

JCL LAW FIRM, APC

Jean-Claude Lapuyade (State Bar #248676)

Monnett De La Torre (State Bar #272884)

5440 Morehouse Drive, Suite 3600

San Diego, CA 92121

Telephone: (619)599-8292

Facsimile: (619) 599-8291

jlapuyade@jcl-lawfirm.com

mdelatorre@jcl-lawfirm.com

ZAKAY LAW GROUP, APLC

Shani O. Zakay (State Bar #277924)

Jackland K. Hom (State Bar #327243)

5440 Morehouse Drive, Suite 3600

San Diego, CA 92121

Telephone: (619)255-9047

Facsimile: (858) 404-9203

shani@zakaylaw.com

jackland@zakaylaw.com

Attorneys for Plaintiffs

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ALAMEDA

DEVIN TERRELL, NESHA SHEDD AND
SUSAN BUSTOS, individuals, on behalf of
themselves, and on behalf of all persons similarly
situated,

Plaintiffs,

v.

KAISERAIR, INC., a California corporation; and
DOES 1 through 50, Inclusive.

Defendants.

Case No. RG21113701

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

Hearing Date: March 29, 2023

Hearing Time: 10:00 a.m.

Department: 21

Trial Date:

Action Filed: September 23, 2021

Reservation ID: 621236664904

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	FACTS AND PROCEDURE	4
	A. Overview of the Litigation	4
	B. Class Counsel's Investigation	5
	C. The Parties Settled at Mediation	6
III.	ARGUMENTS	6
	A. The Court Should Preliminarily Approve the Proposed Class Action Settlement	6
	1. The Parties Reached the Settlement Through Arm's-Length Bargaining Led by Experienced Counsel	8
	2. Class Counsel's Investigation Provided an Objective Measurement of the Settlement's Reasonableness	8
	3. The Settlement Falls Within the Recognized Range of Reasonableness	9
	(a) Estimated Damages for Miscalculation of the Regular Rate of Pay	10
	(b) Estimated Damages for Meal and Rest Period Violations	10
	(c) Exposure for Off the Clock Work	11
	(d) Exposure for Expense Reimbursement Claim	11
	(e) Exposure for Wage Statement Violations and Waiting Time Penalties	11

1	(f) Defendant’s PAGA Exposure	12
2	4. Inherent Risks of Continued Litigation Support Preliminary Approval	13
3	B. The Proposed Notice Packet Informs the Class about the Case and Settlement	15
4	C. The Court Should Preliminarily Approve the Class Representative Service Payments	16
5	D. The Court Should Preliminarily Approve the Class Counsel Fees Payment and Litigation Expenses Payment	16
6	E. Provisional Certification for Settlement Purposes Is Appropriate	17
7	1. The Standard for Class Certification	17
8	2. The Proposed Settlement Class is Ascertainable and there is a Well-Defined Community of Interest Among the Settlement Class Members	18
9	IV. CONCLUSION	19

///

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.....	7
5	<i>Ali v. U.S.A. Cab Ltd.</i>	
6	(2009) 176 Cal.App.4th 1333, 1341.....	13
7	<i>Berry v. Urban Outfitters</i>	
8	(N.D. Cal. Lead Case No. 13-cv-02628-JSW).....	13
9	<i>Brinker v. Superior Court</i>	
10	53 Cal. 4th 1004, 1021-22 (2012).....	14, 18
11	<i>Brown v. Fed Express Corp.</i>	
12	(C.D. Cal. 2008) 249 F.R.D. 580, 587-88.....	14
13	<i>Bufile v. Dollar Financial Group, Inc.</i>	
14	(2008) 162 Cal.App.4th 1193, 1207.....	17
15	<i>Cacho v. Eurostar, Inc.</i>	
16	(2019) 43 Cal.App.5th 885.....	12
17	<i>Campbell v. Best Buy Stores, L.P.</i>	
18	(C.D. Cal. 2013) 2013 WL 5302217 at *11-13.....	14
19	<i>Cardenas v. McLane Foodservice, Inc.</i>	
20	2011 U.S. Dist. LEXIS 13126, *10 (C.D. Cal. 2011).....	12
21	<i>Carrington v. Starbucks Corp.,</i>	
22	30 Cal. App. 5th 504 (2018).....	12
23	<i>Cart v. Super. Ct.</i>	
24	(1975) 50 Cal.App.3d 960, 972.....	15
25	<i>Cellphone Termination Fee Cases</i>	
26	180 Cal. App. 4th 1110, 1118, 1380, 1389, 1393 (2010).....	7, 16
27	<i>Chance v. Super. Ct.</i>	
28	(1962) 58 Cal.2d 275, 290.....	15
	<i>Chavez v. Netflix, Inc.</i>	
	(2008) 162 Cal.App.4th 43, 66 n.11.....	17
	<i>Clark v. American Residential Services LLC</i>	
	(2009) 175 Cal.App.4th 785.....	16
	<i>D'Amato v. Deutsche Bank</i>	
	(2d. Cir. 2001) 236 F.3d 78, 85.....	8
	<i>Dunk v. Ford Motor Co.</i>	
	48 Cal. App. 4th 1794, 1802 (1996).....	7
	<i>Duran v. U.S. Bank National Association</i>	
	(2014) 59 Cal.4th 1, 31.....	13
	<i>Fleming v. Covidien</i>	
	2011 U.S. Dist. LEXIS 154590 (C.D. Cal. 2011).....	12
	<i>Fontana v. Elrod</i>	
	(7th Cir. 1987) 826 F.2d 729, 732.....	15
	<i>Frank v. Eastman Kodak Co.</i>	
	(W.D.N.Y. 2005) 228 FRD. 174, 186.....	9
	<i>Hopson v. Hanesbrands, Inc</i>	
	(N.D. Cal. 2009) 2009 WL 928133 * 9.....	13
	<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).....	8

