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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

MIGUEL HUERTA, individually, and on behalf
of all others similarly situated,

Plaintiff,

vs.

INTERIOR REMOVAL SPECIALIST, INC., a
California corporation; and DOES 1 through 10,
inclusive,

Defendants.

Case No.: 20STCV09163

Hon. Maren Nelson – Dept. SSC-17

CLASS ACTION

**PLAINTIFF’S NOTICE OF MOTION AND
MOTION FOR PRELIMINARY APPROVAL
OF CLASS AND REPRESENTATIVE
ACTION SETTLEMENT; MEMORANDUM
OF POINTS AND AUTHORITIES**

Date: May 24, 2022
Time: 9:00 a.m.
Courtroom: Dept. SSC-17
Judge: Hon. Maren Nelson

Action Filed: March 6, 2020
Trial Date: Not Set

1 TO THE COURT, ALL PARTIES, AND THEIR COUNSEL OF RECORD:

2 PLEASE TAKE NOTICE that on May 24, 2022, at 9:00 a.m., or as soon thereafter as the matter
3 may be heard, in Department SSC-17 of the above-captioned Court, located at 312 North Spring Street,
4 Los Angeles, CA 90012, Plaintiff Miguel Huerta (“Plaintiff”) will and hereby does move this Court for
5 an order:

6 1. Granting class certification of the Class, solely for settlement purposes pursuant to
7 Code of Civil Procedure § 382;

8 2. Preliminarily approving the JOINT STIPULATION OF CLASS AND
9 REPRESENTATIVE ACTION SETTLEMENT (“Settlement” or “Agreement”);

10 3. Appointing counsel for Plaintiff, Moon & Yang, APC, as Class Counsel;

11 4. Appointing Miguel Huerta as the Class Representative;

12 5. Approving the use of the proposed notice procedure and related notice form;

13 6. Approving ILYM Group, Inc. as the third-party administrator;

14 7. Directing that notice be mailed to the Class; and,

15 8. Scheduling a hearing date for motions for final approval of class action settlement
16 and awards of attorneys’ fees and costs.

17 Good cause exists to grant this Motion because:

18 1. The Class meets all of the requirements for class certification for settlement
19 purposes under Code of Civil Procedure § 382;

20 2. The Settlement Agreement is a fair, adequate, and reasonable compromise of the
21 disputed wage and hour claims asserted by Plaintiff;

22 3. Plaintiff and Class Counsel are adequate to represent the Class;

23 4. The proposed notice procedures and related forms comply with California Rules of
24 Court 3.766(d) and (e), adequately apprise Class Members of their rights, and fully comport
25 with due process; and

26 5. Based on the foregoing, notice should be directed to the Class Members and a final
27 fairness hearing should be scheduled (Plaintiff proposes 165 days after preliminary approval is
28 granted).

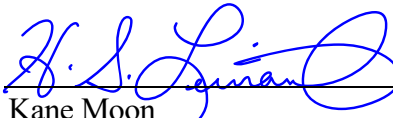
1 This Motion is made pursuant to Rule 3.769 and Rule 3.1113(e) of the California Rules of Court,
2 which require approval by the Court of a class action settlement and permit the Court to extend the page
3 limit for memoranda.

4 This Motion is based on this Notice of Motion and Motion, the attached Memorandum of Points
5 and Authorities, the Declarations of H. Scott Leviant, Plaintiff, and the Settlement Administrator in
6 support thereof, all papers and pleadings on file with the Court in this action, all matters judicially
7 noticeable, and on such oral and documentary evidence as may be presented in connection with the
8 hearing on the Motion.

9 Respectfully submitted,

10 Dated: March 22, 2022

MOON & YANG, APC

11 By: 
12 Kane Moon
13 H. Scott Leviant
14 Lilit Tunyan
15 Mariam Ghazaryan

Attorneys for Plaintiff

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Pursuant to California Rules of Court, Rules 3.769(d) and (e), Plaintiff respectfully requests that this Court preliminarily approve the proposed class action settlement set forth in the JOINT STIPULATION OF CLASS AND REPRESENTATIVE ACTION SETTLEMENT (“Settlement” or “Agreement”) with Defendant INTERIOR REMOVAL SPECIALIST, INC. (“IRS” or “Defendant”).

