

ZAKAY LAW GROUP, APLC

Shani O. Zakay (State Bar #277924)
Jackland K. Hom (State Bar #327243)
Julieann Alvarado (State Bar #334727)
5440 Morehouse Drive, Suite 3600
San Diego, CA 92121
Telephone: (619) 255-9047
Facsimile: (858) 404-9203
shani@zakaylaw.com
jackland@zakaylaw.com
julieann@zakaylaw.com

JCL LAW FIRM, APC

Jean-Claude Lapuyade (State Bar #248676)
5440 Morehouse Drive, Suite 3600
San Diego, CA 92121
Telephone: (619) 599-8292
Facsimile: (619) 599-8291
jlapuyade@jcl-lawfirm.com

Attorneys for Plaintiff JERMELL JONES

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF KERN

JERMELL JONES, an individual, on behalf of
himself, and on behalf of all persons similarly
situated,

Plaintiff,

vs.

MARSHALL E. HELM CORP., a California
Corporation; and DOES 1 through 50, Inclusive,

Defendants.

Case No. BCV-21-102356

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

Date: August 14, 2023

Time: 8:30 A.M.

Judge: Hon. Bernard C. Barmann, Jr.

Dept.: H

TABLE OF CONTENTS

I.	INTRODUCTION	1-3
II.	FACTS AND PROCEDURE	3
	A. Overview of the Litigation	3-4
	B. Class Counsel Thoroughly Investigated the Factual and Legal Issues	4-6
	C. The Parties Settled at Mediation	7
	D. The Proposed Settlement Fully Resolves Plaintiff's Claims	7
	1. The Composition of the Participating Class Members	7
	2. The Settlement Consideration	7
	3. The Funding Date	8
	4. Formula for Calculating Individual Settlement Payments	8
	5. Release by Settlement Class Members	8
	6. PAGA Release by the State of California on behalf of the Aggrieved Employees	8-9
III.	ARGUMENT	9
	A. The Court Should Preliminarily Approve the Proposed Class Action Settlement	9-10
	1. The Parties Reached the Settlement Through Arm's-Length Bargaining Led by Experienced Counsel	10-11

1	2. Class Counsel’s Thorough Investigation Provided an Objective Measurement of the Settlement’s Reasonableness	11
2	.....	
3	3. The Settlement Falls Within the Recognized Range of Reasonableness	11-12
4	.....	
5	a. The Gross Settlement Amount Meets the Recognized Range of Reasonableness	12
6	.....	
7	(1) Exposure for Failure to Pay for All Hours Worked	12-13
8	.....	
9	(2) Exposure for Meal Period Violations	13
10	.....	
11	(3) Exposure for Rest Period Violations	13-14
12	.....	
13	(4) Exposure for Unreimbursed Business Expenses	14
14	.....	
15	(5) Exposure for Wage Statement Violations and Waiting Time Penalties	15
16	.....	
17	(6) Defendant’s PAGA Exposure	15-17
18	.....	
19	b. Inherent Risks of Continued Litigation Support Preliminary Approval	17-18
20	.....	
21	B. The Proposed Notice Informs the Class about the Case and Settlement	18-19
22	.....	
23	C. The Court Should Preliminary Approve the Enhancement Award	19-20
24	.....	
25	D. The Court Should Preliminarily Approve the Attorneys’ Fees and Expenses	20-21
26	.....	
27	E. Provisional Certification for Settlement Purposes Is Appropriate	21
28	.....	
	1. The Standard for Class Certification	21
		

2. The Proposed Settlement Class is Ascertainable and there is a Well-Defined
Community of Interest Among the Participating Class Members21-23

IV. CONCLUSION23

///

TABLE OF AUTHORITIES
CASES

1		
2		
3	<i>7-Eleven Owners for Fair Franchising v. Southland Corp.</i>	
4	(2000) 85 Cal.App.4th 1135, 1151.....	10
5	<i>Ali v. U.S.A. Cab Ltd.</i>	
6	(2009) 176 Cal.App.4th 1333, 1341.....	17
7	<i>Bufile v. Dollar Financial Group, Inc.</i>	
8	(2008) 162 Cal.App.4th 1193, 1207.....	21
9	<i>Brinker</i>	
10	53 Cal. 4th at 1021-1022.....	17, 22
11	<i>Brown v. Fed Express Corp.</i>	
12	(C.D. Cal. 2008) 249 F.R.D. 580, 587-88.....	17
13	<i>Cacho v. Eurostar, Inc.</i>	
14	(2019) 43 Cal.App.5th 885.....	16
15	<i>Campbell v. Best Buy Stores, L.P.</i>	
16	(C.D. Cal. 2013) 2013 WL 5302217 at *11-13.....	17
17	<i>Cardenas v. McLane Foodservice, Inc.</i>	
18	2011 U.S. Dist. LEXIS 13126, *10 (C.D. Cal. 2011).....	16
19	<i>Carrington v. Starbucks Corp.</i>	
20	(2018) 30 Cal.App.5th 504.....	16
21	<i>Cart v. Super. Ct.</i>	
22	(1975) 50 Cal.App.3d 960, 972.....	19
23	<i>Cellphone Termination Fee Cases</i>	
24	180 Cal.App.4th 1110, 1118, 1380, 1389, 1393 (2010).....	9, 10, 19
25	<i>Chance v. Super. Ct.</i>	
26	(1962) 58 Cal.2d 275, 290.....	19
27	<i>Chavez v. Netflix, Inc.</i>	
28	(2008) 162 Cal.App.4th 43, 66 n.11	20
	<i>Clark v. American Residential Services LLC</i>	
	(2009) 175 Cal.App.4th 785.....	20
	<i>D'Amato v. Deutsche Bank</i>	
	(2d. Cir. 2001) 236 F.3d 78, 85.....	10
	<i>Dunk v. Ford Motor Co.</i>	
	(1996) 48 Cal.App.4th 1794, 1802.....	9
	<i>Duran v. U.S. Bank National Association</i>	
	(2014) 59 Cal.4th 1, 31.....	17
	<i>Fleming v. Covidien</i>	
	2011 U.S. Dist. LEXIS 154590 (C.D. Cal. 2011).....	16
	<i>Fontana v. Elrod</i>	
	(7th Cir. 1987) 826 F.2d 729, 732.....	19
	<i>Frank v. Eastman Kodak Co.</i>	
	(W.D.N.Y. 2005) 228 FRD. 174, 186.....	12
	<i>Hopson v. Hanesbrands Inc.</i>	
	No. CV-08-0844 EDL, 2009 WL 928133, at *9 (N.D. Cal. Apr. 3, 2009).....	15
	<i>In re Apple Computer, Inc. Derivative Litig</i>	
	No. C 06-4128 JF (HRL), 2008 U.S. Dist. LEXIS 108195 (N.D. Cal. Nov. 5, 2008).....	10
	<i>In re Global Crossing Sec. and ERISA Litig.</i>	
	(S.D.N.Y 2004) 225 F.R.D. 436, 460.....	12