1	<i>In re Global Crossing Sec. and ERISA Litig.</i>	
	(S.D.N.Y. 2004) 225 F.R.D. 436, 460.....	9
2	<i>In re IKON Office Solutions, Inc Sec Litig.</i>	
	(E.D. Pa. 2000) 194 F.R.D. 166, 184.....	9
3	<i>In re Michael Milken and Assoc. Sec. Litig.</i>	
	(S.D.N.Y. 1993) 150 F.R.D. 57, 66).....	9
4	<i>In re Nordstrom Com. Cases</i>	
	186 Cal.App.4th 576, 589 (2010).....	12-13
5	<i>In re Nvidia Derivs. Litig.</i>	
	(N.D. Cal. 2008) 2008 WL 5382544, at *3.....	14
6	<i>In re Omnivision Tech, Inc.</i>	
	(N.D. Cal. 2008) 559 F.Supp.2d 1036.....	9
7	<i>In re Taco Bell Wage & Hour Actions</i>	
	2016 U.S. Dist. LEXIS 48557, *40-43 (E.D. Cal. Apr. 6, 2016).....	12
8	<i>Jack v. Hartford Fire Ins. Co.</i>	
	(S.D. Cal. 2011) 2011 WL 4899942 * 6.....	13
9	<i>Kass v. Young</i>	
	(1977) 67 Cal.App.3d 100, 106.....	15
10	<i>Kullar v. Foot Locker Retail, Inc.</i>	
	(2008) 168 Cal.App.4th 116, 133.....	9
11	<i>Lee v. Dynamex, Inc.</i>	
	(2008) 166 Cal.App.4th 1325, 1332, 1334.....	17-18
12	<i>Magadia v. Wal-Mart Associates, Inc.</i>	
	(9th Cir. 2021) 999 F.3d 668.....	13-14
13	<i>Misra v. Decision One Mortg. Co.</i>	
	(C.D. Cal. 2009) 2009 WL 4581276, at *7.....	13
14	<i>Moniz v. Adecco</i>	
	(2021) 72 Cal.App.5th 56.....	13
15	<i>Munoz v. BCI Coca-Cola Bottling Co.</i>	
	(2010) 186 Cal.App.4th 399, 409.....	9
16	<i>Nat'l Rural Telecomm. Coop. v. Directv. Inc.</i>	
	(C.D. Cal. 2004) 221 F.R.D. 523, 527.....	9, 14
17	<i>Newman v. Stein</i>	
	(2d. Cir. 2002) 464 F.2d 689, 693.....	9
18	<i>North County Contractor's Assn., Inc. v. Touchstone Ins. Services</i>	
	(1994) 27 Cal.App.4th 1085, 1089-90.....	7
19	<i>O'Conner v. Uber Technologies, Inc.</i>	
	(9th Cir. 2018) 904 F.3d 1087.....	13
20	<i>Officers for Justice v. Civil Serv. Comm'n</i>	
	(9th Cir. 1982) 688 F.2d 615, 625, 628.....	7, 9
21	<i>Rebney v. Wells Fargo Bank</i>	
	(1990) 220 Cal.App.3d 1117, 1140, <i>opinion modified</i> (June 18, 1990).....	14
22	<i>Rodriguez v. West Publishing Corp.</i>	
	(9th Cir. 2009) 563 F.3d 948, 958-59.....	16
23	<i>Sav-On Drug Stores, Inc.</i>	
	(2014) 34 Cal.4th 319, 326, 333.....	17-18
24	<i>Singer v. Becton Dickinson & Co.</i>	
	(S.D. Cal. 2010) 2010 WL 2196104 *2.....	13
25	<i>Stambaugh v. Super. Ct</i>	

(1976) 62 Cal.App.3d 231, 236.....	7
///	
<i>State v. Levi Strauss & Co.</i>	
(1986) 41 Cal.3d 460, 482, 485.....	8, 15
<i>Tien v. Tenet Healthcare Corp.</i>	
(2012) 209 Cal.App.4th 1077, 1088.....	13
<i>Trotsky v. Los Angeles Fed Savings & Loan Assn.</i>	
(1975) 48 Cal.App.3d 143, 151-52.....	15

RULES, CODES, AND STATUTES

<i>Bus. & Prof. Code</i> § 17200 et seq.....	3, 5
<i>Cal. Civ. Proc. Code</i> § 382.....	17-18
<i>Cal. Lab. Code</i> § 201.....	5
<i>Cal. Lab. Code</i> § 202.....	5
<i>Cal. Lab. Code</i> § 203.....	5, 11
<i>Cal. Lab. Code</i> § 226.....	5, 11
<i>Cal. Lab. Code</i> § 226(a).....	11
<i>Cal. Lab. Code</i> § 226.7.....	5
<i>Cal. Lab. Code</i> § 246.....	5
<i>Cal. Lab. Code</i> § 510 et seq.....	5
<i>Cal. Lab. Code</i> § 512.....	5
<i>Cal. Lab. Code</i> § 1194.....	5
<i>Cal. Lab. Code</i> § 1197.....	5
<i>Cal. Lab. Code</i> § 1197.1.....	5
<i>Cal. Lab. Code</i> § 2698 et seq.....	5
<i>Cal. Lab. Code</i> § 2802.....	5
<i>Cal. Lab. Code</i> § 2802(a).....	11
<i>Rule of Court Rule</i> 3.769(c)-(g).....	7
<i>Rule of Court Rule</i> 3.776(e)-(f).....	15

