

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

JCL LAW FIRM, APC
Jean-Claude Lapuyade (State Bar #248676)
Eduardo Garcia (State Bar #290572)
5440 Morehouse Drive, Suite 3600
San Diego, CA 92121
Telephone: (619)599-8292
Facsimile: (619) 599-8291
jlapuyade@jcl-lawfirm.com
egarcia@jcl-lawfirm.com

Attorneys for Plaintiff

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SACRAMENTO

COURTENAY ARNESON, an individual,
on behalf of herself and on behalf of all
persons similarly situated,

Plaintiff,

v.

BAHN THAI, INC. (dba Thai Basil Café /
Veg Café & Bar), a California Corporation;
and DOES 1-50, Inclusive,

Defendants.

Case No: 34-2021-00295429

Action Filed: 01/12/21

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PLAINTIFF'S MOTION FOR
PRELIMINARY APPROVAL**

Hearing Date: January 11, 2022

Hearing Time: 1:30 p.m.

Reservation ID: 2602238

Judge: Shama H. Mesiwala

Dept.: 53

Trial Date: Not Set

Action Filed: February 26, 2021

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I. INTRODUCTION

Plaintiff COURTENAY ARNESON (“Plaintiff”) seeks preliminary approval of the Stipulation of Settlement of Class Action Claims and Release of Claims (“Agreement”)¹, which if approved, would provide valuable monetary relief for approximately 110 Class Members and 59 Aggrieved Employees. The basic terms of the Agreement provide for the following:

1. The “**Class Members**” and “**Class Period**” shall mean all non-exempt employees who are or previously were employed by defendant BAHN THAI, INC. d.b.a. Thai Basil Café/Veg Café & Bar) (“Defendant”) in California during the period between February 26, 2017 and September 17, 2021 (“Class Period”). The Class Members excludes any Class Member who submits a timely and valid request for exclusion. Agreement at §§ I(G) and (FF).

2. The “**Aggrieved Employees**” and “**PAGA Period**” means all non-exempt employees who are or were previously employed by Defendant in California (“Aggrieved Employees”) between October 22, 2019 and September 26, 2021 (“PAGA Period”). Agreement at §I(B).

3. The “**Total Settlement Amount**” is One Hundred Thirty Thousand Dollars (\$130,000) and paid in one lump sum by the Funding Date. Agreement at §§I(I) and (GG). The releases granted to Defendant only become effective upon the funding of the Total Settlement Amount. §III(B). The Total Settlement Amount is non-reversionary and includes the following:

a. A “**Class Representative Service Award**” in the amount of \$7,500 to Plaintiff for her services on behalf of the Settlement Class, and for agreeing to a broad general release of California Civil Code section 1542. Agreement at § III(M)(9).

b. A “**Class Counsel Award**” in the amount not to exceed one-third of the Total Settlement Amount for attorney’s fees, currently estimated to be \$43,333,33 **and** litigation costs and expenses not to exceed \$9,000, to be paid to Class Counsel. Agreement at §III(M)(10).

c. A “**PAGA Settlement**” of \$5,000 shall be allocated from the Total Settlement Amount for settlement of claims for civil penalties under the Private Attorneys General Act of 2004 (“PAGA Amount”). The Settlement Administrator shall pay 75% of the PAGA Settlement (“LWDA

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.

Payment”) the California Labor and Workforce Development Agency. The Settlement Administrator shall distribute 25% of the PAGA Amount (“Aggrieved Employee Payment”) to members of the Aggrieved Employees. Agreement at §III(M)(11).

d. And “**Settlement Administration Costs**” not to exceed \$6,000 payable to the proposed Settlement Administrator, ILYM Group, Inc., for, *inter alia*, the administration of the Notice Packet and Individual Settlement Payments. Agreement at §III(M)(12).

