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7 **SUPERIOR COURT OF CALIFORNIA**
8 **IN AND FOR THE COUNTY OF LOS ANGELES**

9
10 PHILLIP ALONZO, as an individual and on
behalf of all others similarly situated,

11 Plaintiff,

12 vs.

13 BRENNTAG PACIFIC, INC., a California
14 corporation; and DOES 1-50, Inclusive,

15 Defendants.

CASE NO. 20STCV20030

Assigned for All Purposes to:
Hon. Theresa Beaudet
Dept. 50

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

[Filed concurrently with Notice of Motion
and Motion; Declaration of Zachary M.
Crosner; [Proposed] Order]

Date: December 22, 2021
Time: 10:00 a.m.
Dept.: 50

1 **I. INTRODUCTION**

2 Plaintiff Phillip Alonzo hereby moves the Court for an order granting preliminary
3 approval to a proposed non-reversionary class action settlement to resolve wage and hour claims
4 on behalf of approximately 282 individuals employed by Defendant Brenntag Pacific, Inc.
5 (“Brenntag” or “Defendant”) as non-exempt employees in California during the period of May
6 21, 2016 through August 13, 2021. The proposed \$800,000 settlement will provide
7 approximately \$513,000 in cash payments to the class, with an average award estimated at about
8 \$1,800. The balance of approximately \$287,000 will cover reasonable attorney’s fees and actual
9 litigation costs, settlement administration costs, an enhancement award to the named plaintiff, and
10 payment of civil penalties to the state. The settlement is the product of Plaintiff’s pre-filing
11 investigation, formal discovery and a pre-mediation exchange of information, and arms-length
12 negotiations overseen by experienced mediator the Hon. Carl J. West (Ret.).

13 The proposed settlement is within the “range of reasonableness” for approval and.
14 Plaintiff’s counsel believes the settlement is a fair result for the class given the substantial risks
15 inherent in this matter. Accordingly, Plaintiff requests the Court enter an order: (1) granting
16 preliminary approval to the proposed class action settlement; (2) conditionally certifying the
17 settlement class as defined below; (3) appointing Zachary M. Crosner, Michael R. Crosner, Blake
18 R. Jones and Rex Phillips of Crosner Legal, P.C. as Class Counsel; (4) appointing Plaintiff Phillip
19 Alonzo as the Class Representative; (5) appointing Simpluris, Inc. as the Settlement
20 Administrator; (6) approving the form of notice to the class and the notice procedure; and (7)
21 scheduling a final fairness hearing.

22 **II. FACTUAL BACKGROUND AND PROCEDURAL POSTURE**

23 Brenntag touts itself as a global market leader in chemicals and ingredients distribution. It
24 has more than 17,000 employees worldwide and operates a network of more than 670 sites in 77
25 countries. Brenntag is headquartered in Sante Fe Springs, California and has at least six locations
26 throughout California. Most of Defendant’s California employees, including Plaintiff, worked at
27 one of the company’s chemical production and distribution facilities or as distribution drivers.
28 [Declaration of Zachary M. Crosner (“Crosner Decl.”), ¶ 3.]

1 Plaintiff was employed by Defendant for approximately 18 months from 2018 to 2019, as
2 a warehouseman at Defendant's Fresno facility. His duties included unloading rail cars of
3 chemicals, filling up tanker trucks with chemicals, filling containers with chemicals, operating a
4 forklift, and other warehouse-related duties. He alleges he was not paid for all hour worked in
5 that, at the start of a shift and when returning from meal periods, he and he class members had to
6 don/doff protective gear and wash off and that time was not counted or paid for. He further
7 alleges Brenntag underpaid for overtime because it did incorporate meal per diems in the regular
8 rate of pay. Plaintiff also alleges Defendant failed to maintain a written policy meal and rest
9 break policy, and failed to instruct its employees on compliant meal period policies whatsoever
10 until July 2019 and then implemented a meal period waver system in 2020 that was was illegal
11 because employees were forced to sign as a condition of employment. Beyond that, Plaintiff's
12 review of the time records produced suggest substantial "de facto" meal period violations for
13 missed, late, and short meal breaks. Finally, Brenntag evidently never paid premiums for meal or
14 rest break violations despite its own records indicating violations occurred. [Crosner Decl., ¶ 4.]