SECONDARY SOURCES

Conte & Newberg, <i>Newberg on Class Actions</i> , §11.26, 11.51 (4th ed. 2002) § 1 1:38	
.....	7
Eisenberg & Miller, <i>Incentive Awards to Class Action Plaintiffs: An Empirical Study</i> , 53 UCLA L. Rev. 1303 (2006)	
.....	16
Theodore Eisenberg & Geoffrey P. Miller, <i>Attorney Fees in Class Action Settlements: An Empirical Study</i> , <i>J. of Empirical Legal Studies</i> , Vol. 1, Issue 1, 27-78, March 2004, at 35	
.....	17
Wright, A. Miller & M. Kane, <i>Federal Practice and Procedure</i> § 1789, at 253 (2d ed. 1986)	
.....	15

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

Plaintiffs DEVIN TERRELL, NESHA SHEDD, and SUSAN BUSTOS (collectively hereinafter “Plaintiffs”) seek preliminary approval of the Class Action and PAGA Settlement Agreement and Class Notice (“Agreement”)¹, which if approved, would provide valuable monetary relief for approximately 326 members of the Class and 221 Aggrieved Employees. The basic terms of the Agreement provide for the following:

1. The “**Class,**” and “**Class Period**” mean all non-exempt employees who are or previously were employed by KAISERAIR, INC. (“Defendant”) and performed work in California during the Class Period. Agreement at § 1.6. The Class Period means the period from September 23, 2017, to January 18, 2023. Agreement at § 1.13. The Class is comprised of approximately 326 individuals who collectively worked approximately 35,288 Workweeks during the Class Period. Agreement at § 4.1.

2. The “**Participating Class Members**” means a Class Member who does not submit a valid and timely Request for Exclusion. Agreement at § 1.37.

3. The “**Aggrieved Employees**” means all non-exempt employees who are or previously were employed by Defendant and performed work in California during the PAGA Period. Agreement at § 1.4.

4. The “**PAGA Period**” means that period from July 19, 2020, to January 18, 2023. Agreement at § 1.33. At the time of mediation, there were approximately 221 Aggrieved Employees during the PAGA Period that who worked an aggregate of 7,503 PAGA Pay Periods. Agreement at § 4.1.

5. The “**Gross Settlement Amount**” is One Million Two Hundred Thousand Dollars (\$1,200,000.00). Agreement at § 1.24. The Gross Settlement Amount is non-reversionary and includes the following:

a. A “**Class Representative Service Payments**” in the total amount of Twenty Thousand Dollars and Zero Cents (\$20,000.00), allocated as follows: Five Thousand Dollars and Zero Cents (\$5,000.00) to each plaintiff Terrell and Shedd, and Ten Thousand Dollars and Zero Cents

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 (\$10,000.00) to plaintiff Bustos. Agreement at §§ 1.15 and 3.2.1.

2 b. An award of “**Class Counsel Fees Payment**” and “**Class Counsel Litigation**
3 **Expenses**” consisting of attorneys’ fees in the amount of up to one-third of the Gross Settlement
4 Amount currently estimated to be Four Hundred Thousand Dollars and Zero Cents (\$400,000.00)
5 (“Class Counsel Fees Payment”) **and** Class Counsel Litigation Expenses for reimbursement of actually
6 incurred litigation costs by Class Counsel in an amount not to exceed Twenty-Five Thousand Dollars
7 and Zero Cents (\$25,000.00). Agreement at §§ 1.8 and 3.2.2.

8 c. A “**PAGA Penalties**” of Sixty Thousand Dollars and Zero Cents (\$60,000.00) to
9 be allocated from the Gross Settlement Amount, with 25% of the payment going to the Aggrieved
10 Employees (“Individual PAGA Payments”) and 75% of the payment going to the Labor and Workforce
11 Development Agency (“LWDA PAGA Payment”). Agreement at §§ 1.36 and 3.2.5.

12 d. “**Administration Expenses Payment**” not to exceed \$12,000.00 payable to the
13 Settlement Administrator, ILYM Group, Inc., for, *inter alia*, the administration of the Notice Packet
14 and Individual Settlement Payments. Agreement at §§ 1.3 and 3.2.3.

15 5. The “**Net Settlement Amount**” refers to the portion of the Gross Settlement Amount less
16 Class Counsel Fees Payment, Class Counsel Litigation Expenses, Class Representative Service
17 Payments, PAGA Penalties, and Administration Expenses Payment. Agreement at § 1.30. The Net
18 Settlement Amount is approximately Six Hundred Eighty-Three Thousand Dollars and Zero Cents
19 (\$683,000.00) which will be allocated to all Participating Class Members on a pro-rata basis according
20 to the number of Workweeks each Participating Class Member worked during the Class Period.
21 Assuming there are zero opt-outs, the entire Net Settlement Amount will be paid to all Participating
22 Class Members resulting in an average Individual Class Payment of approximately **\$2,095.09**. JCL
23 Dec., ¶ 6.

