incentive awards of \$10,000); *Rodriguez v. West*
15 *Publishing Corp.* (9th Cir. 2009) 563 F.3d 948, 958, *citing* 4 Newberg on Class Actions (4th ed. 2002)
16 § 1 1:38, and Eisenberg & Miller, *Incentive Awards to Class Action Plaintiffs: An Empirical Study*, 53
17 UCLA L. Rev. 1303 (2006).) Enhancement payments "are intended to compensate class representatives
18 for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing
19 the action, and, sometimes, to recognize their willingness to act as a private attorney general."
20 (*Rodriguez*, 563 F.3d at 958-59.) "[T]he rationale for making enhancement or incentive awards to
21 named plaintiffs is that they should be compensated for the expense or risk they have incurred in
22 conferring a benefit on other members of the class." (*Clark v. American Residential Services LLC*
23 (2009) 175 Cal.App.4th 785.)

24 The Settlement provides for a Class Representative Service Payment of \$10,000⁶ for Plaintiff.

25
26 ⁶ The amount of the requested enhancement payment-\$10,000-is reasonable by reference to the amounts that California courts (both federal
27 and state) have repeatedly found to be reasonable for wage and hour class action settlements: *See Baker v. LA. Fitness Int'l, LLC*, No.
28 BC438654 (L.A. County Super. Ct. Dec. 12, 2012) (awarding \$10,000 enhancement payments to three of the named plaintiffs); *Blue v.*
Codwell Banker Residential Brokerage Co., No. BC417335 (L.A. County Super. Ct. Mar. 21, 2011) (awarding \$10,000 enhancement
payment); *Buckmire v. Jo-Ann Stores, Inc.*, No. BC394795 (L.A. County Super. Ct. June 11, 2010) (awarding \$10,000 enhancement
payments to the named plaintiff); *Coleman v. Estes Express Lines, Inc.*, No. BC429042 (L.A. County Super. Ct. Oct. 3, 2013) (awarding
\$10,000 enhancement payment); *Ethridge v. Universal Health Services, Inc.*, No. BC391958 (L.A. County Super. Ct. May 27, 2011)
(awarding \$10,000 enhancement payment); *Hickson v. South Coast Auto Insurance Marketing, Inc.*, No. BC390395 (L.A. County Super.

The service award is fair and reasonable compensation for the Plaintiff's efforts bringing the action, assisting Class Counsel with the litigation and settlement, regularly conferring with Class Counsel on the status of his case and the strategies for prosecuting the claims, and reviewing the proposed Settlement to ensure that its terms are fair and provide adequate relief for the Settlement Class. JCL Dec., ¶ 46.

Class Counsel on behalf of Plaintiff will file a formal motion for the negotiated Class Representative Service Payment once preliminary approval of the Settlement is granted. Plaintiff respectfully submits that the above showing is sufficient for preliminary approval of the negotiated Class Representative Service Payment. JCL Dec., ¶ 47.

D. The Court Should Preliminarily Approve the Class Counsel Fees Payment

The purpose of a Class Counsel Fees Payment in class action litigation is to reward counsel who took the risk of non-payment and invested in a case that achieved a substantial positive result for the class. California courts routinely award attorneys' fees equaling one-third or more of the potential value of the common fund, the amount requested under this settlement. (*See Chavez v. Netflix, Inc.* (2008) 162 Cal.App.4th 43, 66 n.11 ("Empirical studies show that regardless whether the percentage method or the lodestar method is used, fee awards in class actions average around one-third of the recovery."); Theodore Eisenberg & Geoffrey P. Miller, *Attorney Fees in Class Action Settlements: An Empirical*