After the exchange of voluminous documents and data, and an arm’s-length mediation session with experienced third-party mediator Steven Rottman, Plaintiff and Defendant (collectively referred to herein as the “Parties”) reached a proposed class action settlement with a gross settlement amount (“GSA”) of **\$900,000.00** in compromise of disputed claims asserted on behalf of the below-defined Class consisting of approximately **669** members. Plaintiff believes that this settlement is a fair, adequate, and reasonable compromise of the disputed claims for alleged unpaid wage and hour violations and penalties.

Plaintiff now submits this Motion for Preliminary Approval of Class Action Settlement, along with the Settlement (attached to the Declaration of H. Scott Leviant [“Leviant Decl.”], at Exhibit 1 thereto). For the Court’s convenience, below is a summary of the key provisions of the Settlement.

II. THE MAJOR TERMS OF SETTLEMENT

The provisions of the proposed Settlement include the following:

- Defendant stipulates to certification of a Settlement Class for purposes of Settlement only (Settlement, ¶ 19);
- Settlement Amount: Defendant will pay a maximum of \$900,000.00, referred to as the Gross Settlement Amount, resulting in an average **gross** payment per Class Member of approximately **\$1,345.00** (Settlement, ¶ 26(c));
- Data Reviewed and Data Accuracy: Informal discovery provided to Plaintiff included employee handbooks, data for the entire putative class, Plaintiff’s records, job title and job duty documents, sub-counts of current and former employees, meal period waivers, pay rate information sampled for the majority of the class period, time sheets sampled for a majority of the class period, and other policy documents relevant to the claims in this matter. The largest margin of error calculated for any of the data sets provided was **4.4%**.

- 1 • **Class Size:** The Class contained an estimated **669** individuals on January 20, 2022, who
2 worked an estimated 60,432 workweeks through mediation (Settlement, ¶¶ 4, 26(d));
- 3 • **PAGA Group Size:** There are an estimated **365** PAGA Employees, who worked an
4 estimated 14,893 pay periods through mediation (Leviant Decl., ¶ 11);
- 5 • **Escalator Clause:** If, on the date of preliminary approval or June 30, 2022, whichever is
6 sooner, the number of actual Covered Workweeks during the Class Period exceeds 15% of
7 the estimated Covered Workweeks (i.e., exceeds 69,497 workweeks), the Gross Settlement
8 Amount will be increased by 1% for every percentage point that the Covered Workweeks
9 exceed the 15% threshold (Settlement, ¶ 26(d).)
- 10 • **Kullar/Munoz Analysis:** Plaintiff addresses the claims analysis in the Motion, at Part
11 V.B.3, and in more detail below, at Paragraph 18;
- 12 • **Certification:** Plaintiff addresses certification requisites in the Motion, at Part V.A., and
13 below, at Paragraphs 34-40.
- 14 • **No Claim Form:** No claim form is required (Settlement, ¶ 26(f));
- 15 • **No Reversion:** The Settlement is a ***non-reversionary*** settlement (Settlement, ¶ 26(e));
- 16 • **Class Release:** The Settlement will release wage-and-hour claims either pled or that could
17 have been pled based upon the allegations for those Settlement Class Members who do not
18 opt out of the Settlement (Settlement, ¶ 37);
- 19 • **PAGA Release:** The Class Members employed during the PAGA Period will release the
20 PAGA Claims contained in the LWDA Notice Letter, regardless of whether they opt out of
21 the class portion of the Settlement (Settlement, ¶¶ 14, 37(c)(3));
- 22 • **Release Effective Date:** The Release becomes effective on the later of the Effective Date of
23 the Settlement or the payment by Defendant of all money owed under the Settlement
24 (Settlement, ¶ 37(b));
- 25 • **Net Settlement Amount Available to the Class:** After deducting Class Counsel's attorneys'
26 fees and costs, enhancement payment to Plaintiff, Administration costs, and the payment to
27 the LWDA, the remainder will be available for distribution to Class Members who do not
28 opt out, with each Participating Class Member receiving a share based on the number of

workweeks each Participating Class Member worked for Defendant within the Settlement Class Period. The Net Settlement Amount is estimated to be at least \$495,625.00, resulting in an average **net** payment per Class Member of at least **\$740.00**, before any tax withholdings (Settlement, ¶ 26(g));