24 6. The “**Released Class Claims**” means upon entry of an order granting final approval of
25 this settlement and upon funding of the Gross Settlement Amount, Plaintiff and the Participating Class
26 Members agree to release the Released Parties from “any and all claims, debts, liabilities, demands,
27 obligations, penalties, premium pay, guarantees, costs, expenses, attorney’s fees, damages, actions or
28 causes of action of whatever kind or nature, whether known or unknown, contingent or accrued, under

any legal theory under federal and state law for any alleged failure to pay all wages due (including minimum wage and overtime wages), failure to pay for all hours worked (including off-the clock and on-call work), failure to provide meal and authorize and permit rest periods, short/late meal and rest periods, failure to relieve of all duties during meal and rest periods, failure to reimburse business expenses, failure to provide or accurately calculate sick pay, failure to timely pay wages and final wages, failure to furnish accurate wage statements including claims derivative and/or related to these claims, liquidated damages, and conversion of wages through the Class Period. This Release shall include, claims that were raised, or that reasonably could have been raised based on the facts and allegations in the Complaint (after amended pursuant to Paragraph 1.5, above). This Release shall include all claims and theories arising under the applicable regulations, Wage Orders and Labor Code, as well as claims under Business and Professions Code section 17200 et seq., based on violations of the above Labor Code provisions. This release shall apply to all claims arising at any point during the Class Period. This release expressly excludes any claims for penalties arising under PAGA which are to be separately released by the PAGA Class. Agreement at §§ 1.41 and 6.3.

7. The “**Released PAGA Claims**” means upon entry of an order granting final approval of this settlement and upon funding of the Gross Settlement Amount, Defendant shall be entitled to a release from the Aggrieved Employees of all PAGA claims alleged in the operative complaint and Plaintiffs’ 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 §§ 1.42 and 6.4

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

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

6 II. FACTS AND PROCEDURE

7 A. Overview of the Litigation

8 Defendant is an Oakland, California based full-service aviation company operating charter
9 flights from Oakland and Santa Rosa airports. Plaintiff Terrell worked for Defendant as a non-exempt
10 Senior Lead LS Technician and Ramp Coordinator from December 2016 to March 2021. Plaintiff
11 Bustos worked for Defendant as a non-exempt Flight Attendant from August 2009 to March 2022.
12 Plaintiff Shedd has been employed by Defendant since October 2017, and has held the position of
13 Lead Flight Attendant since October 2019. Plaintiffs allege that Defendant, among other things, failed
14 to provide compliant meal and rest periods, furnished inaccurate itemized wage statements,
15 miscalculated the regular rate of pay for purposes of paying overtime compensation, and failed to
16 reimburse employees for mandatory business expenses. Throughout their employment, Plaintiffs were
17 subject to Defendant's written policies and procedures contained in, among other documents, the
18 KaiserAir Employee Handbook. JCL Dec., ¶ 8; Declaration of Devin Terrell ("DT Dec.") at ¶¶ 1-7;
19 Declaration of Nesha Shedd ("NS Dec.") at ¶¶ 1-7; Declaration of Susan Bustos ("SB Dec.") at ¶¶ 1-
20 7.

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

26 On July 19, 2021, Plaintiff Terrell served Defendant and the Labor and Workforce Development
27 Agency ("LWDA") with a Notice of Violations ("PAGA Notice"). Plaintiffs' PAGA Notice set forth
28 the facts and theories supporting Defendant's alleged violations of various provisions of the California

1 Labor Code and applicable Industrial Welfare Commissions (“IWC”) Wage Order and of his intent to
2 pursue claims under California Labor Code Private Attorneys General Act, Cal. Lab. Code Sections
3 2698 *et seq.* (“PAGA”). JCL Dec., ¶ 10.

4 On September 23, 2021, Plaintiff Terrell filed this class action complaint in the Alameda
5 Superior Court. The Action alleged ten causes of action against Defendant for: (1) Unfair Competition
6 in Violation of Bus. and Prof. Code sections 17200 *et seq.*; (2) Failure to pay overtime wages in violation
7 of California Labor Code sections 510 *et seq.*; (3) Failure to pay minimum wages in violation of
8 California Labor Code sections 1194, 1197 & 1197.1; (4) Failure to provide required meal periods in
9 violation of California Labor Code sections 226.7 and 512 and the applicable IWC wage order; (5)
10 Failure to provide required rest periods in violation of California Labor Code sections 226.7 and 512
11 and the applicable IWC wage order; (6) Failure to reimburse employees for required business expenses
12 in violation of California Labor Code section 2802; (7) Failure to provide accurate itemized wage
13 statements in violation of California Labor Code section 226; (8) Failure to pay sick pay at the correct
14 rate of pay in violation of California Labor Code section 246; (9) Failure to provide wages when due
15 in violation of Cal. Lab. Code sections 201, 202 and 203 and (10) Violations of the California Labor
16 Code Private Attorneys General Act [Labor Code section 2698, *et seq.*]. JCL Dec., ¶ 11.

17 After commencing written discovery, the Parties agreed to mediation. Following the successful
18 mediation, Plaintiff served an amended PAGA Notice and filed the operative First Amended Compliant
19 adding Plaintiffs Shedd and Bustos to the action. JCL Dec., ¶ 12.

20 **B. Class Counsels’ Investigation**

21 To prepare for mediation, Class Counsel requested pertinent documents and data points to
22 evaluate Plaintiffs’ claims and measure Defendant’s liability exposure to the Class. In response,
23 Defendant produced, among other things, time, and payroll records for 26% of the Class, aggregate
24 workweek and pay period data, and copies of applicable handbooks, policies, and procedures. In total,
25 Defendant produced nearly 1,000 pages of documents and approximately 1 million unique cells of time
26 and payroll data. JCL Dec., ¶ 13.

