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SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN MATEO

EMILY TOLOSA, on behalf of herself and on
behalf of all persons similarly situated,

Plaintiffs,

v.

KENSINGTON REDWOOD CITY LLC, a
Virginia Limited Liability Company;
KENSINGTON SENIOR LIVING, LLC, a
Virginia Limited Liability Company; and DOES
1-50, Inclusive,

Defendants.

Case No. 21-CV-03030

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

Date: September 21, 2023

Time: 2:00 p.m.

Judge: Hon. Susan Greenberg

Department: 3

Trial Date: N/A

Action Filed: June 2, 2021

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I. INTRODUCTION

Plaintiff EMILY TOLOSA (“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 329 Class Members. The basic terms of the Agreement provide for the following:

1. The “**Class Members**,” “**Class**,” and “**Class Period**” shall mean all non-exempt employees who are or previously were employed by Kensington Senior Living, LLC, and who performed work in California during the Class Period. The Class Period is June 2, 2017 through May 1, 2023. Agreement at §§ A(7), (10). The Class is comprised of approximately 329 individuals who collectively worked approximately 26,500 Workweeks during the Class Period. Agreement at §§F(3).

2. The “**Settlement Class Members**” and “**Settlement Class**” means all Class Members who have not submitted a timely and valid request for exclusion by the Response Deadline. Agreement at § A(43).

3. The “**Aggrieved Employees**” and “**PAGA Period**” shall mean all non-exempt employees who are or previously were employed by Kensington Senior Living, LLC, and who performed work in California during the PAGA Period. The PAGA Period is March 29, 2020 through May 1, 2023. Agreement at §§ A(2), (33). At the time of mediation, there were approximately 217 Aggrieved Employees during the PAGA Period. (JCL Dec., ¶ 6).

4. The “**Gross Settlement Amount**” is Nine Hundred Thirty Thousand Dollars (\$930,000.00). Agreement at § A(19). The Gross Settlement Amount is non-reversionary and includes the following:

a. A “**Service Award**” in the amount of Ten Thousand Dollars (\$10,000.00) to Plaintiff in recognition of her effort and risk assumed in assisting with the prosecution of the Action. Agreement at §§ A(41);

b. An award of “**Attorneys’ Fees**” and “**Attorneys’ Expenses**” consisting of attorneys’ fees not to exceed one-third of the Gross Settlement Amount, currently estimated to be Three

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.

Hundred and Ten Thousand Dollars (\$310,000.00) paid to Class Counsel and attorneys' expenses not to exceed Thirty Thousand Dollars (\$30,000.00). Agreement at §§ D(2)(c)-(d);

c. A "**PAGA Payment**" of Fifty Thousand Dollars (\$50,000) to be allocated from the Gross Settlement Amount, with 25% of the payment going to the PAGA Class Members ("PAGA Class Member Payment") and 75% of the payment going to the Labor and Workforce Development Agency ("LWDA Payment"). Agreement at § D(2)(e); and

d. "**Claims Administration Expenses**" not to exceed \$6,500.00 payable to the Settlement Administrator, Apex Class Action, LLC, for, *inter alia*, the administration of the Notice Packet and Individual Settlement Payments. Agreement at § D(3)(a).

5. The "**Net Settlement Amount**" refers to the portion of the Gross Settlement Amount less Attorneys' Fees, Attorneys' Expenses, Service Award, Claim Administration Expenses and PAGA Payment. Agreement at § A(25). The Net Settlement Amount is approximately \$523,500.00 which will be allocated to all Settlement Class Members on a pro-rata basis according to the number of Workweeks each Settlement Class Member worked during the Class Period. The entire Net Settlement Amount will be paid to all Settlement Class Members who do not opt out of the Settlement resulting in an average Individual Settlement Payment of approximately **\$1,591.19**. JCL Dec., ¶ 6.

6. The "**Released Class Claims**" means once the Gross Settlement Amount is funded, Plaintiff and the Settlement Class Members agree to release Defendant and the Released Parties from any and all 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 §E(1).