1	<i>In re IKON Office Solutions, Inc Sec Litig.</i>	
	(E.D. Pa. 2000) 194 F.R.D. 166, 184.....	12
2	<i>In re Michael Milken and Assoc. Sec. Litig.</i>	
	(S.D.N.Y. 1993) 150 F.R.D. 57, 66.....	12
3	<i>In re Nordstrom Com. Cases</i>	
	186 Cal.App.4th 576, 589 (2010).....	16
4	<i>In re Nvidia Derivs. Litig.</i>	
	(N.D. Cal. 2008) 2008 WL 5382544, at *3.....	18
5	<i>In re Omnivision Tech, Inc.</i>	
	(N.D. Cal. 2008) 559 F.Supp.2d 1036.....	12
6	<i>In re Taco Bell Wage & Hour Actions</i>	
	2016 U.S. Dist. LEXIS 48557, *40-43 (E.D. Cal. Apr. 6, 2016).....	16
7	<i>Jack v. Hartford Fire Ins. Co.</i>	
	No. 09cv1683 MMA (JMA), 2011 WL 4899942, at *6 (S.D. Cal. Oct. 13, 2011).....	15
8	<i>Kass v. Young</i>	
	(1977) 67 Cal.App.3d 100, 106.....	18
9	<i>Kullar v. Foot Locker Retail, Inc.</i>	
	(2008) 168 Cal.App.4th 116, 133.....	11
10	<i>Lee v. Dynamex, Inc.</i>	
	(2008) 166 Cal.App.4th 1325, 1332, 1334.....	21
11	<i>Magadia v. Wal-Mart Associates, Inc.</i>	
	(9th Cir. 2021) 999 F.3d 668.....	17
12	<i>McKenzie v. Fed. Express Corp.</i>	
	No. CV 10-02420 GAF (PLAx), 2012 WL 12882124, at *5 (C.D. Cal. Jan. 23, 2012).....	15
13	<i>Misra v. Decision One Mortg. Co.</i>	
	(C.D. Cal. 2009) 2009 WL 4581276, at *7.....	17
14	<i>Moniz v. Adecco USA, Inc.</i>	
	(2021) 72 Cal.App.5th 56, 77.....	15
15	<i>Munoz v. BCI Coca-Cola Bottling Co.</i>	
	(2010) 186 Cal.App.4th 399, 409.....	12
16	<i>Naranjo v. Spectrum Security Services, Inc.</i>	
	(2023) 88 Cal.App.5th 927.....	15
17	<i>Nat'l Rural Telecomms. Coop v. DirecTV</i>	
	(C.D. Cal. 2004) 221 F.R.D. 523, 527.....	18
18	<i>Newman v. Stein</i>	
	(2d. Cir. 2002) 464 F.2d 689, 693.....	12
19	<i>North County Contractor's Assn., Inc. v. Touchstone Ins. Services</i>	
	(1994) 27 Cal.App.4th 1085, 1089-90.....	9
20	<i>O'Conner v. Uber Technologies, Inc.</i>	
	(9 th Cir. 2018) 904 F.3d 1087.....	17
21	<i>Officers for Justice v. Civil Serv. Comm'n</i>	
	(9th Cir. 1982) 688 F.2d 615, 625, 628.....	9
22	<i>Ordonez v. Radio Shack, Inc.</i>	
	(C.D. Cal. Jan. 17, 2013) 2013 WL 210223, at *11.....	14
23	<i>Rebney v. Wells Fargo Bank</i>	
	(1990) 220 Cal.App.3d 1117, 1140, <i>opinion modified</i> (June 18, 1990).....	18
24	<i>Rodriguez v. West Publishing Corp.</i>	
	(9 th Cir. 2009) 563 F.3d 948, 958-59.....	19
25		
26		
27		
28		

1	<i>Sav-On Drug Stores, Inc.</i>	
2	(2014) 34 Cal.4th 319, 326, 333.....	21
3	<i>Stambaugh v. Super. Ct</i>	
4	(1976) 62 Cal.App.3d 231, 236.....	9
5	<i>State v. Levi Strauss & Co.</i>	
6	(1986) 41 Cal.3d 460, 482, 485.....	10
7	<i>Tien v. Tenet Healthcare Corp.</i>	
8	(2012) 209 Cal.App.4th 1077, 1088.....	17
9	<i>Trotsky v. Los Angeles Fed Savings & Loan Assn.</i>	
10	(1975) 48 Cal.App.3d 143, 151-52.....	19
11	<i>Villa v. United Site Servs. of California, Inc.</i>	
12	(N.D. Cal. Nov. 13, 2012) 2012 WL 5503550, at *8.....	14

RULES, CODES AND STATUTES

13	<i>Cal. Code of Civ. Proc.</i> § 382.....	21-22
14	<i>Cal. Lab. Code</i> § 202.....	4
15	<i>Cal. Lab. Code</i> § 203.....	4, 15
16	<i>Cal. Lab. Code</i> § 226 et seq.....	4, 15
17	<i>Cal. Lab. Code</i> § 226(a).....	15
18	<i>Cal. Lab. Code</i> § 226.2.....	9
19	<i>Cal. Lab. Code</i> § 226.7.....	4
20	<i>Cal. Lab. Code</i> § 246.....	4
21	<i>Cal. Lab. Code</i> § 510 et seq.....	4
22	<i>Cal. Lab. Code</i> § 512.....	4
23	<i>Cal. Lab. Code</i> § 1194.....	4
24	<i>Cal. Lab. Code</i> § 1197.....	9
25	<i>Cal. Lab. Code</i> § 1197.1.....	4
26	<i>Cal. Lab. Code</i> §§ 2698 et seq.....	4
27	<i>Cal. Lab. Code</i> § 2802.....	4, 14
28	<i>Cal. Lab. Code</i> § 2802(a).....	14
29	<i>Rule of Court Rule 3.769(c)-(g)</i>	9
30	<i>Rule of Court Rule 3.776(e)-(f)</i>	19

SECONDARY SOURCES

31	Conte & Newberg, <i>Newberg on Class Actions</i> , §§ 11.26, 11.51 (4th ed. 2022) § 1 1:38	
32	.....	9
33	Eisenberg & Miller, <i>Incentive Awards to Class Action Plaintiffs: An Empirical Study</i> , 53 UCLA L. Rev.	
34	1303 (2006)	
35	.....	19
36	Theodore Eisenberg & Geoffrey P. Miller, <i>Attorneys Fees in Class Action Settlements: An Empirical</i>	
37	<i>Study</i> , <i>J. of Empirical Legal Studies</i> , Vol. 1, Issue 1, 27-78, March 2004, at 35	
38	.....	20
39	Write, A. Miller & M. Kane, <i>Federal Practice and Procedure</i> § 1789, at 253 (2d ed. 1986)	
40	.....	19

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

I. INTRODUCTION

Plaintiff JERMELL JONES (“Plaintiff”) seeks preliminary approval of the Stipulation of Settlement of Class and PAGA Action Claims and Release of Claims (“Agreement”)¹, which if approved, would provide valuable monetary relief for approximately 276 Class Members and 195 Aggrieved Employees. The basic terms of the Agreement provide for the following:

1. The “**Class Members**” and “**Class Period**” shall mean “all non-exempt employees who are or previously were employed by Defendant MARSHALL E. HELM CORP. (“Defendant”), who performed work in California (“Class Members”) during the period of October 13, 2017 through March 5, 2023 (“Class Period”). Agreement at ¶¶ I(G), I(J). At the time of mediation there were approximately 276 Class Members who worked approximately 27,300 Workweeks during the Class Period.