15 Based on these allegations, on May 21, 2020, Plaintiff filed a class action lawsuit against
16 Defendant asserting claims for (1) failure to pay minimum wages, (2) failure to pay overtime, (3)
17 failure to provide meal periods, (4) failure to provide rest periods, (5) failure to provide accurate
18 wage statements, (6) waiting time penalties, (7) unfair competition, and (8) PAGA. Shortly
19 thereafter, Defendant indicated that Plaintiff executed a severance agreement upon termination of
20 employment and accordingly had released his class action claims. Plaintiff then filed an amended
21 complaint dismissing all claims except for the PAGA cause of action. [Crosner Decl., ¶ 5.]

22 Brenntag has at all times denied Plaintiff's allegations and maintained its payroll policies
23 and procedures comply with California law, that it paid the class members all wages due, and that
24 its compensation plan properly compensates the class members for all hours worked at no less
25 than the applicable minimum wage. Defendant also strongly contends the case cannot be
26 maintained as any kind of class or representative action, arguing determining the number of
27 potential off the clock hours worked by each class member, or the number of de facto meal period
28 violations would result individualized issues predominating and that a trial on a representative

1 basis would be unmanageable. [Crosner Decl., ¶ 6.]

2 Ultimately, after initial discovery and meet and confer discussions about the merits of the
3 case, the parties agreed to attempt early mediation, and to further discuss a potential class-wide
4 resolution in addition to the PAGA claims. The Parties also agreed on a protocol for an exchange
5 of additional documents and information before the mediation. Consequently, Plaintiff's counsel
6 reviewed payroll records, personnel policies/handbooks, meal and rest break policies, personnel
7 files, and a random of sampling paystubs and time records for about 20% of the class. Plaintiff
8 had those records analyzed by Berger Consulting Group to look for, inter alia, violation rates for
9 missed, late and/or short meal breaks, potential violations, damages for alleged unpaid double
10 time, etc. [Crosner Decl., ¶ 7; Exh. 2.]

11 The Parties then engaged the Hon. Carl J. West, (Ret.), a respected mediator with
12 substantial wage and hour and class action experience and, on June 14, 2021, the Parties
13 participated in a full day mediation with Judge West. Throughout the day, the arms-length
14 negotiations were hard-fought and adversarial as the Parties exchanged extensive information on
15 their legal and factual positions, and made numerous offers and counter-offers. By the end of the
16 day the Parties reached agreement on all major issues. [Crosner Decl., ¶ 8.] They then
17 collaboratively drafted the Stipulation and Settlement Agreement ("Settlement Agreement")
18 setting forth the full and final settlement terms now before the Court for approval, and a true and
19 correct copy of the Settlement Agreement is attached to the Crosner Declaration as Exhibit 1.

20 **III. THE PROPOSED SETTLEMENT TERMS**

21 Under the settlement, Brenntag will pay \$800,000 into a common fund, the Gross
22 Settlement Amount ("GSA"). Attorney's fees of up to \$233,333.33 (1/3 of the GSA), litigation
23 costs of up to \$15,000, settlement administration costs of no more than \$5,000, a service award to
24 Plaintiff of no more than \$7,500, and a payment of \$26,250 to the Labor & Workforce
25 Development Agency for PAGA penalties, will be paid from the GSA. The remainder of around
26 \$513,000 will be allocated pro rata among the Class Members based on their total weeks worked
27 during the Class Period. No portion of the GSA will revert to Brenntag. [Crosner Decl., ¶ 9.]

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1 **A. Certification of the Settlement Class**

2 The settlement provides for conditional certification of a settlement class including all
3 individuals employed by Defendant as non-exempt employees in the State of California during
4 the period from May 21, 2016 to August 13, 2021. The Settlement Class consists of
5 approximately 282 individuals. [Crosner Decl., ¶ 10.]

6 **B. The Benefit Conferred on the Settlement Class**

7 As noted, the settlement obligates Brenntag to pay \$800,000 to resolve the claims of the
8 Settlement, inclusive of attorney's fees and costs. A minimum of approximately \$513,000 from
9 the GSA will be distributed to the Participating Class Members. This is a cash settlement that
10 does not require Participating Class Members to submit a claim form to receive their settlement
11 share. Participating Class Members will receive their settlement checks automatically via First
12 Class U.S. Mail. Twenty percent of each settlement share will be allocated to wages and the
13 remaining eighty percent will be allocated to penalties and interest, which allocation is consistent
14 with Brenntag's potential liability as discussed below. Brenntag will pay any and all applicable
15 employer-side payroll taxes separately and in addition to the GSA. Subject to the Court's
16 approval, any amounts not claimed (because a class member does not cash a settlement check)
17 will be forwarded to the State Controller's Unclaimed Property Fund. [Crosner Decl., ¶ 11.]