7. The "**Released PAGA Claims**" means once the Gross Settlement Amount is funded, Plaintiff, the Aggrieved Employees, the LWDA and the State of California, agree to release Defendant and the Released Parties from any and all PAGA claims for PAGA civil penalties alleged in the Operative Complaint and Plaintiff's PAGA Notice to the LWDA, or that could have reasonably been alleged in the Operative Complaint or Plaintiff's PAGA Notice based on the facts alleged, which

1 occurred during the PAGA Period, and expressly excluding all other claims, including claims for vested
2 benefits, wrongful termination, unemployment insurance, disability, social security, workers'
3 compensation, and PAGA claims outside of the PAGA Period. Agreement § E(2).

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

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

16 II. FACTS AND PROCEDURE

17 A. Overview of the Litigation

18 Defendant Kensington Senior Living, LLC is a Virginia limited liability company that operates
19 a senior living facility in San Mateo County. Plaintiff worked for Defendants as a non-exempt
20 employee during 2020. Throughout her employment, Plaintiff was subject to Defendants' written
21 policies and procedures. JCL Dec., ¶ 8; Declaration of Emily Tolosa ("ET Dec.") at ¶¶ 1-7.

22 Defendant forcefully denies liability for each of Plaintiff's claims. Further, Defendant asserts
23 that it fully complied with all applicable employment laws and raised several other significant defenses
24 to Plaintiff's claims, including but not limited to, compliant compensation policies and plans, compliant
25 meal and rest practices, compliant wage statements, and timely payment of all wages due upon
26 separation of employment. JCL Dec., ¶ 9.

27 On March 29, 2021, Plaintiff served Defendant and the Labor and Workforce Development
28 Agency ("LWDA") with a Notice of Violations ("PAGA Notice"). JCL Dec., ¶ 10.

On June 2, 2021, Plaintiff filed this class action complaint in the San Mateo Superior Court (“the Action”). The Action alleged ten causes of action against Defendants for: (1) Unfair competition in violation of Business and Professions Code sections 17200 *et seq*; (2) Failure to pay minimum wages in violation of California Labor Code sections 1194, 1197 & 1197.1; (3) Failure to pay overtime wages in violation of California Labor Code sections 510 *et seq*; (4) Failure to provide required meal periods in violation of California Labor Code sections 226.7 and 512 and the applicable IWC wage order; (5) Failure to provide required rest periods in violation of California Labor Code sections 226.7 and 512 and the applicable IWC wage order; (6) Failure to provide accurate itemized wage statements in violation of California Labor Code section 226; (7) Failure to provide wages when due in violation of Cal. Lab. Code sections 201, 202 and 203; and (8) Violation of the Private Attorneys General Act [Labor Code section 2698, *et seq.*]. JCL Dec., ¶ 11.

B. Class Counsels’ Investigation

Class Counsel thoroughly investigated the claims and damages. The investigation included, among other things, time, and payroll records for a sample of Class Members, aggregate workweek and pay period data, and copies of applicable handbooks, policies, and procedures. JCL Dec., ¶¶ 12-14.

C. The Parties Settled at Mediation

On February 1, 2022, the Parties participated in a full day mediation with Tripper Ortman, Esq. an experienced mediator of wage and hour class and PAGA actions. The mediation concluded without a settlement. However, following the mediation the Parties accepted a mediator’s settlement proposal, which was subsequently memorialized in the form of a Memorandum of Understanding (“MOU”). JCL Dec., ¶ 15. Class Counsel submits that the Settlement constitutes a fair, adequate, and reasonable compromise of the claims at issue. JCL Dec., ¶ 16.

III. ARGUMENT

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

The proposed Settlement, including a Gross Settlement Amount of Nine Hundred Thirty Thousand Dollars (\$930,000.00), 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

1 resolution.”.) Class action settlement approval requires an early “preliminary” review by the trial court
2 and a subsequent “final” review after notice of the settlement has been distributed to class members for
3 their comments and objections. (C.R.C. 3.769(c)-(g); *Cellphone Termination Fee Cases*, 180
4 Cal.App.4th 1110, 1118 (2010) (the court first “preliminarily approves the settlement” and later
5 “conducts a final approval hearing to inquire into the fairness of the proposed settlement”).)