3. The “**Net Settlement Fund**” of approximately \$59,166.67 (Total Settlement Amount minus the requested Class Representative Service Award, Class Counsel Award, PAGA Settlement and Settlement Administration Costs) which will be allocated to all participating Class Members, i.e., Settlement Class Members, on a pro-rata basis according to the number of Workweeks each Settlement Class Member performed during the Class Period. Agreement at §III(M)(1); JCL Dec., ¶ 5.

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

As discussed below, the proposed Settlement satisfies all criteria for preliminary settlement approval under California law and falls within the range of reasonableness. The average Individual Settlement Share to the Settlement Class Members meets or exceeds awards in similar wage and hour class actions. Moreover, the proposed Class is appropriate for provisional certification. Accordingly, Plaintiff respectfully requests that this Court grant preliminary approval of the Settlement. JCL Dec., ¶ 6.

II. FACTS AND PROCEDURE

A. Overview of the Litigation

Defendant owns and operates two restaurants in Sacramento County. Plaintiff was employed by Defendant as an hourly, non-exempt, waitress from approximately January 2020 to February 2020.

1 Plaintiff was paid on an hourly basis and was entitled to overtime pay and California-compliant meal
2 and rest breaks. Plaintiff was responsible for receiving customers, taking their orders, serving the
3 customers food, and generally being attentive to customers' requests. JCL Dec., ¶ 7.

4 On October 22, 2020, Plaintiff served Defendant and the Labor and Workforce Development
5 Agency ("LWDA") with a Notice of Violations ("PAGA Notice"). Plaintiff's PAGA Notice set forth
6 the facts and theories supporting Defendant's alleged violations of various provisions of the California
7 Labor Code and applicable Industrial Welfare Commissions ("IWC") Wage Order and of his intent to
8 pursue claims under California Labor Code Private Attorneys General Act, Cal. Lab. Code Sections
9 2698 et seq ("PAGA"). JCL Dec., ¶ 8.

10 Subsequently, on February 26, 2020, Plaintiff filed this class action against Defendant in the
11 Sacramento Superior Court alleging claims for (1) unfair business practices; (2) failure to pay minimum
12 wage; (3) failure to pay overtime; (4) failure to authorize or permit meal breaks; (5) failure to authorize
13 or permit rest breaks; (6) failure to furnish accurate wage statements; (7) failure to provide wages when
14 due; (8) violations of the Private Attorney General Act at Labor Code section 2698 *et seq.*; (9) and failure
15 to reimburse for required business expenses in violation of Cal. Lab. Code §2802 (the "Action"). JCL
16 Dec., ¶ 9.

17 Generally, Plaintiff alleges that Defendant failed to pay employees for all time worked, including
18 overtime, failed to provide them with proper meal breaks and rest breaks, failed to separately compensate
19 employees for rest breaks, failed to provide them with complete and accurate wage statements, failed to
20 reimburse them for business expenses, engaged in unfair business practices, and failed to timely pay
21 them all wages owed at the time of the separation of their employment. Plaintiff's complaint seeks
22 unpaid wages, statutory penalties, civil penalties, attorneys' fees, litigation costs², and any other
23 equitable or legal relief allegedly due and owing to Plaintiff and the other Class Members by virtue of
24 the foregoing claims. JCL Dec., ¶ 10.

25
26 ///

27
28 ² Plaintiff will provide a lodestar analysis for the fees and supporting evidence of the costs with the
final approval papers.

1 After filing the complaint, Plaintiff propounded written discovery aimed at identifying the Class
2 Members. Prior to answering the written discovery, the Parties agreed to mediate Plaintiff's class and
3 representative PAGA claims. JCL Dec., ¶ 11.

4 In anticipation of mediation, the Parties stipulated to stay formal discovery. To prepare for
5 mediation, the Parties agreed to informally produce certain documents and data points subject to the
6 mediation privilege, including but not limited to, the Class Members' time and payroll data. As
7 discussed *infra*, Plaintiff's counsel retained the Berger Consulting Group, to analyze Defendant's time
8 and payroll data. JCL Dec., ¶ 12.