18 Each participating Class Member will receive a share of the Net Settlement Amount based
19 on his or her total weeks worked for Brenntag during the Class Period while employed in a non-
20 exempt position. Thus, each individual Settlement Payment will be calculated using criteria
21 typically used in determining appropriate amounts of unpaid wages, unpaid premium wages for
22 missed meal and rest breaks, and potential statutory penalties under applicable law. These
23 methods will ensure each Class Member receives a portion of the settlement funds corresponding
24 to the relative value of his or her potential claims. The proposed allocation provides a reasonable
25 way to compensate Class Members based on the amount of time they worked for Brenntag and
26 the number of instances they allegedly missed a meal break and/or rest break, were not provided
27 compensation in lieu of such missed breaks, or lost hours worked due to time rounding. The
28 average gross award is estimated to be approximately \$1,800. [Crosner Decl., ¶ 12.]

1 As discussed below, the overall settlement amount is reasonable in light of the
2 considerable risks associated with Plaintiff's claims, and the delay and risk posed by continuing
3 to litigate such disputed allegations. In counsel's judgment, the total value recovered for the class
4 is substantial and within the range of reasonableness.

5 **C. Settlement Administration**

6 Subject to the Court's approval, the Parties have agreed on Simpluris, Inc. as the
7 Settlement Administrator. Simpluris is qualified and has significant experience administering
8 class action settlements, including numerous wage and hour matters. Simpluris's fees and costs
9 will not exceed \$5,000.00. [Crosner Decl., ¶ 13; Exh. 3.]

10 **D. The Class Notice**

11 The proposed Notice of Class Action Settlement (Exhibit A to the Settlement Agreement)
12 sets out information about this case and explains the basic settlement terms in plain language.
13 The Notice also sets forth the individualized information used to calculate Class Members'
14 Individual Settlement Payments and each Class Member's estimated settlement award. The
15 Notice likewise details the procedures for Class Members to dispute their individual information,
16 the procedure for submitting an objection to the Settlement, the procedure to request exclusion,
17 and the fact that any final judgment will bind all class members who do not opt out. Cal. Rules of
18 Court 3.769(f) and 3.766(d). In sum, the Notice provides the Class Members with the
19 information necessary to evaluate the Settlement and decide to participate in, opt out of, or object,
20 and meets all requirements imposed by the California Rules of Court. Coupled with the notice
21 procedure, the Notice provides the best notice practicable. [Crosner Decl., ¶ 14.]

22 **E. Right to Correct Information, Opt Out, or Object**

23 Class Members will have forty-five (45) days to dispute the information in their Notice
24 used to calculate their settlement award, and also have 45 days to submit any objections to the
25 settlement or to request exclusion. If a Class Member disputes their individual information, the
26 Settlement Administrator will review the Class Member's records and any other information
27 submitted, and make a final determination. [Crosner Decl., ¶ 15.]

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1 **F. Release of Claims**

2 All Participating Class Members will release Brenntag from all claims alleged in the
3 operative complaint, or that could have been brought based on the factual allegations in the
4 operative complaint, including PAGA claims, during the Class Period. The release is limited to
5 the claims that were actually pleaded or could have been pleaded based on the alleged facts in the
6 operative complaint. [Crosner Decl., ¶ 16.]

7 **G. PAGA Claims and Notice to the LWDA**

8 The Parties allocated \$35,000 of the GSA to payment of civil penalties under PAGA, as
9 addressed below. Per Labor Code section 2699(l)(2), Plaintiff gave notice of the settlement and
10 the approval hearing to the LWDA via its online portal. [Crosner Decl., ¶ 17; Exh. 4.]