2. The “**Settlement Class Member**” refers to all Class Members who do not file a timely and valid Request for Exclusion. Agreement at ¶ I(LL).

3. The “**Aggrieved Employees**” and “**PAGA Period**” refers to all non-exempt employees who are or previously were employed by Defendant, who performed work in California during the PAGA Period (“Aggrieved Employee”). Agreement at ¶ I(C). The “PAGA Period” refers to the period beginning October 6, 2020, through March 5, 2023. Agreement at ¶ I(Y). Aggrieved employees do not have the ability to opt-out of the PAGA portion of the settlement. Agreement at ¶¶ III(L)(2)(a), III(L)(7). At the time of mediation there were approximately 195 Aggrieved Employees who worked approximately 12,598 pay periods during the PAGA Period. Declaration of Jean-Claude Lapuyade (“JCL Dec.”), ¶ 17.

4. The “**Gross Settlement Amount**” is Six Hundred and Ninety-Five Thousand Dollars and Zero Cents (\$650,000.00). Agreement at ¶ I(Q). The Gross Settlement Amount is non-reversionary and includes the following:

a. A “**Enhancement Award**” in the amount of \$10,000.00 to Plaintiff for his services on behalf of the Class Members. Agreement at ¶¶ I(O), III(M)(9);

b. A payment of “**Attorneys’ Fees and Attorneys’ Expenses**” in the amount not to

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.

1 exceed one-third of the Gross Settlement Amount for attorney's fees, currently estimated to be
2 \$231,666.67 **and** litigation costs and expenses not to exceed \$20,000.00, to be paid to Class Counsel.
3 Agreement at ¶¶ I(E), I(F), III(M)(10);

4 c. A payment of "**PAGA Penalties**" in the amount of \$36,000.00 shall be set aside
5 from the Gross Settlement Amount for settlement of claims for civil penalties under the Private
6 Attorneys General Act of 2004. The Settlement Administrator shall pay \$27,000.00 representing 75%
7 of the PAGA Penalties to the Labor and Workforce Development Agency ("LWDA Payment"). The
8 Settlement Administrator shall distribute \$9,000.00 representing 25% of the PAGA Penalties to the
9 Aggrieved Employees ("Aggrieved Employee Payment"). Agreement at ¶¶ I(Z), III(M)(11); and

10 d. "**Administration Costs**" not to exceed \$8,000.00 payable to the Settlement
11 Administrator, ILYM Group, Inc., for, *inter alia*, the administration of the Class Notice and Individual
12 Settlement Payments. Agreement at ¶¶ I(B), I(KK), III(M)(12).

13 3. The "**Net Settlement Amount**" refers to the portion of the Gross Settlement Amount that
14 remains after accounting for Attorneys' Fees and Attorneys' Expenses, Enhancement Award, PAGA
15 Penalties, and Administration Costs. Agreement at ¶ I(S). The Net Settlement Amount is
16 approximately \$389,333.33 which will be allocated to all Settlement Class Members on a pro-rata basis
17 according to the number of Workweeks each Settlement Class Member worked during the Class Period.
18 The entire Net Settlement Amount will be paid to all Settlement Class Members who do not opt out of
19 the Settlement resulting in an average Individual Settlement Payment of approximately **\$1,410.62**. JCL
20 Dec., ¶ 7.

21 An objective evaluation of the Settlement confirms that the relief negotiated on behalf of the
22 Class is fair, reasonable, and adequate. The Settlement was negotiated by the Parties at arm's length.
23 The Settlement confers substantial benefits to the Settlement Class. The relief offered by the Settlement
24 is particularly impressive when viewed against the difficulties encountered by plaintiffs pursuing wage
25 and hour cases (*see infra*). Indeed, by settling now rather than proceeding to trial, Class Members will
26 not have to wait (possibly years) for relief, nor will they have to bear the risk of class certification being
27 denied or of Defendant prevailing at trial. JCL Dec., ¶ 7.

28 As discussed below, the proposed Settlement satisfies all criteria for preliminary settlement

1 approval and falls within the range of reasonableness. The average Individual Settlement Payment to
2 the Settlement Class meets or exceeds awards in similar wage and hour class actions. Moreover, the
3 proposed Settlement Class is appropriate for provisional certification. Accordingly, Plaintiff
4 respectfully requests the Court grant preliminary approval of the Settlement. JCL Dec., ¶ 8.

5 II. FACTS AND PROCEDURE

6 A. Overview of the Litigation

7 Defendant owns and operates funeral homes, mortuaries, and cemeteries throughout California,
8 including Kern County, where Plaintiff worked. This action asserts claims on behalf of all of
9 Defendant's current and former non-exempt employees, employed in California at any time during the
10 Class Period. Plaintiff worked for Defendant as a non-exempt employee in California from February
11 of 2015 to October of 2020. At all times during his employment, Plaintiff earned an hourly wage and
12 was entitled to legally compliant meal and/or rest periods, and minimum, regular and overtime wages
13 for all hours worked. Throughout his employment, Plaintiff was subject to Defendant's written
14 policies and procedures. JCL Dec., ¶ 9; Declaration of Jermell Jones ("JJ Dec.") at ¶¶ 1-5.

15 Generally, Plaintiff claims that Defendant failed to include non-discretionary incentive
16 compensation when calculating the regular rate of pay when paying overtime wages, meal period
17 premiums, and sick pay, failed to provide compliant meal and rest periods, failed to pay for all hours
18 worked, failed to reimburse for required business expenses, failed to furnish accurate itemized wage
19 statements, and failed to pay all wages when due. Defendant forcefully denies liability for each of
20 Plaintiff's claims. Further, Defendant asserts that it fully complied with all applicable employment laws
21 and raised several other significant defenses to Plaintiff's claims, including but not limited to, asserting
22 that it maintained compliant reimbursement policies, maintained facially compliant meal and rest
23 period policies, issued compliant wage statements, and timely paid all wages when due. JCL Dec., ¶
24 10.

25 On October 6, 2021, Plaintiff served Defendant and the Labor and Workforce Development
26 Agency ("LWDA") with a Notice of Violations ("PAGA Notice"). Plaintiff's PAGA Notice set forth
27 the facts and theories supporting Defendant's alleged violations of various provisions of the California
28 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., ¶ 11.