6 Although Rule of Court Rule 3.769 does not provide detail as to the scope of review of the
7 proposed settlement, preliminary approval is warranted if the settlement falls within a “reasonable
8 range.” (See *North County Contractor’s Assn., Inc. v. Touchstone Ins. Services* (1994) 27 Cal.App.4th
9 1085, 1089-90; Conte & Newberg, *Newberg on Class Actions*, §§ 11.26 (4th ed. 2002).)
10 Reasonableness and fairness are presumed where: (1) the settlement is reached through “arms-length
11 bargaining;” (2) investigation and discovery are “sufficient to allow counsel and the court to act
12 intelligently;” (3) counsel is “experienced in similar litigation. . . .” (*Dunk v. Ford Motor Co.* (1996)
13 48 Cal.App.4th 1794, 1802.) The presumption of fairness is consistent with California’s public policy
14 goal of favoring settlements. (*Stambaugh v. Super. Ct* (1976) 62 Cal.App.3d 231, 236 (“the law wisely
15 favors settlements”); *Cellphone Termination Fee Cases* (2009) 180 Cal.App.4th 1110, 1118 (“public
16 policy generally favors the compromise of complex class action litigation”); *7-Eleven Owners for Fair
17 Franchising v. Southland Corp.* (2000) 85 Cal.App.4th 1135, 1151 (“voluntary conciliation and
18 settlement are the preferred means of dispute resolution ... [t]his is especially true in complex class
19 action litigation”).)

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

26
27 ///

1 1. The Parties Reached the Settlement Through Arm's-Length Bargaining Led by
2 Experienced Counsel.

3 “[W]hat transpires in settlement negotiations is highly relevant to the assessment of a proposed
4 settlement's fairness.” (*State v. Levi Strauss & Co.* (1986) 41 Cal.3d 460, 482.) Courts presume the
5 absence of fraud or collusion in the negotiation of a settlement, unless evidence to the contrary is
6 offered; thus, there is a presumption that settlement negotiations are conducted in good faith. (Newberg,
7 § 11.51.)

8 The Parties participated in mediation with an experienced mediator, Tripper Ortman. Mr.
9 Ortman managed the Parties' expectations and provided a useful, neutral analysis of the issues and risks
10 to both sides. (*In re Apple Computer, Inc. Derivative Litig.* No. C 06-4128 JF (HRL), 2008 U.S. Dist.
11 LEXIS 108195 (N.D. Cal. Nov. 5, 2008) (mediator's participation weighs considerably against any
12 inference of a collusive settlement); *D'Amato v. Deutsche Bank* (2d. Cir. 2001) 236 F.3d 78, 85 (a
13 “mediator's involvement in pre-certification settlement negotiations helps to ensure that the
14 proceedings were free of collusion and undue pressure.”).) The mediation concluded without a
15 settlement, but the Parties subsequently accepted a mediator proposal, which was memorialized in a
16 Memorandum of Understanding (“MOU”). At all times, the Parties' negotiations were at an arm's
17 length, adversarial, and non-collusive. After reaching an agreement in the principle, the Parties drafted
18 and negotiated a long-form settlement which is the subject of the instant motion. Objectively, the
19 Settlement terms are fair, adequate and represent a reasonable compromise of the claims at issue. JCL
20 Dec., ¶ 16.

21 2. Class Counsel's Investigation Provided an Objective Measurement of the
22 Settlement's Reasonableness.

23 As set forth in greater detail above, Class Counsel conducted a very thorough investigation into
24 the factual and legal issues in dispute. The investigation allowed Class Counsel to fully assess the
25 nature and magnitude of the claims being settled, as well as the impediments to recovery, such as to
26 make an independent assessment of the reasonableness of the terms to which the Parties have agreed.
27 Based on this investigation of the facts, applicable law, and marketplace for similar settlements, and
28 considering the risk of significant delay, uncertainty associated with litigation, and the various defenses

1 asserted by Defendant, Class Counsel firmly believes this Agreement to be in the best interests of the
2 Class Members. Because the Settlement's terms are fair, reasonable, and adequate, the Court should
3 preliminarily approve the Settlement. JCL Dec., ¶¶ 12-14.