Ct. Mar. 27, 2012) (awarding \$10,000 enhancement payment); *Hill v. Sunglass Hut Int'l, Inc.*, No. BC422934 (L.A. County Super. Ct. July 2, 2012) (awarding \$10,000 enhancement payments to the named plaintiffs); *Kabamba v. Victoria's Secret Stores, LLC*, No. BC368528 (L.A. County Super. Ct. Aug. 19, 2011) (awarding enhancement payments of \$ 10,000 to the named plaintiffs along with additional compensation for their general release of claims); *Magee v. American Residential Services, LLC*, No. BC423798 (L.A. County Super. Ct. Apr. 21, 2011) (awarding \$15,000 enhancement payment); *Mares v. BFS Retail & Commercial Operations, LLC*, No. BC375967 (L.A. County Super. Ct. June 24, 2010) (awarding \$15,000 enhancement payments to the named plaintiffs); *Nevarez v. Trader Joe's Co.*, No. BC373910 (L.A. County Super. Ct. Jan. 29, 2010) (awarding \$10,000 enhancement payment); *Ordaz v. Rose Hills Mortuary, LP.*, No. BC386500 (L.A. County Super. Ct. Mar. 19, 2010) (awarding 10,000 enhancement payments to the named plaintiffs); *Sheldon v. AHMC Monterey Park Hospital LP*, No. BC440282 (L.A. County Super. Ct. Feb. 22, 2013) (awarding \$10,000 enhancement payment); *Silva v. Catholic Moray Services, Inc.*, No. BC408054 (L.A. County Super. Ct. Feb. 8, 2011) (awarding \$10,000 enhancement payments to the named plaintiffs); *Weisbarth v. Banc West Investment Services, Inc.*, No. BC422202 (L.A. County Super. Ct. May 24, 2013) (awarding \$10,000 enhancement payment); *Zamora v. Balboa Life & Casualty LLC*, No. BC360026 (L.A. County Super. Ct. Mar. 7, 2013) (awarding \$25,000 enhancement payments to the named plaintiffs); *Acheson v. Express, LLC*, No. 109CV135335 (Santa Clara County Super. Ct. Sep. 13, 2011) (awarding \$10,000 enhancement payment); *Aguilar v. Cingular Wireless, LLC*, No. CV 06-8197 DDP (AJWx) (C.D. Cal. Mar. 17, 2011) (awarding \$14,767 enhancement payment); *Bejarano v. Amerisave Mortgage Corp.*, No. EDCV 08-00599 SGL (Opx) (C.D. Cal. June 22, 2010) (awarding \$10,000 enhancement payment); *Carbajal v. Sally Beauty Supply LLC*, No. CIVVS 1004307 (San Bernardino Super. Ct. Aug. 6, 2012) (awarding \$10,000 enhancement payments to the named plaintiffs); *Contreras v. Serco Inc.*, No. 10-cv-04526-CAS-JEMx (C.D. Cal. Sep. 10, 2012) (awarding \$10,000 enhancement payment); *Guerrero v. R.R. Donnelley & Sons Co.*, No. RIC 10005196 (Riverside Super. Ct. July 16, 2013) (awarding \$10,000 enhancement payment); *Kisliuk v. ADT Security Services, Inc.*, No. CV08-0324 DSF (RZx) (C.D. Cal. Jan. 10, 2011) (awarding \$10,000 enhancement payment); *Morales v. BCBG Maxaria Int'l Holdings, Inc.*, No. JCCP 4582 (Orange County Super. Ct. Jan. 24, 2013) (awarding \$10,000 enhancement payment); and *Barrett v. Doyon Security Services, LLC*, Nos. BS900199, BS900517 (San Bernardino County Super. Ct. Apr. 23, 2010) (awarding \$10,000 enhancement payment).

1 *Study, J. of Empirical Legal Studies*, Vol. 1, Issue 1, 27-78, March 2004, at 35 (independent studies of
2 class action litigation nationwide have come to a similar conclusion that a one-third fee is consistent
3 with market rates).)

4 Class Counsel took this matter on a contingency fee basis and invested significant time and
5 expense successfully prosecuting Plaintiff's claims. As discussed *supra*, the estimated average
6 Individual Class Settlement Payment illustrates the demonstrably positive outcome for the Participating
7 Class Members. Considering the positive outcome for the Class Members, and in light of the
8 supporting authority, the proposed Class Counsel Fees Payment is fair and reasonable. JCL Dec., ¶ 48.

9 Plaintiff will file a formal motion for the negotiated Class Counsel Fees Payment once
10 preliminary approval of the Settlement is granted. Plaintiff respectfully submits that the above showing
11 is sufficient for preliminary approval of the negotiated attorneys' fees. JCL Dec., ¶ 49.

12 **E. Provisional Certification for Settlement Purposes Is Appropriate**

13 For Settlement, Plaintiff contends, and Defendant does not dispute, that provisional certification
14 of the Class is appropriate. JCL Dec., ¶ 50; Ybarra Dec. ¶¶ 6-9.