On October 6, 2021, Plaintiff filed a class action complaint in the Kern County Superior Court, Case Number BCV-21-102356 (“Action”). The Action alleged nine causes of action against Defendant for: (1) Unfair Competition in Violation of Cal. Bus. & Prof. Code §§ 17200, *et seq.*; (2) Failure to Pay Overtime Wages in Violation Of Cal. Lab. Code §§ 510, *et seq.*; (3) Failure to Pay Minimum Wages in Violation Of Cal. Lab. Code §§ 1194, 1197 & 1197.1; (4) Failure to Provide Required Meal Periods in Violation Of Cal. Lab. Code §§ 226.7 & 512 and the Applicable IWC Wage Order; (5) Failure to Provide Required Rest Periods in Violation Of Cal. Lab Code §§ 226.7 & 512 and the Applicable IWC Wage Order; (6) Failure to Reimburse Employees for Required Expenses in Violation of Cal. Lab. Code § 2802; (7) Failure to Provide Accurate Itemized Statements in Violation Of Cal. Lab. Code § 226; (8) Failure to Pay Wages When Due in Violation Of Cal. Labor Code §§ 201, 202 and 203; and (9) Unpaid Sick Pay in Violation of Cal. Lab. Code § 246. On December 13, 2021, Plaintiff filed a First Amended Complaint to add a cause of action for Violation of the Private Attorneys General Act [Labor Code §§ 2698 *et seq.*] (“Class Claims”). JCL Dec., ¶ 12.

The Parties agreed relatively early to mediate the Action. To prepare for mediation, the Parties agreed to informally exchange additional documents and data points subject to the mediation privilege, including but not limited to, employee handbooks, the Class Members’ time data, and certain payroll data points. As discussed *infra*, Plaintiff’s counsel retained the forensic consultants at Berger Consulting Group (“BCG”) to analyze Defendant’s time and payroll data. JCL Dec., ¶ 13.

On January 3, 2023, the Parties participated in a full day mediation with wage and hour mediator Gig Kyriacou, Esq. After arms-length negotiations and bargaining, the mediation concluded without a settlement, but the Parties subsequently accepted a Mediator’s settlement proposal and signed a Memorandum of Understanding. After reaching an agreement in principle, the Parties drafted and negotiated a long-form settlement agreement, which is the subject of the instant motion. JCL Dec., ¶ 14.

B. Class Counsel Thoroughly Investigated the Factual and Legal Issues

Months before filing the Action, Class Counsel began their pre-filing investigation into

1 Plaintiff's complaints. Class Counsel's investigation started with several lengthy interviews with
2 Plaintiff. As part of the interview process, Plaintiff produced documents related to his employment,
3 including his wage statements and Defendant's employee handbook. At the conclusion of the
4 interviews, Class Counsel determined that Plaintiff's complaints justified further inquiry. JCL Dec., ¶
5 15.

6 Class Counsel subsequently requested Plaintiff's employee file from Defendant. In response,
7 Defendant produced various documents, including but not limited to, copies of Plaintiff's employment
8 agreements, performance evaluations, timekeeping policies, payroll and time records, and separation
9 documents. Class Counsel reviewed and analyzed the documents and determined the documents
10 appeared to substantiate Plaintiff's claim that Defendant failed to, among other things, include non-
11 discretionary incentive pay in the regular rate of pay, pay for all time worked, issue accurate itemized
12 wage statements, and provide compliant meal and rest periods. JCL Dec., ¶ 16.

13 Considering the many anticipated factual disputes, the Parties agreed that it would be in the best
14 interest of both Parties to mediate the matter. To prepare for mediation, Class Counsel requested
15 documents and data points to further evaluate Plaintiff's claims and Defendant's liability exposure to
16 the Class Members. In response to Class Counsel's request, Defendant produced time records for the
17 Class Members, aggregate workweek and pay period data for the Class Members, aggregate meal
18 premiums paid to the Class Members, average hourly rate for the Class Members, and copies of
19 applicable handbooks, policies, and agreements containing, *inter alia*, compensation, timekeeping, and
20 meal and rest period policies. In total, Defendant produced approximately 8,564 pages of time and
21 payroll data for Class Counsel to analyze. JCL Dec., ¶ 17.

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

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

1 models. Among other things, BCG determined the approximate number of work shifts, workweeks,
2 pay periods, average length of shift and average number of hours worked per week and pay periods
3 during the Class Period. BCG also estimated the number of missed, late or truncated meal and rest
4 periods, the amount of missed meal period premiums paid during the Class Period, the amount of
5 unpaid wages due to miscalculation of the regular rate of pay, the amount of unreimbursed business
6 expenses, and the amount of off-the-clock work performed by the Class Members during the Class
7 Period. JCL Dec., ¶ 19.

8 In advance of mediation, Class Counsel created several damage models predicated on the BCG
9 analysis. Class Counsel's models calculated Defendant's potential liability exposure while accounting
10 for the uncertainties of continued litigation. These damage models informed and guided Class Counsel
11 during the mediated settlement discussions. JCL Dec., ¶ 20.

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

23 Class Counsel only agreed to enter the Settlement following this thorough investigation and
24 evaluation of Plaintiff's claims. Based on their investigation of the facts, applicable law, and
25 marketplace for similar settlements, and considering the risk of significant delay, uncertainty associated
26 with litigation, and the various defenses asserted by Defendant, Class Counsel firmly believe this
27 Agreement to be in the best interests of the Class Members. Because the Settlement's terms are fair,
28 reasonable, and adequate, the Court should preliminarily approve the Settlement. JCL Dec., ¶ 22.

1 **C. The Parties Settled at Mediation**

2 On January 3, 2023, the Parties conducted a full day of mediation with Gig Kyriacou, Esq., a
3 mediator of wage and hour class and representative actions. Mediator Kyriacou helped manage the
4 Parties' expectations and provided a useful, neutral analysis of the issues and risks to both sides. The
5 Parties made substantial progress with Mediator Kyriacou's assistance. Namely, the Parties exchanged
6 information regarding their respective claims and defense, including their respective evaluation of the
7 damages. Although the mediation concluded without a settlement, the Parties subsequently accepted a
8 Mediator's settlement proposal, the complete and final terms of which are now set forth in the
9 Agreement. Class Counsel submit that the Settlement constitutes a fair, adequate, and reasonable
10 compromise of the claims at issue. JCL Dec., ¶ 23.

11 **D. The Proposed Settlement Fully Resolves Plaintiff's Claims**

12 1. The Composition of the Participating Class Members

13 The proposed Settlement Class consists of all non-exempt employees who are or previously were
14 employed by Defendant, who performed work in California during the period of October 13, 2017
15 through March 5, 2023, who do not file a timely and valid Request for Exclusion. Agreement at ¶¶
16 I(G), I(LL). In the data exchanged at the time the Agreement was executed, there were approximately
17 276 Class Members that worked approximately 27,300 workweeks. JCL Dec., ¶ 17.

18 2. The Settlement Consideration

19 The Parties agreed to settle the underlying class claims in exchange for the Gross Settlement
20 Amount of \$695,000.00. The Gross Settlement Amount includes: (1) Individual Settlement Payments
21 to the Settlement Class; (2) an Enhancement Award of \$10,000.00 to Plaintiff for his services on behalf
22 of the Settlement Class; (3) PAGA Penalties in the amount of \$36,000.00; (4) Administration Costs
23 estimated at \$8,000.00; (5) Attorneys' Fees and Attorneys' Expenses in the amount of \$251,666.67,
24 comprised of attorneys' fees equal to one-third of the Gross Settlement Amount estimated to be
25 \$231,666.67 and an estimated \$20,000.00 for actually incurred litigation expenses. *See generally*
26 Agreement at ¶ III(M).