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

5 The Gross Settlement Amount of \$930,000.00 is within the range of reasonableness. To
6 determine whether a settlement is fair and reasonable, the court should "consider enough information
7 about the nature and magnitude of the claims being settled, as well as the impediments to recovery, to
8 make an independent assessment of the reasonableness of the terms to which the parties have agreed."
9 (*Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 133.) In making this determination,
10 the court is "not to try the case" but rather "satisfy itself that the class action settlement is within the
11 'ballpark of reasonableness.'" (*Id.* (emphasis added).) For this analysis, courts do "not require any such
12 explicit statement of value; [they] require[] a record which allows an understanding of the amount that
13 is in controversy and the realistic range of outcomes of the litigation." (*Munoz v. BCI Coca-Cola*
14 *Bottling Co.* (2010) 186 Cal.App.4th 399, 409 (internal citation omitted).) The reasonableness of a
15 settlement is not dependent upon its actual value approaching the potential recovery plaintiffs might
16 have received if they had succeeded at trial.² Indeed, "[t]he determination whether a settlement is
17 reasonable does not involve the use of a 'mathematical equation yielding a particularized sum.'" (*Frank*
18 *v. Eastman Kodak Co.* (W.D.N.Y. 2005) 228 FRD. 174, 186 (quoting *In re Michael Milken and Assoc.*
19 *Sec. Litig.* (S.D.N.Y. 1993) 150 F.R.D. 57, 66).)

20 The Gross Settlement Amount of \$930,000.00 is fair and reasonable considering the nature and
21 magnitude of the claims being settled and the various potential impediments to recovery. Prior to
22 mediation, Class Counsel retained Berger Consulting Group ("BCG") to develop economic damage
23 models measuring Defendant's liability exposure while accounting for the uncertainties of continued
24 litigation. The various models were informed by Class Counsel's investigation, including the analysis
25 of a significant sample of time and payroll data. Class Counsel projected Defendants' liability exposure
26 for *class claims* (excluding PAGA Penalties) at \$3,634,933 dollars. Thus, the Gross Settlement Amount

27
28 ² 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.

of \$930,000.00 represents approximately 25.6% of Defendant's *class-wide* liability exposure. The following summarizes Defendant's estimated exposure. JCL Dec., ¶ 17.

(a) Estimated Damages for Failure to Pay for All Hours Worked

Plaintiff's primary claim in the Action alleged Defendant employed an unlawful rounding policy pursuant to which Defendant rounded Plaintiff's and Class Members' time sheets to exact, quarter-rounded total hours worked. As a result, Defendant's rounding policy systematically undercompensated Plaintiff and Class Members for minimum and overtime wages owed. JCL Dec., ¶ 18.

Defendant vigorously denied liability for this claim. Defendant argued that all Class Members were properly paid minimum and overtime compensation for all hours worked. Further, Defendant argued that its rounding policy is facially neutral and in practice, favors neither overpayment nor underpayment. Plaintiff estimated Defendant's exposure for this claim at \$53,009 JCL Dec., ¶ 19.

(b) Estimated Damages for Meal and Rest Period Violations

Plaintiff also alleged that because of his rigorous work schedule, Plaintiff and Class Members were not able to take timely and duty-free meal and rest periods. Defendant's time and payroll data evidenced a 38.9% violation rate for meal periods. Plaintiff utilized an assumed a similar violation rate for purposes of quantifying damages for rest period violations. In total, Class Counsel estimated Defendant's exposure for the meal and rest claims at \$1,770,422. JCL Dec., ¶ 20.

Defendant argued, *inter alia*, that it provided the Class Members with compliant meal and rest periods. Defendant also argued that it maintained facially complaint meal and rest period policies. Thus, Defendant argued that there was no potential liability for Plaintiff's alleged meal and rest period violations and any claimed violations required a highly individualized inquiry not suitable to class treatment. JCL Dec., ¶ 21.