- Tax Allocation and Reasonableness of Tax Allocation: The amounts distributed to Class Members will be characterized as 25% alleged unpaid wages and 75% as alleged unpaid penalties and interest, with the PAGA payment allocated as 100% penalties. (Settlement, ¶ 26(k)). ***This allocation is appropriate***: the risk-adjusted value of all wage claims is estimated to be \$98,520.72, while the risk-adjusted value of all penalty/non-wage claims other than PAGA is estimated to be \$530,331.75.
- Employer's Portion of Payroll Taxes Paid Separately: Defendant's portion of payroll taxes (e.g., FICA, FUTA, etc.) owed on any settlement payments to Settlement Class Members that constitute wages will be paid separate and apart from the GSM (Settlement, ¶ 26(h));
- Settlement Administrator: The notice portion of the Settlement is administered by a third-party Administrator, ILYM Group, Inc., and the bid cost of administration, **\$14,375.00**, does not exceed the \$25,000 estimate. (Settlement, ¶ 26(p).)
- Class Data for Administration: The Settlement Administrator will receive the Class List within 14 days of Preliminary Approval, use the NCOA database to update the Class List, and then use skip tracing on returned Notices (Settlement, ¶ 32(a));
- Notice Language: Notice issued in English and Spanish. (Settlement, ¶ 26(t).)
- Notice Issuance: The Notice will issue within 30 days of receipt of the Class List (Settlement, ¶ 32(b)). The Notice describes how to dispute workweeks, submit an objection in writing, in person, or through an attorney, or request exclusion (Settlement, Exhibit A).
- PAGA Allocation: From the GSA, \$80,000 is allocated to settle claims brought pursuant to the California Private Attorneys General Act, Labor Code § 2699 *et seq.* ("PAGA"), and seventy-five percent (75%), or **\$60,000.00**, will be paid to the California Labor & Workforce Development Agency. (Settlement, ¶ 9.)
- Notice to LWDA: Notice was provided prior to the filing of this Motion. Evidence is

attached hereto, as Exhibit 2.

- Enhancement/Service Awards to Plaintiff: Defendant will not oppose the application for a Class Representative Enhancement of up to **\$5,000** for Plaintiff, to be paid from the GSA (Settlement, ¶ 26(n));
- Fees and Costs: Defendant will not oppose Class Counsel's application for fees not to exceed 33 1/3% of the GSA (**\$300,000.00**), and actual costs, in an amount not to exceed \$25,000, to be paid out of the GSA; (Settlement, ¶ 26(m)).
- Objections: Objections can be submitted in person, through an attorney, or in writing to the Settlement Administrator, with no pre-requisite to being heard (Settlement, ¶ 26(x));
- Exclusion Requests: The procedure for exclusion requests, mailing a request to the Settlement Administrator, is the same as the procedure for submitting a writing objection (Settlement, ¶¶ 26(w) and 26(x));
- Check Void Period: Settlement checks will be valid for 180 days (Settlement, ¶ 34);
- Uncashed Checks: Any settlement checks mailed to the Settlement Class Members that remain uncashed after 180 days of the date of issuance will be cancelled, and the moneys will be directed to the State Controller's Office-Uncollected Funds (Settlement, ¶ 35);
- Judgment Notice: Judgment will be posted on the Settlement Administrator's website after entry (Settlement, ¶ 30).

(Leviant Decl., ¶¶ 11-12 and Exhibit 1 thereto.)

III. FACTUAL AND PROCEDURAL BACKGROUND

A. Plaintiff's Claims

On March 6, 2020, Plaintiff filed a putative Class Action against Defendant Interior Removal Specialist, Inc. alleging the following labelled causes of action: (1) Failure to Pay Minimum Wage and Regular Rate Wages [Cal. Lab. Code §§ 204, 1194, 1194.2, and 1197]; (2) Failure to Pay Overtime Compensation [Cal. Lab. Code §§ 1194 and 1198]; (3) Failure to Provide Meal Periods [Cal. Lab. Code §§ 226.7, 512]; (4) Failure to Authorize and Permit Rest Breaks [Cal. Lab. Code §§ 226.7]; (5) Failure to Indemnify Necessary Business Expenses [Cal. Lab. Code § 2802]; (6) Failure to Timely Pay Final Wages at Termination [Cal. Lab. Code §§ 201-203]; (7) Failure to Provide Accurate Itemized Wage

Statements [Cal. Lab. Code § 226]; and (8) Unfair Business Practices [Cal. Bus. & Prof. Code §§ 17200, *et seq.*] (The “Action.”). (Leviant Decl., ¶ 4.)