27 Subject to the Court approving the Enhancement Award, Attorneys' Fees and Attorneys'
28 Expenses, PAGA Penalties, and the Administration Costs, the Net Settlement Amount will be

distributed to each participating member of the Settlement Class. Agreement at ¶ III(M)(1). There is no reversion to Defendant and Defendant must separately pay for its share of the employer payroll taxes. Agreement at ¶ III(A)(1).

3. The Funding Date

Assuming there are no objectors, and no appeal is filed, Defendant will fund the \$695,000.00 Gross Settlement Amount within sixty-five (65) calendar days of the Court's entry of the order granting final approval of this Settlement. Agreement at ¶ I(P).

4. Formula for Calculating Individual Settlement Payments

Each Settlement Class Member will receive an Individual Settlement Payment. The Class Data provided by Defendant to the Settlement Administrator will include the number of eligible Workweeks for each Settlement Class Member. The Individual Settlement Payments will be calculated by dividing the Net Settlement Amount by the total number of Workweeks worked by all Settlement Class Members during the Class Period and multiplying the result by each Settlement Class Member's Workweeks. Agreement at ¶ III(M)(1). Each Individual Settlement Payment will be reduced by any legally mandated employee tax withholdings (e.g., employee payroll taxes, etc.).

Given that there are approximately 276 Participating Class Members, the average gross recovery is approximately \$1,410.62 (Net Settlement Amount divided by Settlement Class Members). JCL Dec., ¶ 7.

5. Release by Settlement Class Members

Generally, as of the Funding Date, Plaintiff and the Settlement Class Members will agree to release the Released Parties from the Released Class Claims. The Released Class Claims are defined as all class claims alleged in the operative complaint, or which could have been alleged in the operative complaint based on the facts alleged, which occurred during the Class Period, and expressly excluding all other claims, including claims for vested benefits, wrongful termination, unemployment insurance, disability, social security, workers' compensation, and class claims outside of the Class Period. Agreement at ¶¶ III(B), I(EE).

6. PAGA Release by the State of California on behalf of the Aggrieved Employees

Generally, upon the Court's entry of Final Approval Order and Judgment, and funding of the

Gross Settlement Amount, Plaintiff, acting as the representative of the State of California, on behalf of the Aggrieved Employees, will release the Released Parties from the Released PAGA Claims. The Released PAGA Claims include all PAGA claims alleged in the operative complaint and Plaintiff's PAGA notice to the LWDA which occurred during the PAGA Period, and expressly excluding all other claims, including claims for vested benefits, wrongful termination, unemployment insurance, disability, social security, workers' compensation, and PAGA claims outside of the PAGA Period. Agreement at ¶¶ III(C), I(FF).

III. ARGUMENT

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

The proposed Settlement, including a Gross Settlement Amount of \$695,000.00, 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

1 policy generally favors the compromise of complex class action litigation”); *7-Eleven Owners for Fair*
2 *Franchising v. Southland Corp.* (2000) 85 Cal.App.4th 1135, 1151 (“voluntary conciliation and
3 settlement are the preferred means of dispute resolution ... [t]his is especially true in complex class
4 action litigation”).)

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

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

13 “[W]hat transpires in settlement negotiations is highly relevant to the assessment of a proposed
14 settlement’s fairness.” (*State v. Levi Strauss & Co.* (1986) 41 Cal.3d 460, 482.) Courts presume the
15 absence of fraud or collusion in the negotiation of a settlement, unless evidence to the contrary is
16 offered; thus, there is a presumption that settlement negotiations are conducted in good faith. (Newberg,
17 § 11.51.)

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

28 Once the Parties agreed to the Mediator’s proposal, the parties subsequently executed a binding

1 and enforceable Memorandum of Understanding. The Agreement is the final product of these mediated
2 negotiations. Objectively, the Settlement terms are fair, adequate and represent a reasonable
3 compromise of the claims at issue. JCL Dec., ¶ 25.

4 2. Class Counsel’s Thorough Investigation Provided an Objective Measurement of the
5 Settlement’s Reasonableness.

6 As set forth in greater detail above, Class Counsel conducted a very thorough investigation into
7 the factual and legal issues in dispute. In addition to informal discovery, document review, data
8 analysis and legal research, Class Counsel also researched similar wage and hour actions. Although no
9 two cases are identical, this research provided Class Counsel with a marker to inform settlement
10 discussions and, ultimately, to measure this settlement against. The investigation allowed Class
11 Counsel to realistically assess the value of the claims and intelligently engage defense counsel in
12 settlement discussions that culminated in the proposed settlement now before the Court. JCL Dec., ¶
13 26.

14 Class Counsel only agreed to enter the Settlement following their thorough investigation and
15 evaluation of Plaintiff’s claims. Based on this investigation of the facts, applicable law, and
16 marketplace for similar settlements, and considering the risk of significant delay, uncertainty associated
17 with litigation, and the various defenses asserted by Defendant, Class Counsel firmly believe this
18 Agreement to be in the best interests of the Class Members. Because the Settlement’s terms are fair,
19 reasonable, and adequate, the Court should preliminarily approve the Settlement. JCL Dec., ¶ 27.

20 3. The Settlement Falls Within the Recognized Range of Reasonableness.

21 The Gross Settlement Amount of \$695,000.00 is within the range of reasonableness. To
22 determine whether a settlement is fair and reasonable, the court should “consider enough information
23 about the nature and magnitude of the claims being settled, as well as the impediments to recovery, to
24 make an independent assessment of the reasonableness of the terms to which the parties have agreed.”
25 (*Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 133.) In making this determination,
26 the court is “not to try the case” but rather “satisfy itself that the class action settlement is within the
27 ‘ballpark of reasonableness.’” (*Id.* (emphasis added).) For this analysis, courts do “not require any such
28 explicit statement of value; [they] require[] a record which allows an understanding of the amount that

1 is in controversy and the realistic range of outcomes of the litigation. ” (*Munoz v. BCI Coca-Cola*
2 *Bottling Co.* (2010) 186 Cal.App.4th 399, 409 (internal citation omitted).) The reasonableness of a
3 settlement is not dependent upon its actual value approaching the potential recovery plaintiffs might
4 have received if they had succeeded at trial.² Indeed, “[t]he determination whether a settlement is
5 reasonable does not involve the use of a ‘mathematical equation yielding a particularized sum.’ ”
6 (*Frank v. Eastman Kodak Co.* (W.D.N.Y. 2005) 228 FRD. 174, 186 (quoting *In re Michael Milken and*
7 *Assoc. Sec. Litig.* (S.D.N.Y. 1993) 150 F.R.D. 57, 66).)