11 **IV. ARGUMENT**

12 **A. Standard of Review for a Class Action Settlement**

13 The law favors settlement, particularly in class actions where substantial resources can be
14 conserved by avoiding the time, costs and rigors of formal litigation. H. Newberg & A. Conte, 4
15 Newberg on Class Actions (4th ed. 2002) § 11.41; Class Plaintiffs v. City of Seattle (9th Cir.
16 1992) 955 F.2d 1268, 1276, cert. denied, 506 U.S. 953; Potter v. Pacific Coast Lumber Co.
17 (1951) 37 Cal.2d 592, 602. Nevertheless, to ensure the rights of absent class members are not
18 unjustly compromised, settlement of a class action requires court approval. Cal. Rule of Court.
19 3.769; Wershba v. Apple Computer (2001) 91 Cal.App.4th 224, 245; Dunk v. Ford Motor Co.
20 (1996) 48 Cal.App.4th 1794, 1801. This judicial review protects against fraud or collusion, and
21 ensures fairness to the absent class members. Dunk, 48 Cal.App.4th at 1800-01. Judicial review
22 occurs via a two-step process to determine, under all the circumstances, if the proposed settlement
23 is fair, reasonable and adequate. Id. at 1801; Wershba, 91 Cal.App.4th at 245.

24 The first step is a motion for preliminary approval, through which the parties present the
25 court with the proposed settlement and seek a determination that it is sufficiently fair and
26 reasonable to warrant notice to the class and further proceedings as to its fairness and adequacy.
27 Cal. Rule of Court 3.769(c). This preliminary evaluation determines if the proposed settlement is
28 within the “range of reasonableness” and if notice should be provided to the class regarding the

1 settlement's proposed terms and conditions, and whether a final fairness hearing should be
2 scheduled. Wershba, 91 Cal.App.4th at 234-35; North County Contractors Ass'n, Inc. v.
3 Touchstone Ins. Servs. (1994) 27 Cal.App.4th 1085, 1089-90. Considering the strong judicial
4 policy favoring settlement of class actions, courts generally apply a presumption of fairness to
5 class action settlements when (1) the settlement results from arms-length bargaining, (2)
6 investigation and discovery are sufficient to allow counsel and the court to act intelligently, (3)
7 counsel is experienced in similar litigation, and (4) the percentage of objectors is small. Dunk, 48
8 Cal.App.4th at 1802; Wershba, 91 Cal.App.4th at 245.

9 If the court grants preliminary approval, it then orders the class be given notice in an
10 appropriate manner, establishes a schedule and procedures for class members to request exclusion
11 or object, and sets the matter for a final fairness hearing. Typically, any motion for attorney's
12 fees and costs is filed subsequent to preliminary approval and heard with the motion for final
13 approval, as part of the second step of the two-step approval process. Dunk, 48 Cal.App.4th at
14 1800; Wershba, 91 Cal.App.4th at 232. The proposed settlement in this matter warrants
15 preliminary approval under the liberal standard discussed above, as it is fair, reasonable and
16 adequate under all the circumstances, and represents a favorable result for the class.

17 **B. The Proposed Settlement Class Should Be Conditionally Certified**

18 The purpose of conditional class certification for purposes of settlement is to facilitate
19 provision of notice of the proposed settlement's terms, and the date and time of the final fairness
20 hearing. In this context, courts apply lesser scrutiny than they would otherwise in the context of
21 certifying a class. Dunk, 48 Cal.App.4th at 1807, n.19; Global Minerals & Metals Corp. v.
22 Superior Court (2003) 113 Cal.App.4th 836, 839 ("[I]t is well established that trial courts should
23 use different standards to determine the propriety of a settlement class.")

24 In the present matter, conditional certification is proper since this matter satisfies all
25 requirements for class certification under Code of Civil Procedure section 382. First, the class is
26 both sufficiently numerous, consisting of approximately 282 individuals, and ascertainable by
27 reference to Defendant's personnel and payroll records. [Crosner Decl., ¶ 18.] Next, Plaintiff is
28 an adequate class representative, as his claims do not conflict with and are not antagonistic to the

1 claims of other class members. Further, his claims are typical given he is a member of the class
2 and his claims arise from the same employment practices giving rise to the claims of the other
3 class members. [Crosner Decl., ¶ 19.] Lastly, his counsel is experienced and adequate class
4 counsel. [Crosner Decl., ¶¶ 34-40.]