9 On September 17, 2021, the Parties participated in a full day mediation with Jill Sperber, Esq.
10 The mediation concluded with a settlement after both sides agreed to a Mediator's proposal which was
11 subsequently memorialized in the form of a Memorandum of Understanding. After reaching an
12 agreement in principle, the parties drafted and negotiated a long-form settlement agreement, which is
13 the subject of the instant motion. JCL Dec., ¶ 13.

14 **B. Class Counsel Thoroughly Investigated the Factual and Legal Issues**

15 In May 2020, Class Counsel began its pre-filing investigation into Plaintiff's complaints. Class
16 Counsel's investigation started with several lengthy interviews with Plaintiff. As part of the interview
17 process, Plaintiff produced numerous documents related to her employment for Defendant. At the
18 conclusion of the interviews, Class Counsel determined that Plaintiff's complaints justified further
19 inquiry. JCL Dec., ¶ 14.

20 Class Counsel subsequently requested Plaintiff's employee file from Defendant. In response,
21 Defendant produced a number of documents, including but not limited, a copies of Plaintiff's hiring
22 documents. Class Counsel reviewed and analyzed the documents and determined the documents
23 substantiated Plaintiff's claim that Defendant's failed to, among other things, provide complaint meal
24 and rest periods. Shortly thereafter, Class Counsel summarized the known factual and legal issues in
25 the PAGA Notice addressed to the LWDA. Several weeks later, Class Counsel filed this class action.
26 JCL Dec., ¶ 15.

27 In anticipation of mediation, Defendant produced the time and payroll records for the Class
28 members, aggregate workweek and pay period data for 100% of the Settlement Class, and copies of

1 applicable handbooks containing, *inter alia*, compensation, timekeeping and, meal and rest period
2 policies. In total, Defendant produced approximately 4,500 pages containing nearly one-half million
3 unique cells of time and payroll data for Class Counsel to. JCL Dec., ¶ 16.

4 Class Counsel then retained the statisticians and economists at Berger Consulting Group
5 (“BCG”), to evaluate the Class Members’ payroll and time data. BCG provides data analysis and
6 damage modeling consulting services specializing in wage and hour class actions. BCG’s team of
7 financial and data analysts are credentialed and experienced experts in their fields and have provided
8 their expertise on thousands of cases. Stated differently, the BCG is uniquely qualified to analyze
9 Defendant’s time and payroll data. JCL Dec., ¶ 17.

10 BCG analyzed Defendant’s time and payroll data to assist in the development of various damage
11 models. Among other things, BCG determined the approximate number of work shift, work weeks,
12 pay periods, average rate of pay, average length of shift and average number of hours worked per week
13 and pay period during the Class Period. BCG also estimated the number of missed, late or truncated
14 meal and rest periods and the amount of meal period premiums paid during the Class Period. JCL Dec.,
15 ¶ 18.

16 In advance of mediation, Class Counsel created several damage models predicated on BCG
17 analysis. Class Counsel’s models calculated Defendant’s potential liability exposure while accounting
18 for the uncertainties of continued litigation. These damage models informed and guided Class Counsel
19 during the mediated settlement discussions. JCL Dec., ¶ 19.

20 Overall, Class Counsel thoroughly investigated the claims at issue, including: (1) determining
21 Plaintiff’s suitability as a putative class representative through interviews, background investigations,
22 and analysis of his employment files; (2) evaluating all of Plaintiff’s potential claims; (3) researching
23 similar wage and hour class actions as to the claims brought, the nature of the positions, and the type
24 of employer; (4) analyzing the Settlement Class’ time and payroll records; (5) analyzing Defendant’s
25 labor policies and practices; (6) researching settlements in similar cases as well as outstanding issues
26 which could affect settlement approval; (7) evaluating Plaintiff’s claims and estimating Defendant’s
27 liability for purposes of settlement; (8) drafting the mediation brief and (9) participating in the
28 mediation. This investigation allowed Class Counsel to fully assess the nature and magnitude of the

claims being settled, as well as the impediments to recovery, such as to make an independent assessment of the reasonableness of the terms to which the parties have agreed. JCL Dec., ¶ 20.