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

10 The Gross Settlement Amount of \$695,000.00 is fair and reasonable considering the nature and
11 magnitude of the claims being settled and the various potential impediments to recovery. Prior to
12 mediation, Class Counsel retained BCG to develop economic damage models measuring Defendant’s
13 liability exposure while accounting for the uncertainties of continued litigation. The various models
14 were informed by Class Counsel’s investigation, including the analysis of a significant sample of time
15 and payroll data. Class Counsel projected Defendant’s liability exposure for *class claims* (excluding
16 PAGA Penalties) at \$3,866,854 if successful at trial. Thus, the Gross Settlement Amount of
17 \$695,000.00 represents approximately 17.9% of Defendant’s *class-wide* liability exposure as estimated
18 by Class Counsel at the time of mediation. The following summarizes Defendant’s estimated exposure.
19 JCL Dec., ¶ 28.

20 (1) Exposure for Failure to Pay for All Hours Worked

21 Plaintiff’s primary claim in the Action alleged that Defendant failed to pay its employees for all
22 hours worked. Specifically, Plaintiff asserts that Defendant failed to include bonuses and incentive

23 ² Federal district courts recognize that there is an inherent “range of reasonableness” in determining whether to approve a
24 settlement “which recognizes the uncertainties of law and fact in any particular case and the concomitant risks and costs
25 necessarily inherent in taking any litigation to completion.” *Newman v. Stein* (2d. Cir. 2002) 464 F.2d 689, 693; *see In re*
26 *Omnivision Tech, Inc.* (N.D. Cal. 2008) 559 F.Supp.2d 1036; *see also Nat’l Rural Telecomm. Coop. v. Directv. Inc.* (C.D.
27 Cal. 2004) 221 F.R.D. 523, 527 (“well settled law that a proposed settlement may be acceptable even though it amounts to
28 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”).

1 compensation payments in the regular rate of pay for purposes of overtime, meal period premiums, and
2 sick pay. Further, Plaintiff asserted Defendant required its employees to perform work-related activities
3 pre and post shift to start their daily duties, help customers, and/or finish the tasks they were unable to
4 complete during their shifts, as well as respond to work-related communications. JCL Dec., ¶ 29.

5 Defendant vigorously denied liability for this claim. Defendant argued, among other things, that
6 all Class Members were properly paid minimum and overtime compensation for all hours worked and
7 that Class Members were instructed not to work off-the-clock. Further, Defendant argued that all non-
8 discretionary incentive compensation was properly included into the regular rate of pay. Plaintiff
9 estimated Defendant's exposure for this claim at \$590,275. JCL Dec., ¶ 30.

10 (2) Exposure for Meal Period Violations.

11 Plaintiff also alleges that Defendant failed to provide compliant meal periods. Specifically,
12 Plaintiff alleges that as a result of their rigorous work schedules, Plaintiff and Class Members were not
13 able to take timely and duty-free meal periods. Consequently, Plaintiff alleges that he is owed meal
14 period premiums for meal period violations that occurred during the Class Period. JCL Dec., ¶ 31.

15 Conversely, Defendant argued, among other things, that they provided all of their employees
16 with the opportunity to take compliant meal periods. Defendant also argued that they maintained
17 facially compliant meal period policies. Further, Defendant argued that they had a valid Voluntary Meal
18 Period Waiver system in place. Thus, Defendant argued that there was no potential liability for
19 Plaintiff's alleged meal period violations and any claimed violations required a highly individualized
20 inquiry not suitable to class treatment. JCL Dec., ¶ 32. Plaintiff estimated Defendant's exposure for
21 this claim at \$590,539. JCL Dec., ¶ 32.

22 (3) Exposure for Rest Period Violations

23 Plaintiff also alleged that Defendants failed to provide compliant rest periods. Specifically,
24 Plaintiff alleged that because of their rigorous work schedules, Plaintiff and Class Members were not
25 able to take timely and duty-free rest periods. JCL Dec., ¶ 33.

26 Again, Defendants denied liability and asserted that they maintained legally compliant rest
27 period policies and practices throughout the Class Period. Moreover, Plaintiff recognizes the
28 evidentiary burdens establishing this claim. Establishing Plaintiff's rest period claim would rely,

1 almost entirely, on Class Member testimony, making it a riskier claim at class certification and liability
2 stages. Certification likely would have required depositions of Class Members who provided
3 declarations, and Defendant argued that they obtained opposing declarations stating either rest breaks
4 were taken, or rest breaks were voluntarily waived. *See, e.g., Ordonez v. Radio Shack, Inc.* (C.D. Cal.
5 Jan. 17, 2013) 2013 WL 210223, at *11 (“Because of the competing testimony before the Court,
6 plaintiff’s evidence that Defendants may have an illegal, written rest break policy is insufficient for this
7 Court to find that common issues predominate.”); *Villa v. United Site Servs. of California, Inc.* (N.D.
8 Cal. Nov. 13, 2012) 2012 WL 5503550, at *8 (“Indeed, Plaintiff’s own evidence confirms that the
9 written policy does not generate uniform practices.”). Nevertheless, Plaintiff estimated Defendant’s
10 exposure for this claim at \$2,407,200. JCL Dec., ¶ 34. [This estimate is based on an assumption that
11 no rest periods were actually taken.]

12 (4) Exposure for Unreimbursed Business Expenses

13 Plaintiff alleged that Defendant required Class Members to incur personal expenses for the use
14 of their own personal cellular phones, as well as the purchase and maintenance of required attire.
15 California employers who require employees to incur personal business expenses for work purposes
16 must reimburse the employee for the cost incurred. (*See* Cal. Lab. Code § 2802(a), providing that “[a]n
17 employer shall indemnify his or her employee for all necessary expenditures or losses incurred by the
18 employee in direct consequence of the discharge of his or her duties, or of his or her obedience to the
19 directions of the employer....”). However, Defendant failed to fully reimburse Plaintiff and Class
20 Members for the costs incurred for the use of their personal cellular phones, and the purchase and
21 maintenance of their required attire in violation of California Labor Code section 2802. JCL Dec., ¶
22 35.

23 Again, Defendant denied any liability for this claim. Defendant argued that most of its
24 employees did not use cellphones as a part of the performance of their duties and on the rare occasion
25 where employees did incur business expenses, these expenses were fully reimbursed. Plaintiff estimated
26 Defendant’s exposure for this claim at \$278,840. JCL Dec., ¶ 36.

27
28 ///

1 (5) Exposure for Wage Statement Violations and Waiting Time Penalties

2 Plaintiff alleges that Defendant's alleged violations resulted in derivative violations of Labor
3 Code sections 203 and 226(a). Class Counsel considered the arguable presence of various penalties
4 and weighed the potential recoveries against probable defenses. Specifically, Defendant could argue
5 that Plaintiff could not prove the "willful" prong needed to obtain waiting time penalties under Labor
6 Code section 203. Additionally, Defendant could argue that Plaintiff could not show that Class
7 Members suffered an "injury" because of wage statement violations, as required by Labor Code section
8 226. Defendant could also argue that that meal and rest period violations do not entitle employees like
9 Plaintiff and the Class Members to pursue the derivative waiting time and itemized wage statement
10 penalties. (*Naranjo v. Spectrum Security Services, Inc.* (2023) 88 Cal.App.5th 927). Plaintiff could not
11 give the penalty claims great weight given that they depended on proving the underlying claims, which
12 had their own risks. Plaintiff estimated Defendant's exposure for this claim at \$1,191,480. JCL Dec.,
13 ¶ 37.