Plaintiff satisfied the administrative exhaustion requirement that is a prerequisite to filing a claim for Civil Penalties under the Labor Code Private Attorneys General Act of 2004 [Lab. Code § 2699, *et seq.*] (“PAGA”). (Leviant Decl., ¶ 5.) On May 20, 2020, Plaintiff filed a First Amended Complaint adding a cause of action for Civil Penalties Under PAGA [Cal. Lab. Code § 2699, *et seq.*]. Thereafter, the Parties agreed to mediate the matter. (*Id.*)

B. Pre-Mediation Data Production and Analysis

The Parties have conducted a thorough investigation of the facts and law. Such discovery and investigation have included, *inter alia*, the exchange of informal data and discoverable information in preparation for the mediation session. (Leviant Decl., ¶ 6.) The Parties have analyzed payroll and other data pertaining to Plaintiff and the Class during the relevant Settlement Period, including but not limited to the numbers of former and current members of each purported subclass within the Class, average workweeks, and average rate of hourly pay. (*Id.*) In addition, Defendant also provided documents reflecting its wage and hour policies and practices during the Settlement Period and information regarding the total number of current and former employees in the Class. (*Id.*)

After reviewing documents regarding Defendant’s wage and hour policies and practices and other information obtained during the informal exchange of discovery, Class Counsel were able to evaluate the probability of class certification, success on the merits, and the reasonably obtainable maximum monetary exposure for all claims. Class Counsel reviewed these records and prepared a damage analysis prior to mediation. Class Counsel also investigated the applicable law regarding the claims and defenses asserted in the litigation. (Leviant Decl., at ¶ 7.)

C. Settlement

On January 20, 2022, the Parties mediated before Steven Rottman, Esq., who is a highly experienced and well-regarded mediator for wage and hour class action litigation.¹ (Leviant Decl., ¶ 8.)

¹ The mediation in this matter was cancelled and rescheduled on two occasions. Because of Mr. Rottman’s congested mediation calendar, it took a significant amount of time to complete.

At the mediation, the Parties discussed at length the burdens and risks of continuing with the litigation as well as the merits of the claims and defenses. (*Id.*) The Parties agreed to the basic terms of a proposed settlement and ultimately signed a long form settlement agreement (the Agreement). (*Id.*)

Plaintiff and Class Counsel are aware of the burdens of proof necessary to establish liability for the claims asserted in the Action, both generally and in response to Defendant’s defenses thereto. (Leviant Decl., ¶ 9.) Plaintiff and Class Counsel have also taken into account Defendant’s agreement to enter into a Settlement that confers substantial relief upon the Class.

Based on the foregoing, Plaintiff and Class Counsel have determined that the Settlement set forth in this Agreement is a fair, adequate, and reasonable Settlement and is in the best interests of the Class. (Leviant Decl., ¶ 10.) Solely for the purpose of settling this case, the Parties stipulate to class certification. (*Id.*) If this Settlement is not approved by the Court for any reason, Defendant reserves its rights to contest class certification. (*Id.*) This Settlement, if approved by the Court, will result in the termination with prejudice of the litigation through the entry of the Judgment and the release of all Released Claims for all Class Members, including all within the class definition who have not elected to exclude themselves from the Class. (*Id.*)

IV. **CLASS DEFINITION**

The Class is defined as follows:

All non-exempt employees of Defendant who worked in California during the Class Period (the “Class Period” is March 6, 2016 through the date the court issues an order granting preliminary approval or June 30, 2022, whichever is sooner). “Settlement Class Members” are those Class Members who do not submit timely exclusion requests to the Settlement Administrator. (Settlement, ¶¶ 3-4.)

(Leviant Decl., ¶ 34 and Exhibit 1.)

V. **DISCUSSION**

A. **The Court Should Conditionally Certify the Class Because It Meets All the Requirements for Certification for Settlement Purposes Under CCP § 382**

Under Code of Civil Procedure § 382, class certification is warranted so long as there is a numerous and ascertainable class with a well-defined community of interest among its members and that a “class action proceeding is superior to other means for a fair and efficient adjudication of the litigation.” *See, e.g., Sav-on Drug Stores, Inc. v. Superior Court*, 34 Cal.4th 319, 326, 332 (2004). Any

doubts as to the appropriateness of class treatment must be resolved in favor of certification, subject to later modification. *Richmond v. Dart Indus. Inc.*, 29 Cal. 3d 462, 473-475 (1981). For purposes of this Settlement only, Defendant stipulated to conditional certification of the proposed class. (Settlement ¶ 19.)