5 Next, common questions of law and fact predominate – particularly for purposes of a
6 settlement class – as the Class Members all were subject to the same payroll scheme and policies
7 that Plaintiff contends violates California labor law. Since the focus of the claims against
8 Brenntag concerns the legality of common policies applied uniformly to the entire class, common
9 issues predominate over individualized inquiries concerning liability. For instance, Brenntag’s
10 practice of paying class members via trip minimums rather than actual hours worked either
11 complies with California law or it does not. Regardless of that determination, it will decide
12 liability for all class members one way or another. [Crosner Decl., ¶ 20.]

13 By now it is well-settled a theory of recovery asserting the existence of a uniform policy
14 violating California law is sufficient to satisfy the requirements for class certification. Jones v.
15 Farmers Ins. Exch. (2013) 221 Cal.App.4th 986, 996 (“Claims alleging that a uniform policy
16 consistently applied to a group of employees is in violation of the wage and hour laws are of the
17 sort routinely, and properly, found suitable for class treatment”); Williams v. Superior Court
18 (2013) 221 Cal.App.4th 1353 (“A company-wide practice can sustain a common question of fact
19 or law that supports commonality for class certification”). Lastly, a class action is superior to
20 other means for the fair and efficient adjudication of this controversy. [Crosner Decl., ¶ 21.]

21 **C. The Proposed Settlement Meets the Kullar Factors and is within the Range of**
22 **Reasonableness**

23 The proposed settlement resulted from serious, arms-length negotiations facilitated by
24 respected mediator, the Hon. Carl J. West (Ret.), who has considerable experience mediating
25 wage and hour class action cases. [Crosner Decl., ¶ 8.] Plaintiff’s counsel Michael R. Crosner,
26 Zachary M. Crosner, Blake R. Jones, and Rex Phillips of Crosner Legal, P.C. have years of
27 experience litigating wage and hour class actions. Plaintiff’s counsel is well-qualified to evaluate
28 the risks and benefits of further litigation versus settling the matter. [Crosner Decl., ¶¶ 34-40.]

1 Next, California law recognizes several factors bearing on the fairness, adequacy, and
2 reasonableness of a proposed class settlement. Kullar v. Foot Locker Retail, Inc. (2008) 168
3 Cal.App.4th 116, 128. In relevant part, these factors include: 1) the amount offered in settlement
4 2) the strength of plaintiff's case; 3) the risk, expense, complexity, and likely duration of further
5 litigation; 4) the risk of maintaining class action status throughout trial; and 5) the experience and
6 views of counsel. Id. Here, the proposed settlement satisfies these requirements.

7 Prior to mediation, the parties engaged in formal and informal discovery to facilitate
8 settlement discussions. Thus, Plaintiff reviewed documents and information regarding Brenntag's
9 payroll practices, a random sampling of pay stubs and time records for sampling of class
10 members, applicable compensation plans, etc., and information from Defendant regarding class
11 size and breakdown, work weeks/pay periods, rates of pay, and other relevant information.
12 Plaintiff then had that information analyzed by a consulting expert to assist in determining
13 potential violation rates and other data used to formulate a damages model. Plaintiff's counsel
14 are confident they obtained sufficient information to understand the law and facts of this case and
15 make an informed decision regarding the proposed settlement. [Crosner Decl., ¶¶ 7, 22.]

16 Next, the proposed settlement falls within the range of reasonableness warranting
17 preliminary approval. The proposed settlement involves a significant sum that, when distributed,
18 will confer direct monetary benefits on the class members. Each class member will be entitled to
19 a monetary payment without having to file a claim and each payment will be relative to the value
20 of his or her potential claims. Through the information exchanged and analysis undertaken,
21 Plaintiff weighed the risks of continued litigation against the benefits of the proposed settlement
22 and determined settlement to be the most reasonable option.

23 That analysis was supported by the pre-mediation production of payroll and other data
24 permitting counsel to estimate potential damages on various theories of liability. Using that data,
25 Plaintiff ran calculations and estimated Brenntag's likely maximum exposure on the class claims
26 at approximately \$5,382,000, including about \$865,000 on the unpaid minimum wage/donning
27 and doffing claims, about \$138,000 on the underpaid overtime/regular rate issue, approximately
28 \$3,550,000 on the meal and rest break claims, approximately \$727,000 on the wage statement

1 claims, and approximately \$534,000 on the waiting time penalty claims. [Crosner Decl., ¶¶ 23-
2 24.] Plaintiff's counsel substantially discounted the value of these claims, however, in light of
3 the multiple and considerable risks posed by proceeding with the litigation, as Defendant raised
4 numerous defenses and vigorously defended against these claims.