27 Class Counsel then retained the statisticians and economists at Berger Consulting Group
28 (“BCG”) to evaluate the Class Members’ payroll and time data and to calculate Defendant’s liability

1 exposure to the Class. BCG provides data analysis and damage modeling consulting services,
2 specializing in wage and hour class actions. BCG analyzed Defendant's time and payroll data and
3 developed various damage models that assisted Class Counsel at the time of mediation. JCL Dec., ¶
4 14.

5 Overall, Class Counsel thoroughly investigated the claims at issue. Class Counsel (1) reviewed
6 Plaintiffs' suitability as a putative class representatives through interviews, background investigations,
7 and analysis of her employment files; (2) evaluated Plaintiffs' potential claims; (3) researched similar
8 wage and hour class actions; (4) analyzed time and payroll records for the Class; (5) analyzed
9 Defendant's labor policies and practices; (6); developed comprehensive damage models which
10 estimated Defendant's liability for purposes of settlement with the assistance of a third party damages
11 consultant, BCG; (7) drafted the mediation brief; and (8) participated in the mediation. This
12 investigation allowed Class Counsel to fully assess the nature and magnitude of the claims being settled,
13 and to make an independent assessment of the reasonableness of the terms to which the Parties have
14 agreed. Based on its investigation of the facts, applicable law, and marketplace for similar settlements,
15 and considering the risk of significant delay and uncertainty associated with litigation, and the various
16 defenses asserted by Defendants, Class Counsel firmly believe this Agreement to be in the best interests
17 of the Class Members. Because the Settlement's terms are fair, reasonable, and adequate. JCL Dec.,
18 ¶ 15.

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

20 On November 18, 2022, the Parties participated in a full day mediation with Steven Rottman,
21 Esq., an experienced wage and hour mediator. The mediation concluded with a settlement after the
22 Parties accepted a Mediator's proposal, which was subsequently memorialized in the form of a
23 Memorandum of Understanding ("MOU") and then the Agreement. JCL Dec., ¶ 16. Class Counsel
24 submits that the Settlement constitutes a fair, adequate, and reasonable compromise of the claims at
25 issue. JCL Dec., ¶¶ 6, 17.

26 **III. ARGUMENT**

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

28 The proposed Settlement, including a Gross Settlement Amount of One Million Two Hundred

1 Thousand Dollars and Zero Cents (\$1,200,000.00), meets the standards for preliminary approval. Pre-
2 trial settlement of complex class actions is a judicially favored remedy. (*Officers for Justice v. Civil*
3 *Serv. Comm’n* (9th Cir. 1982) 688 F.2d 615, 625 (“Voluntary conciliation and settlement are the
4 preferred means of dispute resolution.”).) Class action settlement approval requires an early
5 “preliminary” review by the trial court and a subsequent “final” review after notice of the settlement
6 has been distributed to class members for their comments and objections. (C.R.C. 3.769(c)-(g);
7 *Cellphone Termination Fee Cases*, 180 Cal.App.4th 1110, 1118 (2010) (the court first “preliminarily
8 approves the settlement” and later “conducts a final approval hearing to inquire into the fairness of the
9 proposed settlement”).)

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

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

1 and adequate to all concerned.” (*Id.*)

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

4 “[W]hat transpires in settlement negotiations is highly relevant to the assessment of a proposed
5 settlement’s fairness.” (*State v. Levi Strauss & Co.* (1986) 41 Cal.3d 460, 482.) Courts presume the
6 absence of fraud or collusion in the negotiation of a settlement, unless evidence to the contrary is
7 offered; thus, there is a presumption that settlement negotiations are conducted in good faith. (Newberg,
8 § 11.51.)

9 The Parties participated in mediation with highly respected mediator Jeff Ross. Mediator Ross
10 managed the Parties’ expectations and provided a useful, neutral analysis of the issues and risks to both
11 sides. (*In re Apple Computer, Inc. Derivative Litig.* No. C 06-4128 JF (HRL), 2008 U.S. Dist. LEXIS
12 108195 (N.D. Cal. Nov. 5, 2008) (mediator’s participation weighs considerably against any inference
13 of a collusive settlement); *D’Amato v. Deutsche Bank* (2d. Cir. 2001) 236 F.3d 78, 85 (a “mediator’s
14 involvement in pre-certification settlement negotiations helps to ensure that the proceedings were free
15 of collusion and undue pressure.”).) The Parties only reached a settlement after both sides agreed to a
16 Mediator’s proposal, which was subsequently memorialized in a Memorandum of Understanding
17 (“MOU”). At all times, the Parties’ negotiations were at an arm’s length, adversarial, and non-
18 collusive. After reaching an agreement in the principle, the Parties drafted and negotiated a long-form
19 settlement which is the subject of the instant motion. Objectively, the Settlement terms are fair,
20 adequate and represent a reasonable compromise of the claims at issue. JCL Dec., ¶¶ 16-17.

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., ¶¶ 13-17.

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

5 The Gross Settlement Amount of \$1,200,000.00 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 \$1,200,000.00 is fair and reasonable considering the nature
21 and magnitude of the claims being settled and the various potential impediments to recovery. Prior to
22 mediation, Class Counsel retained BCG to develop economic damage models measuring Defendant's

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").

liability exposure while accounting for the uncertainties of continued litigation. The various models were informed by Class Counsel's investigation, including the analysis of a significant sample of time and payroll data. Class Counsel projected Defendant's liability exposure for *class claims* (excluding PAGA Penalties) at \$7,866,763.00 dollars. Thus, the Gross Settlement Amount of \$1,200,000.00 represents approximately 15.2% of Defendant's *class-wide* liability exposure. The following summarizes Defendant's estimated exposure. JCL Dec., ¶ 18.