“The certification question is ‘essentially a procedural one that does not ask whether an action is legally or factually meritorious.’” *Id.*, at 326, quoting *Linder v. Thrifty Oil Co.*, 23 Cal. 4th 429, 439-440 (2000). Indeed, the certification question simply asks whether the theory of recovery advanced by the plaintiff is likely to prove amenable to class treatment. *See, e.g., Jaimez v. Daiohs USA, Inc.*, 181 Cal. App. 4th 1286, 1298 (2010). In ruling on certification, a trial court’s task is to determine “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.” *Id.* Thus, “[t]he relevant comparison lies between the costs and benefits of adjudicating plaintiffs’ claims in a class action and the costs and benefits of proceeding by numerous separate actions” *See, e.g., id.*

“[I]t is also well established that trial courts should use different standards to determine the propriety of a settlement class, as opposed to a litigation class certification. Specifically, a lesser standard of scrutiny is used for settlement cases.” *Global Minerals & Metals Corp. v. Superior Court*, 113 Cal. App. 4th 836, 859 (2003), citing *Dunk v. Ford Motor Co.* 48 Cal. App. 4th 1794, 1807 n. 19 (1996). As the court noted in *Dunk*, although certification requirements are intended “to protect the interests of the non-representative class members,” that concern is “protected by the trial court’s fairness review of the settlement.” *Dunk*, 48 Cal. App. 4th at 1807 n.19.

Indeed, numerous courts have certified settlement classes. For example, the court in *In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d 285 (2d Cir. 1992), cert. dismissed, 506 U.S. 1088, 122 L. Ed. 497, 113 S. Ct 1070 (1993), addressed settlement before a class was certified. After a hearing, the “district court issued an order certifying the class and approving the settlement agreement.” *Id.* at 289; *see also Alaniz v. California Processors, Inc.*, 73 F.R.D. 269, 278 (N.D. Cal. 1976) (“the use of the tentative settlement class procedure was appropriate in this case”), *aff’d*, 572 F.2d 657 (9th Cir.), cert. denied, 439 U.S. 837 (1978). Certification of a settlement class is a regular feature of class action litigation and an approved procedure which ought to be followed in this case. *See Newberg on Class*

1 Actions (3d ed. 1991) § 11.27, pp. 11-40 to 11-56; Manual for Complex Litigation, 2d (1993) § 30.45.

2 In view of these standards, and as shown below, the Class should be certified for purposes of
3 settlement. Code Civ. Proc. § 382; Rules of Court, Rule 3.769(c).

4 **1. The Members of the Class Are Both Objectively Ascertainable and**
5 **Sufficiently Numerous.**

6 Whether an ascertainable class exists turns on three factors: (1) the class definition, (2) the size of
7 the class, and (3) the means of identifying the class members. *See Miller v. Woods*, 148 Cal. App. 3d
8 862, 873 (1983). In this case, Plaintiff contends that all three considerations strongly favor class
9 certification.

10 A class is ascertainable when “it is defined ‘in terms of objective characteristics and common
11 transactional facts’ that make ‘the ultimate identification of class members possible when that
12 identification becomes necessary.’” *Noel v. Thrifty Payless, Inc.*, 7 Cal. 5th 955, 980 (2019). No set
13 number of class members is required to maintain a class action. *Hebbard v. Colgrove*, 28 Cal. App. 3d
14 1017, 1030 (1972). In fact, the California Supreme Court has upheld a class of as few as ten members.
15 *Bowles v. Superior Court*, 44 Cal. 2d 574 (1955).

16 The class definition is sufficiently specific to enable the Parties, Class Members, and the Court to
17 readily determine the parameters of the class. *See Clothesrigger, Inc. v. GTE Corp.*, 191 Cal. App. 3d
18 605, 617 (1987) (proposed class defined as all persons nationwide subscribing to telephone service since
19 January 1, 1981, who were charged for one or more unanswered long distance calls, deemed “plainly”
20 ascertainable).

21 The question of whether class members are easily identifiable turns on whether a plaintiff can
22 establish “the existence of an ascertainable class,” not whether the plaintiff can “identify the individual
23 members of such class as prerequisite to the class suit.” *Daar*, 67 Cal.2d at 706; *see also, Reyes v. San*
24 *Diego County Bd. of Supervisors*, 196 Cal. App. 3d 1263, 1275 (1987).