15 1. The Standard for Class Certification

16 Class actions are statutorily authorized "when the question is one of common or general interest,
17 of many persons, or when the parties are numerous, and it is impracticable to bring them all before the
18 court." (*Cal.Civ.Proc. Code* § 382; *Lee v. Dynamex, Inc.* (2008) 166 Cal.App.4th 1325, 1332.) Class
19 certification is appropriate when there is an "ascertainable class and a well-defined community of
20 interest among class members." (*Sav-On Drug Stores, Inc.* (2014) 34 Cal.4th 319, 326.) Class treatment
21 is appropriate even if class members at some point may be required to make an individual showing as
22 to eligibility for recovery. (*Bufile v. Dollar Financial Group, Inc.* (2008) 162 Cal.App.4th 1193, 1207;
23 *Sav-On*, 34 Cal.4th at 333.)

24 2. The Proposed Settlement Class is Ascertainable and there is a Well-Defined
25 Community of Interest Among the Participating Class Members.

26 Whether a class is "ascertainable" within the meaning of Code of Civil Procedure section 382 is
27 "determined by examining (1) the class definition, (2) the size of the class, and (3) the means available
28 for identifying class members." (*Lee*, 166 Cal.App.4th at 1334.) Class members are ascertainable where

they may be readily identified without unreasonable expense or time by reference to official records.
(*Id.*)

The community of interest requirement embodies three factors: (1) predominant common questions of law or fact; (2) a class representative with claims or defenses typical of the class; and (3) a class representative and counsel who can adequately represent the class. (*Cal. Civ. Proc. Code* § 382.)

In April 2012, the Supreme Court expounded on the element of predominance: The “ultimate question” the element of predominance presents is whether “the issues which may be jointly tried, when compared with those requiring separate adjudication, are so numerous or substantial that the maintenance of a class action would be advantageous to the judicial process and to the litigants.” (*Brinker*, 53 Cal. 4th at 1021-1022 (citations omitted).)

Because all Class Members are Defendant’s current and former employees, the class is readily ascertainable from Defendant’s regular business records, i.e., payroll records. JCL Dec., ¶ 51.

The statutes relating to each of Plaintiff’s claims apply with equal force and effect to the entire Settlement Class. Factually, Defendant’s policies and practices apply class-wide and Defendant’s liability can be determined by facts common to all members of the class. The wage and hour issues are both numerous and substantial, and a class action is the most advantageous method of dealing with the claims of the Settlement Class. JCL Dec., ¶ 52.

Plaintiff’s wage and hour claims are typical of the proposed Settlement Class because they arise from the same factual basis and are based on the same legal theories applicable to the other Class Members. Likewise, Plaintiff’s interests are entirely coextensive with the interests of the Settlement Class. Plaintiff alleges that he was injured by the same company-wide practices to which the proposed Class Members were subject to and seek the same relief. Plaintiff has already demonstrated his ability to advocate for the interests of the Class Member by initiating this litigation, participating in mediation, and evaluating the proposed settlement to assure that it is fair. JCL Dec., ¶ 53.

Additionally, Plaintiff is represented by competent Class Counsel who have extensive experience in litigating wage and hour class action cases. Class Counsel successfully briefed, argued, certified, and gained state court settlement approval of the same class-wide causes of action that are at issue in this case. Class Counsel’s wage and hour class action experience establishes that they are well qualified to

1 represent the interests of this Class. JCL Dec., ¶¶ 55-62, Declaration of Shani Zakay, ¶¶ 1-3.

2 A class action is superior to a multitude of individual lawsuits. Given the size and amount of
3 each individual claim, the Class Members likely have little incentive to litigate their claims on an
4 individual basis because the out-of-pocket expense and personal commitment necessary to litigate each
5 claim outweighs any potential recovery. In sum, class treatment is superior to individual, case-by-case
6 adjudication. JCL Dec., ¶ 54.

7 IV. CONCLUSION

8 The Parties have negotiated a fair and reasonable settlement of claims. Having appropriately
9 presented the materials and information necessary for preliminary approval, the Parties request that
10 the Court preliminarily approve the settlement.

11 Dated: September 8, 2022

JCL LAW FIRM, APC

13 By: 

14 Jean-Claude Capuyade, Esq.