5 On the unpaid wage claims, Plaintiff alleges Brenntag failed to record and pay Plaintiff
6 and the class members for all of the hours. Specifically, Plaintiff alleges he and the class members
7 had to "don and doff" protective gear and wash thoroughly since they worked with a variety of
8 highly toxic chemicals, and that this was performed "off the clock." Brenntag argued it
9 accurately tracks and pays for all hours worked, and that its payroll policies and donning/doffing
10 guidelines are legal and fully comply with California law, and that no cognizable amount of "off
11 the clock" work occurred. Defendant also notes proving liability on this claim likely might
12 involve substantial individualized questions and accordingly make class certification difficult or
13 render a PAGA trial unmanageable. [Crosner Decl., ¶ 25.]

14 Plaintiff also alleges Defendant failed to pay sufficient overtime by not incorporating their
15 bonuses and other non-discretionary remunerations in the regular rate of pay for purposes of
16 calculating overtime pay. Defendant compensated the class members with non-discretionary
17 bonuses as well as a per diem for meals. Under state and federal law, in any pay period where an
18 hourly employee earns certain other compensation, such as a non-discretionary bonus in addition
19 to his or her base hourly wages, the regular rate is computed by dividing the employee's total
20 compensation in the period in which the other compensation is earned by the total hours worked
21 in that period. Marin v. Costco Wholesale Corp. (2008) 169 Cal.App.4th 804, 807. Review of the
22 payroll records provided by Defendant suggests it did not "true up" overtime paid by
23 recalculating the regular rate to include such non-discretionary compensation. While Plaintiff
24 believes this is one of his stronger claims, he also is cognizant that the amounts underpaid are
25 relatively small. [Crosner Decl., ¶ 26.]

26 On the meal break claims, Plaintiff argues Defendant failed to maintain a compliant policy
27 and, even if it did, its own time records show a de facto violation rate of around 50 percent.
28 Considering the time-sensitive and extremely meticulous and hazardous nature of the job duties

1 being performed by the class members in order to meet production and delivery deadlines,
2 Plaintiff believes such violations were quite common, and were not properly compensated with
3 premium pay. [Crosner Decl, ¶ 27.] In response to Brenntag’s argument that many class members
4 waived meal periods, Plaintiff believes Defendant requires its employees to sign a meal period
5 waiver as a condition of employment, and many courts have found that “the apparently universal
6 signing of the second meal waiver lends itself to the inference that signing the waiver is a
7 condition of employment and gives rise to a class question.” Escano v. Kindred Healthcare
8 Operating Co. (C.D. Cal. March 5, 2013) 2013 WL 816146, at *10; Bradescu v. Hillstone
9 Restaurant Group, Inc. (C.D. Cal. Sep. 18, 2014) 2014 WL 5312546, at *7.

10 As with meal breaks, Defendant argues its rest break policies complied with California
11 law and authorized and permitted employees to take all required breaks. Defendant further
12 contended that, in light of the fact that it is not required to maintain a record of rest periods, any
13 evidence of failure to authorize rest periods and/or discouragement from taking rest periods
14 would be purely anecdotal and individual issues would predominate on liability. Defendant also
15 may contend that it is only liable if Plaintiffs can prove, on a shift-by-shift basis, the aggrieved
16 employees actually did not receive a fully compliant rest break. This arguably would make a trial
17 unmanageable since the number of instances an employee missed a rest break would have to be
18 tested on a case by case basis to determine if there was compliance. [Crosner Decl., ¶ 28.]

19 Finally, Plaintiff alleged derivative claims under Labor Code § 226 (alleged inaccurate
20 wage statement violations) and §§ 201-203 (waiting time penalties), both based on the failure to
21 properly record and pay for all hours worked, and pay all overtime owed, and these claims will
22 rise or fall along with the primary claims, in addition to being subject to “good faith” and other
23 defenses available to Defendant. E.g., Amaral v. Cintas Corp. No. 2 (2008) 163 Cal.App.4th
24 1157, 1203-04 (holding employer did not willfully fail to pay wages under Labor Code § 203
25 even though the class prevailed on the merits on the underlying claim for failing to pay living
26 wages). Accordingly, Plaintiff discounted the derivative claims significantly in light of these
27 multiple potential defenses. [Crosner Decl., ¶ 29.]