(c) Exposure for Wage Statement Violations and Waiting Time Penalties

Plaintiff also alleged that the Defendant's labor code violations resulted in derivative liability for wage statement violations and waiting time penalties. Class Counsel considered the arguable presence of various penalties and weighed the potential recoveries against probable defenses. Specifically, Defendant argued that Plaintiff could not prove the "willful" prong needed to obtain waiting time

1 penalties under Labor Code section 203. Additionally, Defendant argued that Plaintiff could not show
2 that Class Members suffered an “injury” because of wage statement violations, as required by Labor
3 Code section 226. (*Naranjo v. Spectrum Security Services, Inc.* (2023) 88 Cal.App.5th 927.)
4 Notwithstanding the uncertain nature of the claims, Plaintiff estimated Defendant’s exposure for these
5 penalties to be approximately \$1,811,503 (\$979,503 for Labor Code section 203 penalties and \$832,000
6 for Labor Code section 226 penalties). JCL Dec., ¶ 22.

7 **(d) Defendant’s PAGA Exposure**

8 Class Counsel’s damage models also estimated Defendant’s exposure for PAGA penalties. At
9 the time of mediation, Plaintiff estimated Defendants’ PAGA exposure to be approximately \$2,749,200.
10 JCL Dec., ¶ 23. Under PAGA, Courts have considerable discretion to reduce the penalty award. In
11 *Fleming v. Covidien*, 2011 U.S. Dist. LEXIS 154590 (C.D. Cal. 2011), a federal court reduced PAGA
12 penalties from \$2,800,000 to \$500,000, a reduction of 82.2%, because the court found maximum
13 penalties “unjust” because the employees had suffered no injuries. Some trial courts have actually
14 awarded no civil penalties, even when Labor Code violations are established. (*See In re Nordstrom Com.*
15 *Cases*, 186 Cal.App.4th 576, 589 (2010) (affirming an award of \$0 in PAGA penalties in a wage and
16 hour class action); *In re Taco Bell Wage & Hour Actions*, 2016 U.S. Dist. LEXIS 48557, *40-43 (E.D.
17 Cal. Apr. 6, 2016) (PAGA penalties denied after trial).)

18 To recover any PAGA penalties, Plaintiff would be required at trial to prove each of the
19 underlying Labor Code violations. (*See Cardenas v. McLane Foodservice, Inc.*, 2011 U.S. Dist. LEXIS
20 13126, *10 (C.D. Cal. 2011) (“Given the statutory language [of PAGA], a plaintiff cannot recover on
21 behalf of individuals whom the plaintiff has not proven suffered a violation of the Labor Code by the
22 defendant.”).) Here, Plaintiff would need to prove that each Aggrieved Employee suffered a violation
23 for each pay period the employee worked. Again, Defendant raised several defenses that presented
24 serious threats to the claims of the Plaintiff and the Aggrieved Employees. JCL Dec., ¶ 24.

25 *Carrington v. Starbucks Corp.* (2018) 30 Cal.App.5th 504, illustrates the risk of PAGA claims.
26 In *Carrington*, while the plaintiff prevailed on his PAGA claim upon trial, the trial court reduced the
27 maximum PAGA penalty amount by 90%, citing the employer's good faith attempt at complying with
28 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%.

The proposed Settlement allocates \$50,000 to satisfy the PAGA claims. This amount represents approximately 5.3% of the Gross Settlement Amount. This achieves a fair, reasonable, and adequate resolution of Plaintiff's PAGA claim. (See *Moniz v. Adecco* (2021) 72 Cal.App.5th 56.) Further, the amount allocated to the satisfaction of Plaintiff's PAGA claim, is well within the range of reasonableness. (See, e.g., *Nordstrom Comm'n Cases* (2010) 186 Cal.App.4th 576, 589 (approving 0% PAGA allocation); *Berry v. Urban Outfitters* (N.D. Cal. Lead Case No. 13-cv-02628-JSW) (approving 1% PAGA allocation in \$5M settlement); *Jack v. Hartford Fire Ins. Co.* (S.D. Cal. 2011) 2011 WL 4899942 * 6 (approving \$3,000 PAGA allocation in \$1.2M settlement); *Singer v. Becton Dickinson & Co.* (S.D. Cal. 2010) 2010 WL 2196104 *2 (approving \$3,000 PAGA allocation in \$1M settlement); and *Hopson v. Hanesbrands, Inc* (N.D. Cal. 2009) 2009 WL 928133 * 9 (approving \$1,500 PAGA allocation in \$1.026M settlement.)) JCL Dec., ¶ 25.