14 (6) Defendant's PAGA Exposure

15 In all, Class Counsel projected Defendant's liability exposure for PAGA claims at \$3,103,900 if
16 successful at trial. JCL Dec., ¶ 38. The proposed PAGA allocation of the Gross Settlement Amount is
17 fair, just, and reasonable. *Moniz v. Adecco USA, Inc.* (2021) 72 Cal.App.5th 56, 77. Where settlements
18 "negotiate a good faith amount" for PAGA Payment and "there is no indication that this amount was the
19 result of self-interest at the expense of class members," such amounts are generally considered
20 reasonable. *Hopson v. Hanesbrands Inc.*, No. CV-08-0844 EDL, 2009 WL 928133, at *9 (N.D. Cal.
21 Apr. 3, 2009). Courts routinely approve of amounts for PAGA Payment in the range of zero to two
22 percent of the settlement. *See id.* at *1, 9 (approving a PAGA payment of 0.3%); *Jack v. Hartford Fire*
23 *Ins. Co.*, No. 09cv1683 MMA (JMA), 2011 WL 4899942, at *6 (S.D. Cal. Oct. 13, 2011) (approving a
24 PAGA payment of 0.25%); *McKenzie v. Fed. Express Corp.*, No. CV 10-02420 GAF (PLAx), 2012 WL
25 12882124, at *5 (C.D. Cal. Jan. 23, 2012) (acknowledging that courts approve PAGA claim settlements
26 in the range of zero to two percent of the total settlement).

27 Here, the Parties negotiated a good faith payment for PAGA Penalties in the amount of \$36,000
28 which is 5.18% of the Gross Settlement Amount. This amount falls well within the range of approved

1 PAGA Penalties. Seventy-Five percent (75%) of the PAGA Penalties (\$27,000.00) will be paid to the
2 LWDA ("LWDA Payment") with the remaining twenty-five percent (25%) of the PAGA Penalties
3 (\$9,000.00) will be distributed to the Aggrieved Employees, which is within the range of PAGA
4 Penalties approved by courts and should be approved. JCL Dec., ¶ 39.

5 Under PAGA, Courts have considerable discretion to reduce the penalty award. In *Fleming v.*
6 *Covidien*, 2011 U.S. Dist. LEXIS 154590 (C.D. Cal. 2011), a federal court reduced PAGA penalties
7 from \$2,800,000 to \$500,000, a reduction of 82.2%, because the court found maximum penalties
8 "unjust" because the employees had suffered no injuries. Some trial courts have actually awarded no
9 civil penalties, even when Labor Code violations are established. See *In re Nordstrom Com. Cases*, 186
10 Cal.App.4th 576, 589 (2010) (affirming an award of \$0 in PAGA penalties in a wage and hour class
11 action); *In re Taco Bell Wage & Hour Actions*, 2016 U.S. Dist. LEXIS 48557, *40-43 (E.D. Cal. Apr.
12 6, 2016) (PAGA penalties denied after trial).

13 In order to recover any PAGA penalties, Plaintiff would be required at trial to prove each of the
14 underlying Labor Code violations. See *Cardenas v. McLane Foodservice, Inc.*, 2011 U.S. Dist. LEXIS
15 13126, *10 (C.D. Cal. 2011) ("Given the statutory language [of PAGA], a plaintiff cannot recover on
16 behalf of individuals whom the plaintiff has not proven suffered a violation of the Labor Code by the
17 defendant."). Here, Plaintiff would need to prove that each Aggrieved Employee suffered a violation for
18 each pay period the employee worked. Again, Defendant raised several defenses that presented serious
19 threats to the claims of the Plaintiff and the Aggrieved Employees. In addition to those arguments
20 discussed *supra*, Defendant also argued that the Court of Appeals decision in *Cacho v. Eurostar, Inc.*
21 (2019) 43 Cal.App.5th 885, weakened Plaintiff's claims, on liability, value, and manageability as to the
22 rest period claims. JCL Dec., ¶ 40.

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

1 For the aforementioned reasons, the PAGA allocation of the Gross Settlement Amount is fair,
2 just, and reasonable.

3 **b. Inherent Risks of Continued Litigation Support Preliminary Approval.**

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

9 With respect to the most immediate challenge, i.e., class certification, the risks attendant to the
10 certification of similar wage and hour claims are demonstrated by *Magadia v. Wal-Mart Associates,*
11 *Inc.* (9th Cir. 2021) 999 F.3d 668. There, the Ninth Circuit, vacated reversed and remanded a \$110
12 million judgement against an employer for, *inter alia*, inaccurately paying overtime, and directed the
13 trial court to enter judgement in favor of the employer. *See also O’Conner v. Uber Technologies, Inc.*
14 (9th Cir. 2018) 904 F.3d 1087 (decertification of wage and hour misclassification action); *see also*
15 *Duran v. U.S. Bank National Association* (2014) 59 Cal.4th 1, 31 (reversing a trial verdict in favor
16 plaintiffs in a wage and hour class action)); *Tien v. Tenet Healthcare Corp.* (2012) 209 Cal.App.4th
17 1077, 1088 (“[T]he reason, if any, that employees might not take their breaks were predominantly
18 individualized questions of fact not susceptible to class treatment.”); *Ali v. U.S.A. Cab Ltd.* (2009) 176
19 Cal.App.4th 1333, 1341 (affirming denial of certification because employees’ declarations attesting to
20 having taken meal and rest breaks demonstrated that individualized inquiries were required to show
21 harm); *Campbell v. Best Buy Stores, L.P.*, (C.D. Cal. 2013) 2013 WL 5302217 at *11-13 (following
22 *Brinker* and denying certification of proposed off-the-clock and rest and meal break classes due to lack
23 of uniform policy); *Brown v. Fed Express Corp.* (C.D. Cal. 2008) 249 F.R.D. 580, 587-88 (denying
24 certification of driver meal and rest period claims based on the predominance of individual issues).
25 Collectively, the examples cited above illustrate the uncertain nature of class litigation. Consequently,
26 the uncertainty of obtaining certification through a contested motion is a significant risk factor favoring
27 settlement. JCL Dec., ¶ 41.

28 “The Settlement eliminates these and other risks of continued litigation, including the very real

1 risk of no recovery after several years of litigation.” (*In re Nvidia Derivs. Litig.* (N.D. Cal. 2008) 2008
2 WL 5382544, at *3.) Indeed, potential appeals aside, litigating a complex case through trial is
3 inherently perilous regardless of the strengths of merits of the claims:

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

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

10 Finally, continuing to litigate this action would require continued and extensive resources
11 coupled with significant Court time to proceed through trial and post-trial motions; which can often
12 take years. Furthermore, wage and hour litigation is complex and expensive, as it often necessitates
13 extensive expert testimony, particularly with regards to damages. But even if Plaintiff is successful at
14 trial, Plaintiff is acutely aware that a judgment does not end the litigation. Plaintiff fully expects that
15 Defendant would appeal any favorable judgment. As demonstrated by *Magadia, supra*, 999 F.3d 668,
16 the risk of an appeal and subsequent reversal is real. JCL Dec., ¶ 42. “Avoiding such a trial and the
17 subsequent appeals in this complex case strongly militates in favor of settlement rather than further
18 protracted and uncertain litigation.” (*Nat’l Rural Telecomms. Coop v. DirecTV* (C.D. Cal. 2004) 221
19 F.R.D. 523, 527.) Thus, “unless the settlement is clearly inadequate, its acceptance and approval are
20 preferable to lengthy and expensive litigation with uncertain results.” (*Id.* at 526.)