(a) Estimated Damages for Miscalculation of the Regular Rate of Pay

Plaintiffs' primary claim in this Action is that Defendant failed to calculate certain non-discretionary compensation into the regular rate of pay for purposes of paying overtime and redeemed sick pay. Based on the review of the Class Members' time and payroll data, BCG estimated Defendant underpaid the Class Members approximately \$266,040. Defendant vigorously denied liability and asserted that all incentive compensation was either properly calculated into the regular rate of pay or properly excluded as discretionary compensation. JCL Dec., ¶ 19.

(b) Estimated Damages for Meal and Rest Period Violations

Plaintiffs also alleged that because of their rigorous work schedule, Plaintiff, Class Members, and Aggrieved Employees were not able to take timely and duty-free meal and rest periods. However, Plaintiffs' analysis showed that Defendant's time and payroll data evidenced a 57% violation rate for meal periods. Defendant's dispute this analysis and suggested the violation rate was significantly lower. Plaintiffs utilized the same 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 \$5,514,072. JCL Dec., ¶ 20.

Defendant argued, *inter alia*, that it provided the Class Members and Aggrieved Employees with compliant meal and rest periods as evidenced by the modest violation rate. Defendant also argued that they maintained facially compliant meal and rest period policies and paid more than \$50,000 in meal period premiums during the Class Period. Thus, Defendant argued, any missed meal and rest periods were done so voluntarily and not eligible for premium payments. In sum, Defendant argued that there was no potential liability for Plaintiffs' 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 Off the Clock Work

Plaintiffs also alleged that they were required to perform work while off-the-clock. Specifically, Plaintiffs alleged that during portions of the Class Period, Defendant required the Class to complete pre-shift COVID-19 screening while off-the-clock. Plaintiffs' expert estimated Defendant's exposure for this claim to be \$105,140.80 based on an assumed 5 minutes of uncompensated time spent performing mandatory pre-shift COVID-19 screening. Defendant argued that any time spent performing this task was voluntary and de minimis, and, thus, not compensable. JCL Dec., at ¶ 22.

(d) Exposure for Expense Reimbursement Claim

Plaintiffs further alleged that Defendant required the Class to use personal cell phones to receive and respond to work-related communications with supervisors and co-workers regarding task completions, scheduling, and flight information. California employers who require employees to use a personal cellular device for work purposes must reimburse the employee for the cost incurred in furnishing the device, including voice and data service. (See *Cal. Labor Code* § 2802(a), providing that "An employer shall indemnify his or her employee for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties, or of his or her obedience to the directions of the employer...".) Plaintiffs estimated Defendant's exposure for this claim at \$192,060 or \$20 per month for each member of the Class during the Class Period. JCL Dec., at ¶ 23.

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

Plaintiffs allege that Defendant's alleged violations resulted in derivative violations of Labor Code sections 203 and 226(a). Class Counsel considered the arguable presence of various penalties and weighed the potential recoveries against probable defenses. Specifically, Defendant could argue that Plaintiffs could not prove the "willful" prong needed to obtain waiting time penalties under Labor Code section 203. Additionally, Defendant could argue that Plaintiffs could not show that Class Members suffered an "injury" because of wage statement violations, as required by Labor Code section 226. Plaintiffs estimated Defendant's exposure for these claims to be approximately \$1,789,451 (\$1,050,201 for Labor Code section 203 waiting time penalties and \$739,250 for Labor Code section 226 penalties). JCL Dec., ¶ 24.

1 **(f) Defendant's PAGA Exposure**

2 Class Counsel's damage models also estimated Defendant's exposure for PAGA penalties. At
3 the time of mediation, Plaintiffs estimated Defendant's PAGA exposure to be approximately \$3,575,700
4 dollars. JCL Dec., ¶ 25. Under PAGA, Courts have considerable discretion to reduce the penalty award.
5 In *Fleming v. Covidien*, 2011 U.S. Dist. LEXIS 154590 (C.D. Cal. 2011), a federal court reduced PAGA
6 penalties from \$2,800,000 to \$500,000, a reduction of 82.2%, because the court found maximum
7 penalties "unjust" because the employees had suffered no injuries. Some trial courts have awarded no
8 civil penalties, even when Labor Code violations are established. See *In re Nordstrom Com. Cases*, 186
9 Cal.App.4th 576, 589 (2010) (affirming an award of \$0 in PAGA penalties in a wage and hour class
10 action); *In re Taco Bell Wage & Hour Actions*, 2016 U.S. Dist. LEXIS 48557, *40-43 (E.D. Cal. Apr.
11 6, 2016) (PAGA penalties denied after trial).

12 To recover any PAGA penalties, Plaintiffs would be required at trial to prove each of the
13 underlying Labor Code violations. See *Cardenas v. McLane Foodservice, Inc.*, 2011 U.S. Dist. LEXIS
14 13126, *10 (C.D. Cal. 2011) ("Given the statutory language [of PAGA], a plaintiff cannot recover on
15 behalf of individuals whom the plaintiff has not proven suffered a violation of the Labor Code by the
16 defendant."). Here, Plaintiffs would need to prove that each Aggrieved Employee suffered a violation
17 for each pay period the employee worked. Again, Defendant raised several defenses that presented
18 serious threats to the claims of the Plaintiffs and the Aggrieved Employees. In addition to those
19 arguments discussed *supra*, Defendant also argued that the Court of Appeals' decision in *Cacho v.*
20 *Eurostar, Inc.* (2019) 43 Cal.App.5th 885, weakened Plaintiffs' claims, on liability, value, and
21 manageability as to the rest period claims. JCL Dec., ¶ 26.