4. Inherent Risks of Continued Litigation Support Preliminary Approval.

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). Consequently, the uncertainty of obtaining certification through a contested motion is a significant risk factor favoring settlement. JCL Dec., ¶¶ 26-27.

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

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

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

11 Finally, continuing to litigate this action would require continued and extensive resources
12 coupled with significant Court time to proceed through trial and post-trial motions, which can often
13 take years. Furthermore, wage and hour litigation is complex and expensive, as it often necessitates
14 extensive expert testimony, particularly with regards to damages. But even if Plaintiff is successful at
15 trial, Plaintiff is acutely aware that a judgment does not end the litigation. Plaintiff fully expects that
16 Defendant would appeal any favorable judgment. As demonstrated by *Magadia, supra*, 999 F.3d 668,
17 the risk of an appeal and subsequent reversal is real. JCL Dec., ¶¶ 26-28. “Avoiding such a trial and
18 the subsequent appeal in this complex case strongly militates in favor of settlement rather than further
19 protracted and uncertain litigation.” (*Nat’l Rural Telecomms. Coop v. DirecTV* (C.D. Cal. 2004) 221
20 F.R.D. 523, 527.) Thus, “unless the settlement is clearly inadequate, its acceptance and approval are
21 preferable to lengthy and expensive litigation with uncertain results.” (*Id.* at 526.)

22 Given the amount of the settlement here, as compared to potential value of the claims, offset by
23 the various inherent risks to continued litigation, the settlement is fair and reasonable. JCL Dec., ¶ 28.

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

25 The Class is entitled to the best practical notice under the circumstances. (*Kass v. Young* (1977)
26 67 Cal.App.3d 100, 106.) The purpose of the notice is to give class members sufficient information to
27 decide whether they should accept the benefits offered, opt out and pursue their own remedies, or object
28 to the settlement. (*Trotsky v. Los Angeles Fed Savings & Loan Assn.* (1975) 48 Cal.App.3d 143, 151-

52.) The notice must advise class members “that they may be excluded from the class if they so request and that they will be bound by the judgment, whether favorable or not, if they do not request exclusion.” (*Kass*, 67 Cal.App.3d at 106.) Authorities generally require service of the class notice by mail or similar reliable means. (*Chance v. Super. Ct.* (1962) 58 Cal.2d 275, 290; *Cart v. Super. Ct.* (1975) 50 Cal.App.3d 960, 972.)³

The Parties jointly drafted the Notice Packet which fairly and neutrally informs the Class Members of their rights and remedies. The Settlement Administrator will first verify addresses, then mail the proposed Notice Packet to all Class Members. The Notice Packet will include information regarding the nature of the lawsuit, a summary of the substance of the Settlement’s terms, the procedure, and time within which to requests for exclusions or objections to the Settlement, the date for the final approval hearing, the formula used to calculate settlement payments, and the terms and scope of the Released Class Claims. The Parties negotiated this method to ensure delivering the most reasonable method of notice to the Class Members while ensuring cost effective administration of the Settlement. JCL Dec., ¶¶ 30-31.

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

C. The Court Should Preliminarily Approve the Service Award

Enhancement payments “are fairly typical in class action cases.” (*Cellphone Termination Fee Cases* (2010) 186 Cal.App.4th 1380, 1393 (affirming incentive awards of \$10,000).) 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.)

³ Due process does not require that each class member actually receive a notice, but rather a procedure reasonably certain 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 The Settlement provides for a Service Award of \$10,000 for Plaintiff. JCL Dec., ¶¶ 32-33. Class
2 Counsel on behalf of Plaintiff will file a formal motion for the negotiated Service Award once
3 preliminary approval of the Settlement is granted. Plaintiff respectfully submits that the above showing
4 is sufficient for preliminary approval of the negotiated Service Award. JCL Dec., ¶ 34.