C. The Parties Settled at Mediation

On September 17, 2021, the Parties conducted a mediation with Jill Sperber, Esq., a highly regarded wage and hour mediator. Mediator Sperber helped to manage the Parties' expectations and provided a useful, neutral analysis of the issues and risks to both sides. The Parties made substantial progress with the Mediator's assistance. Namely, the parties exchanged information regarding their respective claims and defense, including their respective evaluation of the damages. After hours of arm's length and adversarial negotiations, the mediation nearly concluded without a settlement. However, at the conclusion of the mediation, Mediator Sperber issued a proposal for settlement that the Parties accepted. The complete and final terms of the Parties' settlement are now set forth in the Agreement. Class Counsel submits that the Settlement constitutes a fair, adequate, and reasonable compromise of the claims at issue. JCL Dec., ¶¶ 21-23.

D. The Proposed Settlement Fully Resolves Plaintiff's Claims

1. The Composition of the Class

The proposed Class consists of all non-exempt employees who are or were previously employed by Defendant in California between February 26, 2017 and September 17, 2021. The Settlement Class excludes any person who submits a timely and valid request for exclusion. Agreement at §§ I(G) and (FF). There are approximately 110 Class Members that worked an estimated 5,500 workweeks during the Class Period. Agreement at §III(A)(2).

2. The Settlement Consideration

The Parties agreed to settle the underlying class claims in exchange for the Total Settlement Amount of \$130,000. The Total Settlement Amount Fund: (1) Individual Settlement Payments to the Settlement Class; (2) a Class Representative Service Award of \$7,500 to Plaintiff for her services on behalf of the Class Member and, equally important, for a general release of claims; (3) a PAGA Settlement in the amount of \$5,000; (4) Settlement Administration costs estimated at \$6,000, (5) Class Counsel Award in the amount of \$52,333.33, comprised of attorneys' fees equal to one-third of the Total Settlement Amount estimated to be at least \$43,333.33 and an estimated \$9,000 for actually

1 incurred litigation expenses. Agreement at §III(M).

2 Subject to the Court approving the Class Representative Service Award, Class Counsel Award,
3 PAGA Settlement, and Settlement Administration Costs, the Net Settlement Amount will be distributed
4 to each participating member of the Settlement Class Member. Agreement at §III(M)(1). There is no
5 reversion to Defendant and Defendant must separately pay for its share of the employer payroll taxes.
6 Agreement at §III(A)(1).

7 3. Formula for Calculating Individual Settlement Payments

8 Each participating member of the Settlement Class will receive an Individual Settlement
9 Payment. The Individual Settlement Payment will be proportional to the number of Workweeks each
10 Settlement Class member worked for Defendant during the Class Period. Using the Class Data, the
11 Settlement Administrator shall add up the total number of Workweeks for all Settlement Class
12 Members. Each Settlement Class Member's final Individual Settlement Payment will be calculated by
13 multiplying the Net Settlement Amount by a fraction, the numerator of which is the Settlement Class
14 Member's total number of Workweeks, and the denominator of which is the total number of
15 Workweeks of all Settlement Class Members. Agreement at §III(M)(1).

16 Each Individual Settlement Payment will be reduced by any legally mandated employee tax
17 withholdings (e.g., employee payroll taxes, etc.). Agreement at §III(M)(1). Individual Settlement
18 Payments for Class Members who submit valid and timely requests for exclusion will be redistributed
19 to Settlement Class Members on a pro rata basis. Agreement at §III(M)(1). Given that there are
20 approximately 110 Class Members, **the average gross recovery is approximately \$537.87** (Net
21 Settlement Amount divided by Class Members). JCL Dec., ¶ 5.

22 4. Release by Participating Settlement Class Members

23 Generally, as of the Funding Date, Plaintiff and the Settlement Class Members will agree to
24 release the Released Parties from the Released Claims (those class claims alleged in the complaint
25 which occurred during the Class Period, and expressly excluding all other claims, including claims for
26 vested benefits, wrongful termination, unemployment insurance, disability, social security, workers'
27 compensation, and class claims outside the Class Period). Agreement at §§I(Z) and III(B).