21 In this matter, Class Counsel negotiated a Gross Settlement Amount of \$695,000.00 that is
22 approximately 17.9% of Defendant’s *class-wide* liability exposure as estimated by Class Counsel at the
23 time of mediation. Given the amount of the settlement here, as compared to potential value of the
24 claims, offset by the various inherent risks to continued litigation, the settlement is fair and reasonable.
25 JCL Dec., ¶ 43.

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

27 The Settlement Class is entitled to the best practical notice under the circumstances. (*Kass v.*
28 *Young* (1977) 67 Cal.App.3d 100, 106.) The purpose of the notice is to give class members sufficient

1 information to decide whether they should accept the benefits offered, opt out and pursue their own
2 remedies, or object to the settlement. (*Trotsky v. Los Angeles Fed Savings & Loan Assn.* (1975) 48
3 Cal.App.3d 143, 151-52.) The notice must advise class members “that they may be excluded from the
4 class if they so request and that they will be bound by the judgment, whether favorable or not, if they
5 do not request exclusion.” (*Kass*, 67 Cal.App.3d at 106.) Authorities generally require service of the
6 class notice by mail or similar reliable means. (*Chance v. Super. Ct.* (1962) 58 Cal.2d 275, 290; *Cart*
7 *v. Super. Ct.* (1975) 50 Cal.App.3d 960, 972.)³

8 The Parties jointly drafted the Notice Packet which fairly and neutrally informs the Class
9 Members of their rights and remedies. The Settlement Administrator will first verify addresses, then
10 mail the proposed Notice Packet to all Class Members. The Notice Packet will include information
11 regarding the nature of the lawsuit, a summary of the substance of the Settlement’s terms, the procedure,
12 and time period within which to requests for exclusions or objections to the Settlement, the date for the
13 final approval hearing, the formula used to calculate settlement payments, and the terms and scope of
14 the Released Class Claims. Agreement at ¶ III(L). This method was negotiated by the Parties to ensure
15 delivering the most reasonable method of notice to the Class Members while ensuring cost effective
16 administration of the Settlement. JCL Dec., ¶¶ 44-45.

17 Accordingly, both the method of disseminating the Notice Packet and content of the Notice
18 Packet satisfy due process. (See C.R.C. 3.776(e)-(f); *State of Cal. v. Levi Strauss* (1986) 41 Cal.3d
19 460,485 (the class notice must “fairly apprise the class members of the terms of the proposed
20 compromise and of the options open to dissenting class members.”).)

21 **C. The Court Should Preliminarily Approve the Enhancement Award**

22 Enhancement payments “are fairly typical in class action cases.” (*Cellphone Termination Fee*
23 *Cases* (2010) 186 Cal.App.4th 1380, 1393 (affirming incentive awards of \$10,000); *Rodriguez v. West*
24 *Publishing Corp.* (9th Cir. 2009) 563 F.3d 948, 958, *citing* 4 Newberg on Class Actions (4th ed. 2002)
25 § 1 1:38, and Eisenberg & Miller, *Incentive Awards to Class Action Plaintiffs: An Empirical Study*, 53

26
27 ³ Due process does not require that each class member actually receive a notice, but rather a procedure reasonably certain to
28 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.

UCLA L. Rev. 1303 (2006).) Enhancement payments “are intended to compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action, and, sometimes, to recognize their willingness to act as a private attorney general.” (*Rodriguez*, 563 F.3d at 958-59.) “[T]he rationale for making enhancement or incentive awards to named plaintiffs is that they should be compensated for the expense or risk they have incurred in conferring a benefit on other members of the class.” (*Clark v. American Residential Services LLC* (2009) 175 Cal.App.4th 785.)

The Settlement provides for an Enhancement Award of \$10,000.00 for Plaintiff. The enhancement 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 Enhancement Award once preliminary approval of the Settlement is granted. Plaintiff respectfully submits that the above showing is sufficient for preliminary approval of the negotiated Enhancement Award. JCL Dec., ¶ 47.

D. The Court Should Preliminarily Approve the Attorneys’ Fees and Expenses

The purpose of a payment to Class Counsel for Attorneys’ Fees and Expenses 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 Study*, *J. of Empirical Legal Studies*, Vol. 1, Issue 1, 27-78, March 2004, at 35 (independent studies of class action litigation nationwide have come to a similar conclusion that a one-third fee is consistent with market rates).)

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

6 Plaintiff will file a formal motion for the negotiated Attorneys' Fees and Expenses once
7 preliminary approval of the Settlement is granted. Plaintiff respectfully submits that the above showing
8 is sufficient for preliminary approval of the negotiated attorneys' fees. JCL Dec., ¶ 49.

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

10 For Settlement, Plaintiff contends, and Defendant does not dispute for settlement purposes only,
11 that provisional certification of the Class is appropriate. JCL Dec., ¶ 50.

12 1. The Standard for Class Certification

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

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

23 Whether a class is "ascertainable" within the meaning of Code of Civil Procedure section 382 is
24 "determined by examining (1) the class definition, (2) the size of the class, and (3) the means available
25 for identifying class members." (*Lee*, 166 Cal.App.4th at 1334.) Class members are ascertainable
26 where they may be readily identified without unreasonable expense or time by reference to official
27 records. (*Id.*)

28 The community of interest requirement embodies three factors: (1) predominant common

1 questions of law or fact; (2) a class representative with claims or defenses typical of the class; and (3)
2 a class representative and counsel who can adequately represent the class. (*Cal. Civ. Proc. Code* § 382.)

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

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

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

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

22 Additionally, Plaintiff is represented by competent Class Counsel who have extensive experience
23 in litigating wage and hour class action cases. Class Counsel successfully briefed, argued, certified, and
24 gained state court settlement approval of the same class-wide causes of action that are at issue in this
25 case. Class Counsel’s wage and hour class action experience establishes that they are well qualified to
26 represent the interests of this Class. JCL Dec., ¶¶ 54, 56-62, Declaration of Shani Zakay, ¶¶ 1-3.

27 A class action is superior to a multitude of individual lawsuits. Given the size and amount of
28 each individual claim, the Class Members likely have little incentive to litigate their claims on an

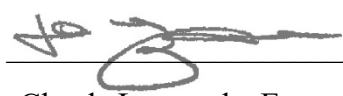
1 individual basis because the out-of-pocket expense and personal commitment necessary to litigate each
2 claim outweighs any potential recovery. In sum, class treatment is superior to individual, case-by-case
3 adjudication. JCL Dec., ¶ 55.

4 IV. CONCLUSION

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

8
9 Dated: July 3, 2023

JCL LAW FIRM, APC

10 By:  _____

11 Jean-Claude Lapuyade, Esq.