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

1 The proposed Settlement allocates \$60,000 to satisfy the PAGA claims. This amount represents
2 approximately 5% of the Gross Settlement Amount. This achieves a fair, reasonable, and adequate
3 resolution of Plaintiffs' PAGA claim. See *Moniz v. Adecco* (2021) 72 Cal.App.5th 56. Further, the
4 amount allocated to the satisfaction of Plaintiffs' PAGA claim, is well within the range of
5 reasonableness. See, e.g., *Nordstrom Comm'n Cases* (2010) 186 Cal.App.4th 576, 589 (approving 0%
6 PAGA allocation); *Berry v. Urban Outfitters* (N.D. Cal. Lead Case No. 13-cv-02628-JSW) (approving
7 1% PAGA allocation in \$5M settlement); *Jack v. Hartford Fire Ins. Co.* (S.D. Cal. 2011) 2011 WL
8 4899942 * 6 (approving \$3,000 PAGA allocation in \$1.2M settlement); *Singer v. Becton Dickinson &*
9 *Co.* (S.D. Cal. 2010) 2010 WL 2196104 *2 (approving \$3,000 PAGA allocation in \$1M settlement);
10 and *Hopson v. Hanesbrands, Inc* (N.D. Cal. 2009) 2009 WL 928133 * 9 (approving \$1,500 PAGA
11 allocation in \$1.026M settlement.) JCL Dec., ¶ 27.

12 4. Inherent Risks of Continued Litigation Support Preliminary Approval.

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

18 With respect to the most immediate challenge, i.e., class certification, the risks attendant to the
19 certification of similar wage and hour claims are demonstrated by *Magadia v. Wal-Mart Associates,*
20 *Inc.* (9th Cir. 2021) 999 F.3d 668. There, the Ninth Circuit, vacated reversed and remanded a \$110
21 million judgement against an employer for, *inter alia*, inaccurately paying overtime, and directed the
22 trial court to enter judgement in favor of the employer. See also *O'Conner v. Uber Technologies, Inc.*
23 (9th Cir. 2018) 904 F.3d 1087 (decertification of wage and hour misclassification action); see also
24 *Duran v. U.S. Bank National Association* (2014) 59 Cal.4th 1, 31 (reversing a trial verdict in favor
25 plaintiffs in a wage and hour class action)); *Tien v. Tenet Healthcare Corp.* (2012) 209 Cal.App.4th
26 1077, 1088 ("[T]he reason, if any, that employees might not take their breaks were predominantly
27 individualized questions of fact not susceptible to class treatment."); *Ali v. U.S.A. Cab Ltd.* (2009) 176
28 Cal.App.4th 1333, 1341 (affirming denial of certification because employees' declarations attesting to

1 having taken meal and rest breaks demonstrated that individualized inquiries were required to show
2 harm); *Campbell v. Best Buy Stores, L.P.*, (C.D. Cal. 2013) 2013 WL 5302217 at *11-13 (following
3 *Brinker* and denying certification of proposed off-the-clock and rest and meal break classes due to lack
4 of uniform policy); *Brown v. Fed Express Corp.* (C.D. Cal. 2008) 249 F.R.D. 580, 587-88 (denying
5 certification of driver meal and rest period claims based on the predominance of individual issues).
6 Collectively, the examples cited above illustrate the uncertain nature of class litigation. Consequently,
7 the uncertainty of obtaining certification through a contested motion is a significant risk factor favoring
8 settlement. JCL Dec., ¶ 28.

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

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

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

19 Finally, continuing to litigate this action would require continued and extensive resources
20 coupled with significant Court time to proceed through trial and post-trial motions, which can often
21 take years. Furthermore, wage and hour litigation is complex and expensive, as it often necessitates
22 extensive expert testimony, particularly with regards to damages. But even if Plaintiffs are successful
23 at trial, Plaintiffs are acutely aware that a judgment does not end the litigation. Plaintiffs fully expect
24 that Defendant would appeal any favorable judgment. As demonstrated by *Magadia, supra*, 999 F.3d
25 668, the risk of an appeal and subsequent reversal is real. JCL Dec., ¶ 29. “Avoiding such a trial and
26 the subsequent appeal in this complex case strongly militates in favor of settlement rather than further
27 protracted and uncertain litigation.” (*Nat’l Rural Telecomms. Coop v. DirecTV* (C.D. Cal. 2004) 221
28 F.R.D. 523, 527.) Thus, “unless the settlement is clearly inadequate, its acceptance and approval are

1 preferable to lengthy and expensive litigation with uncertain results.” (*Id.* at 526.)

2 Given the amount of the settlement here, as compared to potential value of the claims, offset by
3 the various inherent risks to continued litigation, the settlement is fair and reasonable. JCL Dec., ¶ 30.

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

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

14 The Parties jointly drafted the Class Notice which fairly and neutrally informs the Class of their
15 rights and remedies. The Settlement Administrator will first verify addresses, then mail the proposed
16 Class Notice to the entire Class. The Class Notice includes information regarding the nature of the
17 lawsuit, a summary of the substance of the Settlement’s terms, the procedure, and time within which
18 to requests for exclusions or objections to the Settlement, the date for the final approval hearing, the
19 formula used to calculate settlement payments, and the terms and scope of the Released Class Claims.
20 Agreement at §§ 1.12 and 8.4. The Parties negotiated this method to ensure delivering the most
21 reasonable method of notice to the Class while ensuring cost effective administration of the Settlement.
22 JCL Dec., ¶¶ 31-32.