28 ///

5. Release by the LWDA and the Aggrieved Employees

Generally, upon the Funding Date the LWDA and the Aggrieved Employees will release all PAGA Claims alleged in the operative complaint and Plaintiff's noticer 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 class claims outside the PAGA Period. Agreement at §§I(AA) and III(C).

III. ARGUMENT

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

The proposed Settlement, including a Total Settlement Amount of \$130,000 meets the standards for preliminary approval. Pre-trial settlement of complex class actions is a judicially favored remedy. (*Officers for Justice v. Civil Serv. Comm'n* (9th Cir. 1982) 688 F.2d 615, 625 ("Voluntary conciliation and settlement are the preferred means of dispute resolution.")) In California, class action settlement approval requires an early "preliminary" review by the trial court and a subsequent "final" review after notice of the settlement has been distributed to class members for their comments and objections. (C.R.C. 3.769(c)-(g); *Cellphone Termination Fee Cases*, 180 Cal. App. 4th 1110, 1118 (2010) (the court first "preliminarily approves the settlement" and later "conducts a final approval hearing to inquire into the fairness of the proposed settlement").)

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

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

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

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

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

The Parties participated in mediation with the highly respected wage and hour mediator Jill Sperber, Esq. Mediator Sperber managed the Parties’ expectations and provided a useful, neutral analysis of the issues and risks to both sides. (*In re Apple Computer, Inc. Derivative Litig*, No. C 06-4128 JF (HRL), 2008 U.S. Dist. LEXIS 108195 (N.D. Cal. Nov. 5, 2008) (mediator’s participation weighs considerably against any inference of a collusive settlement); *D’Amato v. Deutsche Bank* (2d. Cir. 2001) 236 F.3d 78, 85 (a “mediator’s involvement in pre-certification settlement negotiations helps to ensure that the proceedings were free of collusion and undue pressure.”).) At all times, the Parties’ negotiations were at an arm’s length, adversarial and non-collusive. In fact, despite hours of mediated negotiations, the Parties reached an impasse and the mediation session nearly concluded without a settlement. The matter resolved only when Mediator Sperber issued a mediator’s proposal that the Parties accepted. JCL Dec., ¶ 22.

Once the Parties agreed to the Mediator’s proposal, the Parties engaged in protracted negotiations

1 regarding the written terms of the class action settlement. The Parties maintained the arm's length, non-
2 collusive and adversarial negotiations while arriving at the final terms of the Settlement. The
3 Agreement is the final product of these mediated negotiations. Objectively, the Settlement terms are
4 fair, adequate and represent a reasonable compromise of the claims at issue. JCL Dec., ¶ 23.

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

7 As set forth in greater detail above, Class Counsel conducted a very thorough investigation into
8 the factual and legal issues in dispute. In addition to informal discovery, witness interview, document
9 review, data analysis and legal research, Class Counsel also researched similar wage and hour actions.
10 Although no two cases are identical, this research provided Class Counsel with a marker to inform
11 settlement discussions and, ultimately, to measure this settlement against. The investigation allowed
12 to Class Counsel to realistically assess the value of Plaintiff's claims and intelligently engage defense
13 counsel in settlement discussions that culminated in the proposed settlement now before the Court. JCL
14 Dec., ¶¶ 14-20.

15 Class Counsel only agreed to enter the Settlement following his thorough investigation and
16 evaluation of Plaintiff's claims. Based on his investigation of the facts, applicable law, and marketplace
17 for similar settlements, and in light of the risk of significant delay, uncertainty associated with litigation,
18 and the various defenses asserted by Defendant, Class Counsel firmly believes this Agreement to be in
19 the best interests of Settlement Class. Because the Settlement's terms are fair, reasonable, and
20 adequate, the Court should preliminarily approve the Settlement. JCL Dec., ¶ 20.