1 As far as potential PAGA liability, the theoretical penalties totaled around \$1.5-1.6
2 million should Plaintiff prevail on all claims and establish violations of the multiple Labor Code
3 sections at issue for every single eligible pay period. [Crosner Decl., ¶ 30.] As with the class
4 claims, Plaintiff discounted the potential PAGA penalties for the multi-layered defenses proffered
5 by Defendant on the merits, and further discounted these claims since the Court possesses wide
6 discretion to reduce such penalties even if Plaintiff ultimately prevailed. Fleming v. Covidien
7 (C.D. Cal. 2011) 2011 U.S. Dist. LEXIS 154590, *8-9 (court reduced the potential penalties by
8 over 82% after a bench trial); Carrington v. Starbucks Corp. (2018) 30 Cal.App.5th 504 (after a
9 bench trial, the trial court awarded penalties of just \$5 per pay period, a 90% reduction, which
10 decision was upheld on appeal); In re Taco Bell Wage and Hour Actions (E.D. Cal. Apr. 8, 2016)
11 2016 U.S. Dist. Lexis 48557 (PAGA penalties denied after trial).

12 Accordingly, the Parties allocated \$35,000 to PAGA penalties, which amount is
13 reasonable and in line with comparable settlements in other class actions in California. Van
14 Kempen v. Matheson Tri-Gas, Inc. (N.D. Cal. Aug. 25, 2017) 2017 U.S. Dist. LEXIS 137182
15 (granting final approval of \$5,000 PAGA penalty from \$370,000 settlement, or 1.4 percent of
16 total settlement); Slavkov v. First Water Heater Partners I (N.D. Cal. July 25, 2017) 2017 U.S.
17 Dist. LEXIS 116303 (finding a \$7,500 PAGA payment reasonable when measured against the
18 overall settlement of \$345,000 and the possible weaknesses in plaintiffs' case, or 2.2 percent of
19 total settlement). Additionally, the LWDA has been informed of the terms of the PAGA portion
20 of the settlement, and will be able to weigh in as necessary. Jennings v. Open Door Mktg. Inc.
21 (N.D. Cal. Oct. 3, 2018) 2018 U.S. Dist. LEXIS 171356, at *27 (approving settlement with
22 PAGA penalties of 0.6% where "[p]laintiffs [have] submitted the settlement agreement to the
23 LWDA, and the LWDA has not objected to the settlement").

24 Thus, Defendant raised various defenses to each of Plaintiff's claims, any one of which, if
25 successful, could have derailed Plaintiff's case. Accordingly, Plaintiff faced risky issues going
26 forward with this litigation, and given the need to secure class certification, try the case, and deal
27 with post-trial appeals, it would have taken years to realize any recovery in this action. Plaintiff's
28 counsel discounted the value of the class claims consistent with the risks discussed above, and

1 carefully weighed the likelihood of the class receiving substantially greater benefit if the litigation
2 continued. Plaintiff's counsel concluded – in light of these very real and substantial risks –
3 settlement on the proposed terms and without prolonged and costly litigation was in the best
4 interests of the class. The overall \$800,000 recovery represents a significant percentage of
5 Defendant's potential exposure, and is roughly 15% of the maximum theoretical value of the class
6 claims. Given these risks, a total recovery for the class of \$800,000, with an average award of
7 some \$1,800 per class member, is a fair result within the range of reasonableness considering all
8 potential outcomes. [Crosner Decl., ¶¶ 31-33.]