23 Accordingly, both the method of disseminating the Notice Packet and content of the Notice
24 Packet satisfy due process. (*See* C.R.C. 3.776(e)-(f); *State of Cal. v. Levi Strauss* (1986) 41 Cal.3d
25 460,485 (the class notice must “fairly apprise the class members of the terms of the proposed

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.

1 compromise and of the options open to dissenting class members.”.)

2 **C. The Court Should Preliminarily Approve the Class Representative Service Payments**

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

14 The Settlement provides for an Enhancement Award of \$5,000 to each Plaintiff Terrell and
15 Plaintiff Shedd, and \$10,000 to Plaintiff Bustos. Unlike Terrell and Shedd, Bustos is granting
16 Defendant a broad waiver of California Civil Code Section 1542. The Service Payments are fair and
17 reasonable compensation for the Plaintiffs’ efforts bringing the action, assisting Class Counsel with the
18 litigation and settlement, regularly conferring with Class Counsel on the status of his case and the
19 strategies for prosecuting the claims, reviewing the proposed Settlement to ensure that its terms are fair
20 and provide adequate relief for the Settlement Class. JCL Dec., ¶ 33.

21 Class Counsel on behalf of Plaintiffs will file a formal motion for the negotiated Class
22 Representative Service Award once preliminary approval of the Settlement is granted. Plaintiffs
23 respectfully submits that the above showing is sufficient for preliminary approval of the negotiated
24 Class Representative Service Award. JCL Dec., ¶ 34.

25 **D. The Court Should Preliminarily Approve the Class Counsel Fees Payment and Litigation**
26 **Expenses Payment**

27 The purpose of the attorneys’ Fees in class action litigation is to reward counsel who took the
28 risk of non-payment and invested in a case that achieved a substantial positive result for the class.

1 California courts routinely award attorneys' fees equaling one-third or more of the potential value of
2 the common fund, the amount requested under this settlement. (*See Chavez v. Netflix, Inc.* (2008) 162
3 Cal.App.4th 43, 66 n.11 ("Empirical studies show that regardless whether the percentage method or the
4 lodestar method is used, fee awards in class actions average around one-third of the recovery.");
5 Theodore Eisenberg & Geoffrey P. Miller, *Attorney Fees in Class Action Settlements: An Empirical*
6 *Study, J. of Empirical Legal Studies*, Vol. 1, Issue 1, 27-78, March 2004, at 35 (independent studies of
7 class action litigation nationwide have come to a similar conclusion that a one-third fee is consistent
8 with market rates).)

9 Class Counsel took this matter on a contingency fee basis and invested significant time and
10 expense successfully prosecuting Plaintiffs' claims. As discussed *supra*, the estimated average
11 Individual Class Payments illustrates the demonstrably positive outcome for the Class. Considering
12 the positive outcome, and considering the supporting authority, the proposed Class Counsel Fees
13 Payment and Class Counsel Litigation Expenses Payment are fair and reasonable. JCL Dec., ¶ 35.

14 Plaintiffs will file a formal motion for the Class Counsel Fees Payment and Class Counsel
15 Litigation Expenses Payment once preliminary approval of the Settlement is granted. Plaintiffs
16 respectfully submits that the above showing is sufficient for preliminary approval of the negotiated
17 attorneys' fees. JCL Dec., ¶ 36.

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

19 For Settlement, Plaintiffs contend, and Defendant does not dispute, that provisional certification
20 of the Class is appropriate. JCL Dec., ¶ 37.

21 **1. The Standard for Class Certification**

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

1 *Sav-On*, 34 Cal.4th at 333.)

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

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

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

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

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

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

25 Plaintiffs’ wage and hour claims are typical of the proposed Settlement Class because they arise
26 from the same factual basis and are based on the same legal theories applicable to the other Class
27 Members. Likewise, Plaintiffs’ interests are entirely coextensive with the interests of the Settlement
28 Class. Plaintiffs allege that she was injured by the same company-wide practices to which the proposed

1 Class Members were subject to and seeks the same relief. Plaintiffs have already demonstrated his
2 ability to advocate for the interests of the Class Member by initiating this litigation, undertaking
3 extensive class discovery, and evaluating the proposed settlement to assure that it is fair. JCL Dec., ¶
4 40.

5 Additionally, Plaintiffs are represented by competent Class Counsel who have extensive
6 experience in litigating wage and hour class action cases. Class Counsel successfully briefed, argued,
7 certified, and gained state court settlement approval of the same class-wide causes of action that are at
8 issue in this case. Class Counsel's wage and hour class action experience establishes that they are well
9 qualified to represent the interests of this Class. JCL Dec., ¶¶ 5, 41; Declaration of Shani Zakay, ¶¶ 1-
10 3.

11 A class action is superior to a multitude of individual lawsuits. Given the size and amount of
12 each individual claim, the Class Members likely have little incentive to litigate their claims on an
13 individual basis because the out-of-pocket expense and personal commitment necessary to litigate each
14 claim outweighs any potential recovery. In sum, class treatment is superior to individual, case-by-case
15 adjudication. JCL Dec., ¶ 42.

16 IV. CONCLUSION

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

20
21 Dated: March 6, 2023

JCL LAW FIRM, APC

22 By: 
23 Jean-Claude Lapuyade, Esq.