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

22 The Total Settlement Amount of \$130,000 is well within the range of reasonable for preliminary
23 approval. To determine whether a settlement is fair and reasonable, the court should "consider enough
24 information about the nature and magnitude of the claims being settled, as well as the impediments to
25 recovery, to make an independent assessment of the reasonableness of the terms to which the parties
26 have agreed." (*Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 133.) In making this
27 determination, the court is "not to try the case" but rather "satisfy itself that the class action settlement
28 is within the 'ballpark of reasonableness.'" (*Id.* (emphasis added).) For this analysis, courts do "not

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

9 **a. The Total Settlement Amount Meets the Recognized Range of**
10 **Reasonableness.**

11 The Total Settlement Amount of \$130,000 is fair and reasonable considering the nature and
12 magnitude of the claims being settled and the various potential impediments to recovery. Prior to
13 mediation, Class Counsel retained BCG to develop varied economic damages models measuring
14 Defendant’s liability exposure while accounting for the uncertainties of continued litigation. The
15 various models were informed by Class Counsel’s investigation, including the analysis of a significant
16 sample of time and payroll data. Class Counsel projected Defendant’s liability exposure for class-wide
17 and PAGA damages and penalties ranged between approximately \$1,029,527 dollars (“Conservative
18 Model”) and approximately \$1,519,927 dollars (“Aggressive Model”) if successful at trial. Both
19 models, account for the maximum class-wide **damages** of approximately \$624,227. However, the
20 range between the Conservative and Aggressive model reflects the uncertainty regarding Plaintiff’s
21 ability to obtain subsequent violation rate penalties under PAGA. Consequently, Defendant’s PAGA
22 exposure ranged between \$405,300 - \$895,700. Thus, the Total Settlement Amount of \$130,000
23 represents approximately 20% of the class-wide verdict value of the claims being released and between
24 8% and 12% of the full verdict value of class and PAGA claims. JCL Dec., ¶ 24-36.

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

26 “It can be difficult to ascertain with precision the likelihood of success at trial. The Court cannot
27 and need not determine the merits of the contested facts and legal issues at this stage, [Citation], and to
28 the extent courts assess this factor, it is to ‘determine whether the decision to settle is a good value for a

1 relatively weak case or a sell-out of an extraordinary strong case.” (*Misra v. Decision One Mortg. Co.*
2 (C.D. Cal. 2009) 2009 WL 4581276, at *7.)

3 With respect to the most immediate challenge, i.e., class certification, the risks attendant to the
4 certification of similar wage and hour claims are demonstrated by *Donohue v. AMN Services, LLC*
5 (2018) 29 Cal.App.5th 1068 (cert granted.) In *Donohue*, Fourth District Court of Appeal affirmed Hon.
6 Joel Pressman’s denial of class certification for missed meal and rest periods by call center employees.
7 (*See also O’Conner v. Uber Technologies, Inc.* (9th Cir. 2018) 904 F.3d 1087 (decertification of wage
8 and hour misclassification action); *see also Duran v. U.S. Bank National Association* (2014) 59 Cal.4th
9 1, 31 (reversing a trial verdict in favor plaintiffs in a wage and hour class action)); *Tien v. Tenet*
10 *Healthcare Corp.* (2012) 209 Cal.App.4th 1077, 1088 (“[T]he reason, if any, that employees might not
11 take their breaks were predominantly individualized questions of fact not susceptible to class
12 treatment.”); *Ali v. U.S.A. Cab Ltd.* (2009) 176 Cal.App.4th 1333, 1341 (affirming denial of
13 certification because employees’ declarations attesting to having taken meal and rest breaks
14 demonstrated that individualized inquiries were required to show harm); *Campbell v. Best Buy Stores,*
15 *L.P.*, (C.D. Cal. 2013) 2013 WL 5302217 at *11-13 (following *Brinker* and denying certification of
16 proposed off-the-clock and rest and meal break classes due to lack of uniform policy); *Brown v. Fed*
17 *Express Corp.* (C.D. Cal. 2008) 249 F.R.D. 580, 587-88 (denying certification of driver meal and rest
18 period claims based on the predominance of individual issues.) Plaintiff is confident about the strength
19 of her claims. Nonetheless, Plaintiff recognizes that Defendant has factual and legal defenses that, if
20 successful, would potentially defeat or substantially impair the value of Plaintiff’s lawsuit.
21 Collectively, the examples cited above illustrate the uncertain nature of class litigation. Consequently,
22 the uncertainty of obtaining certification through a contested motion is a significant risk factor favoring
23 settlement. JCL Dec., ¶ 37.