9 Importantly, the mere fact that a settlement does not provide the same recovery as might
10 be achieved at trial is not a proper indicator of whether the settlement is fair, reasonable, and
11 adequate. Wershba, 91 Cal.App.4th at 246, 250 (“even if the relief afforded by the proposed
12 settlement is substantially narrower than it would be if the suits were to be successfully litigated,
13 this is no bar to a class settlement because the public interest may indeed be served by a voluntary
14 settlement in which each side gives ground in the interest of avoiding litigation”); 7-Eleven
15 Owners for Fair Franchising v. Southland Corp. (2000) 85 Cal.App.4th 1135, 1150 (“The fact that
16 a proposed settlement may amount to only a fraction of the potential recovery does not, in and of
17 itself, mean that the proposed settlement is grossly inadequate and should be disapproved”); Lane
18 v. Facebook, Inc. (9th Cir. 2012) 696 F.3d 811, 819 (“[T]he question whether a settlement is
19 fundamentally fair . . . is different from the question whether the settlement is perfect in the
20 estimation of the reviewing court”); White v. Experian Information Solutions, Inc. (C.D. Cal.
21 2011) 803 F.Supp.2d 1086, 1098 (rejecting contention settlement was not fair and reasonable
22 even though it represented 99% discount off the maximum value of the claims). Importantly as
23 well, the proposed settlement is non-reversionary and will provide benefits to the Class Members
24 without a claims process. White, 803 F.Supp.2d at 1098; c.f., Federal Judicial Center, Managing
25 Class Action Litigation: A Pocket Guide for Judges (3d ed. 2010) at 20, available at
26 www.fjc.gov/sites/default/files/2012/ClassGd3.pdf (reversionary provisions and/or cumbersome
27 claims process may indicate lack of fairness). Plaintiff and his counsel submit the settlement is
28 within the “range of reasonableness,” and is fair and adequate for the Class.

1 **E. Attorney's Fees and Costs**

2 The terms of the Parties' settlement also allow Plaintiff's counsel to apply for an award of
3 attorney's fees of up to 1/3 of the GSA, or \$233,333.33, and reimbursement of actual costs and
4 expenses of up to \$15,000.00. In advance of the Final Approval Hearing, Plaintiff's counsel will
5 submit a separate motion for attorney's fees and actual litigation costs per the terms of the
6 Settlement Agreement and applicable law, and will provide the Court with appropriate
7 information and evidence regarding hourly rates, tasks performed, and time expended on the case.
8 [Crosner Decl., ¶ 43.]

9 **F. Plaintiff's Enhancement Award**

10 A modest incentive award for Plaintiff is appropriate under applicable law. See Staton v.
11 Boeing (9th Cir. 2003) 327 F.3d 938, 977 (collecting cases awarding class representatives service
12 and incentive payments ranging from \$2,000 to \$25,000). He devoted time and resources to the
13 litigation, provided documents, assisted Class Counsel with investigating the claims asserted and
14 in preparing for mediation. The service payment provided to Plaintiff as the class representative is
15 typical in class action cases and reasonable. Rodriguez v. W Publ'g Corp. (9th Cir. 2009) 563 F.3d
16 948, 958-59 (incentive awards are "intended to compensate class representatives for work done on
17 behalf of the class, to make up for financial or reputational risk undertaken in bringing the action,
18 and, sometimes, to recognize their willingness to act as a private attorney general.").

19 Here, the Settlement Agreement provides for an enhancement of up to \$7,500.00 for
20 Plaintiff, and this request is reasonable given the risks he undertook on behalf of the Class
21 Members. By contacting and retaining counsel to pursue these claims, Plaintiff helped make this
22 settlement possible for the absent Class Members, while shouldering the risk of being liable for
23 Defendant's litigation costs. Plaintiff also exposed himself to unwanted notoriety related to filing
24 a public lawsuit (discoverable even through a simple google search) for the benefit of other
25 employees, placing himself at risk of discrimination by future prospective employers.

26 Among taking many other actions assisting in the successful litigation of this case,
27 Plaintiff provided substantial factual information and documents to counsel, attended numerous
28 meetings/phone conferences with counsel to discuss the case, and kept abreast of all significant

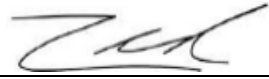
1 developments, and he will submit a declaration prior to final approval detailing his efforts and
2 time expended.. [Crosner Decl., ¶ 42.]

3 **V. CONCLUSION**

4 For all the foregoing reasons, Plaintiff respectfully requests that the Court grant this
5 motion, conditionally certify the settlement class, grant preliminary approval to the proposed
6 class action settlement, and enter the [Proposed] Order filed herewith.

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9 Dated: November 30, 2021

CROSNER LEGAL, PC

10 By: 
11 Zachary Crosner
12 Attorneys for Plaintiff PHILLIP ALONZO
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