5 **D. The Court Should Preliminarily Approve the Attorneys' Fees and Attorneys' Expenses**

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

12 Class Counsel took this matter on a contingency fee basis and invested significant time and
13 expense successfully prosecuting Plaintiff's claims. As discussed *supra*, the estimated average
14 Individual Settlement Payment illustrates the demonstrably positive outcome for the Class Members.
15 Considering the positive outcome, and considering the supporting authority, the proposed Attorneys'
16 Fees and reimbursement of Attorneys' Expenses are fair and reasonable. JCL Dec., ¶ 35.

17 Plaintiff will file a formal motion for the Attorneys' Fees and Attorneys' Expenses once
18 preliminary approval of the Settlement is granted. Plaintiff respectfully submits that the above showing
19 is sufficient for preliminary approval of the negotiated attorneys' fees. JCL Dec., ¶ 36.

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

21 For Settlement, Plaintiff contends, and Defendant does not dispute, that provisional certification
22 of the Class is appropriate. JCL Dec., ¶ 37.

23 1. The Standard for Class Certification

24 Class actions are statutorily authorized "when the question is one of common or general interest,
25 of many persons, or when the parties are numerous, and it is impracticable to bring them all before the
26 court" (*Cal.Civ.Proc. Code* § 382; *Lee v. Dynamex, Inc.* (2008) 166 Cal.App.4th 1325, 1332.) Class
27 certification is appropriate when there is an "ascertainable class and a well-defined community of
28 interest among class members." (*Sav-On Drug Stores, Inc.* (2014) 34 Cal.4th 319, 326.) Class treatment

1 is appropriate even if class members at some point may be required to make an individual showing as
2 to eligibility for recovery. (*Bufile v. Dollar Financial Group, Inc.* (2008) 162 Cal.App.4th 1193, 1207;
3 *Sav-On*, 34 Cal.4th at 333.)

4 2. The Proposed Class is Ascertainable and there is a Well-Defined Community of
5 Interest Among the Class Members.

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

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

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

19 Because all Class Members are Defendant’s current and former non-exempt employees, the class
20 is readily ascertainable from Defendant’s regular business records, i.e., payroll records. JCL Dec., ¶ 38.

21 The statutes relating to each of Plaintiff’s claims apply with equal force and effect to the entire
22 Class. Factually, Defendant’s policies and practices apply class-wide and Defendant’s liability can be
23 determined by facts common to all members of the class. The wage and hour issues are both numerous
24 and substantial, and a class action is the most advantageous method of dealing with the claims of the
25 Class. JCL Dec., ¶ 39.

26 Plaintiff’s wage and hour claims are typical of the proposed Class because they arise from the
27 same factual basis and are based on the same legal theories applicable to the other Class Members.
28 Likewise, Plaintiff’s interests are entirely coextensive with the interests of the Class. Plaintiff alleges

1 that she was injured by the same company-wide practices to which the proposed Class Members were
2 subject to and seeks the same relief. Plaintiff has already demonstrated her ability to advocate for the
3 interests of the Class Member by initiating this litigation, undertaking extensive class discovery, and
4 evaluating the proposed settlement to assure that it is fair. JCL Dec., ¶ 40.

5 Additionally, Plaintiff is represented by competent Class Counsel who have extensive experience
6 in litigating wage and hour class action cases. Class Counsel successfully briefed, argued, certified, and
7 gained state court settlement approval of the same class-wide causes of action that are at issue in this
8 case. Class Counsel's wage and hour class action experience establishes that they are well qualified to
9 represent the interests of this Class. JCL Dec., ¶¶ 5, 42-49; Declaration of Shani Zakay, ¶¶ 3, 8

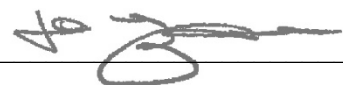
10 A class action is superior to a multitude of individual lawsuits. Given the size and amount of
11 each individual claim, the Class Members likely have little incentive to litigate their claims on an
12 individual basis because the out-of-pocket expense and personal commitment necessary to litigate each
13 claim outweighs any potential recovery. In sum, class treatment is superior to individual, case-by-case
14 adjudication. JCL Dec., ¶ 41.

15 IV. CONCLUSION

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

19 Dated: July 18, 2023

JCL LAW FIRM, APC

21 By: 
22 Jean-Claude Lapuyade, Esq.