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

28 [N]othing is assured when litigating against commercial giants with vast

litigative resources, particular in such complex litigation as this, which would strain the cognitive capacities of any jury. Defense judgments were hardly beyond the realm of possibility. Accordingly, this factor weighs in favor of preliminary approval.

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

Finally, continuing to litigate this action would require continued and extensive resources coupled with significant Court time to proceed through trial and post-trial motions; which can often take years. Furthermore, wage and hour litigation are complex and expensive, as it often necessitates extensive expert testimony, particularly with regards to damages. But even if Plaintiff is successful at trial, Plaintiff is acutely aware that a judgment does not end the litigation. Plaintiff fully expects that Defendant would appeal any favorable judgment. JCL Dec., ¶ 38. “Avoiding such a trial and the subsequent appeals in this complex case strongly militates in favor of settlement rather than further protracted and uncertain litigation.” (*Nat’l Rural Telecomms. Coop v. DirecTV* (C.D. Cal. 2004) 221 F.R.D. 523, 527.) Thus, “unless the settlement is clearly inadequate, its acceptance and approval are preferable to lengthy and expensive litigation with uncertain results.” (*Id.* at 526.)

In this matter, Class Counsel negotiated a Total Settlement Amount of \$130,000 that is roughly between 8% and 20% of Defendant’s maximum liability exposure. Given the amount of the settlement here, as compared to the potential value of the claims, offset by the various inherent risks to continued litigation, the settlement is fair and reasonable. JCL Dec., ¶ 39.

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

The Settlement Class is entitled to the best practical notice under the circumstances. (*Kass v. Young* (1977) 67 Cal.App.3d 100, 106.) The purpose of the notice is to give class members sufficient information to decide whether they should accept the benefits offered, opt out and pursue their own remedies, or object 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.) In a case such as this involving a significant number of class members, California 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.) Here, both the method of disseminating the Class Notice and content of the Class Notice satisfy due process and the requirements of California law. (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.”).). JCL Dec., ¶¶ 40-41.

C. The Court Should Preliminarily Approve the Class Representative Enhancement 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); *Rodriguez v. West Publishing Corp.* (9th Cir. 2009) 563 F.3d 948, 958, citing 4 Newberg on Class Actions (4th ed. 2002) § 1 1:38, and Eisenberg & Miller, *Incentive Awards to Class Action Plaintiffs: An Empirical Study*, 53 UCLA L. Rev. 1303 (2006).) Enhancement payments “are intended to compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action, and, sometimes, to recognize their willingness to act as a private attorney general.” (*Rodriguez*, 563 F.3d at 958-59.) “[T]he rationale for making enhancement or incentive awards to named plaintiffs is that they should be compensated for the expense or risk they have incurred in conferring a benefit on other members of the class.” (*Clark v. American Residential Services LLC* (2009) 175 Cal.App.4th 785.)

Approximately 110 members of the Settlement Class will share in the Net Settlement Amount due entirely to the effort and commitment of Plaintiff. Subject to Court approval, therefore, the Settlement provides for a Class Representative Service Award of \$7,500 for Plaintiff. The service award is fair and reasonable compensation for Plaintiff’s efforts bringing the action, assisting Class Counsel with the litigation and settlement, regularly conferring with Class Counsel on the status of her case and the strategies for prosecuting the claims, reviewing the proposed Settlement to ensure that its terms are fair and provide adequate relief for the Settlement Class, and agreeing to provide Defendant a general release of all claims arising out of her employment. JCL Dec., ¶¶ 42-43.

Class Counsel on behalf of Plaintiff will file a formal motion for the negotiated Class Representative Service Award once preliminary approval of the Settlement is granted. Plaintiff

respectfully submits that the above showing is sufficient for preliminary approval of the negotiated Class Representative Service Award. JCL Dec., ¶ 44.

D. The Court Should Preliminarily Approve the Negotiated Class Counsel Award

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

Class Counsel took this matter on a contingency fee basis and invested significant time and expense successfully prosecuting Plaintiff's claims. As discussed *supra*, the estimated average Individual Settlement Share illustrates the demonstrably positive outcome for the Class Members. The Agreement provides for a Class Counsel Award in the amount of one-third of the Total Settlement Amount and litigation costs and expenses not to exceed \$9,000. Agreement at §III(M)(10). Considering the positive outcome for the Settlement Members, and in light of the supporting authority, the proposed Class Counsel award is fair and reasonable. Plaintiff will file a formal motion for the negotiated Class Counsel Award once preliminary approval of the Settlement is granted. Plaintiff respectfully submits that the above showing is sufficient for preliminary approval of the negotiated attorneys' fees. JCL Dec., ¶ 45.

E. California Law Authorizes Provisional Certification for Settlement Purposes

For Settlement, Plaintiff contends, and Defendant does not dispute, that provisional certification of the Settlement Class is appropriate. JCL Dec., ¶ 46.

1. The California Standard for Class Certification

Class actions are statutorily authorized "when the question is one of common or general interest,

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

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

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

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

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

Generally, the proposed Class consists of all of Defendant’s current and former California employees during the Class Period. Defendant’s records show that the Class Members consist of approximately 110 individuals, making joinder of all Class Members impracticable. Further, because all Class Members are Defendant’s current and former employees, the class is readily ascertainable from Defendant’s regular business records, i.e., payroll records. JCL Dec., ¶ 47.

The California statutes relating to each of Plaintiff’s claims apply with equal force and effect to

1 the entire Settlement Class. Factually, Defendant's policies and practices apply class-wide and
2 Defendant's liability can be determined by facts common to all members of the class. The wage and
3 hour issues are both numerous and substantial, and a class action is the most advantageous method of
4 dealing with the claims of the Settlement Class. JCL Dec., ¶ 48.

5 Plaintiff's wage and hour claims are typical of the proposed Class because they arise from the
6 same factual basis and are based on the same legal theories applicable to the other Class Members.
7 Likewise, Plaintiff's interests are entirely coextensive with the interests of the Settlement Class.
8 Plaintiff alleges that they were injured by the same company-wide practices to which the proposed
9 Class was subject and seeks the same relief. Plaintiff has already demonstrated his ability to advocate
10 for the interests of the Class by initiating this litigation, undertaking class discovery, and evaluating the
11 proposed settlement to assure that it is fair. JCL Dec., ¶ 49.

12 Additionally, Plaintiff is represented by competent Class Counsel who has extensive experience
13 in litigating wage and hour class action cases. Class Counsel successfully briefed, argued, certified, and
14 gained state court settlement approval of the same class-wide causes of action that are at issue in this
15 case. Class Counsel's wage and hour class action experience establishes that they are well qualified to
16 represent the interests of this Class. JCL Dec., ¶¶ 51-58; Declaration of Shani Zakay, ¶¶ 1-6.

17 A class action is superior to a multitude of individual lawsuits. Given the size and amount of
18 each individual Class Member's claim, Class Settlement Members likely have little incentive to litigate
19 their claims on an individual basis because the out-of-pocket expense and personal commitment
20 necessary to litigate each claim outweighs any potential recovery. In sum, class treatment is superior
21 to individual, case-by-case adjudication. JCL Dec., ¶ 50.

1 **IV. CONCLUSION**

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

5
6 Dated: December 20, 2021

JCL LAW FIRM, APC

7 By: 
8 Jean-Claude Lapuyade, Esq.