25 In this case, there are approximately 669 Class Members, all of whom may be identified by
26 reference to Defendant’s records. In addition, to facilitate the administration of the Settlement, Defendant
27 has agreed to share the information from its records and has already demonstrated that it can do so when
28 providing class-wide informal discovery to Plaintiff to facilitate settlement discussions. Accordingly, the

Class is not only ascertainable, but also sufficiently numerous. (Leviant Decl., ¶ 35.)

2. There Are Common Questions That Predominate Over Any Questions That May Be Unique to Individual Class Members.

The community of interest requirement embodies three factors: (1) predominant questions of law and fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class. *Dunk*, 48 Cal. App. 4th at 1806; *Richmond*, 29 Cal. 3d at 473-75. In this case, Plaintiff's claims satisfy all three factors.

A question of law or fact is common to the members of a class if it may be resolved through common proof. *See, Jaimez*, 181 Cal.App.4th at 1305. As for predominance, it "is a comparative concept, and 'the necessity for class members to individually establish eligibility and damages does not mean individual fact questions predominate.'" *Sav-on*, 34 Cal. 4th at 334, quoting *Reyes v. Los Angeles County Bd. of Supervisors*, 196 Cal. App. 3d 1263, 1278 (1979). Thus, "[i]ndividual issues do not render class certification inappropriate so long as such issues may effectively be managed." *Id.* This is especially so where the key difference between class members solely concerns their damages. *See id.*

In this case, common questions include, but are not limited to: (i.) Whether or not Defendant paid proper wages to the Class; (ii.) Whether or not Defendant provided meal periods to the Class; (iii.) Whether or not Defendant provided rest periods to the Class; (iv.) Whether or not Defendant paid compensation timely upon separation of employment to former Class Members; (v.) Whether or not waiting-time penalties are available to the Class for violation of California Labor Code § 203; (vi.) Whether or not Defendant engaged in unlawful or unfair business practices affecting the Class in violation of California Business and Professions Code §§ 17200-17208; and (vii.) Whether or not Plaintiff and the Class are entitled to penalties pursuant to PAGA. (Leviant Decl., ¶¶ 37-38.)

In the Action, Plaintiff's claims present sufficient common issues of law and fact that predominate over individual issues and warrant class certification. From their review of the documentation provided, Class Counsel determined that for purposes of these claims, Defendant's policies and practices are either identical, or sufficiently similar, to raise the same questions of liability, and applied to all Class Members. Because Class Members would have to prove the same issues of law and fact to prevail, and because their potential legal remedies are identical, it would be preferable to

1 resolve all Class Members' claims by means of the Settlement than to require each Class Member to
2 litigate his or her individual claims. Therefore, common questions predominate over any questions that
3 may be unique to individual Class Members, and class-wide settlement is superior to any other method
4 of resolution.

5 **3. Plaintiff's Claims Are Typical of Those of the Class.**

6 Typicality "requires a showing that the class representative has claims or defenses typical of the
7 class." *See, e.g., Ghazaryan v. Diva Limousine, Ltd.*, 169 Cal. App. 4th 1524, 1534 (2008), citing
8 *Fireside Bank v. Superior Court*, 40 Cal. 4th 1069, 1089 (2007), and *Sav-On*, 34 Cal. 4th at 326,
9 approved by *Jaimez*, 181 Cal. App. 4th at 1298 and *Brinker Rest. Corp. v. Super. Ct.*, 53 Cal. 4th 1004
10 (2012). To satisfy the typicality requirement, California law does not require that plaintiffs have claims
11 identical to the other class members. Rather, the test of typicality for a class representative is whether
12 other members have the same or similar injury, whether the action is based on conduct which is not
13 unique to the named plaintiffs, and whether other class members have been injured by the same course of
14 conduct. *Seastrom v. Neways, Inc.*, 149 Cal. App. 4th 1496, 1502 (2007). The typicality requirement for
15 a class representative refers to the nature of the claim or defense of the representative, and not to the
16 specific facts from which it arose or the relief sought. *Id.*; *Hanon v. Dataproducts Corp.*, 976 F.2d 497,
17 508 (9th Cir. 1992).

18 The purpose of this requirement is to ensure that the representative plaintiff has interests that are
19 reasonably co-extensive with those of absent class members. *See id.* "The test of typicality 'is whether
20 other members have the same or similar injury, whether the action is based on conduct which is not
21 unique to the named plaintiffs, and whether other class members have been injured by the same course of
22 conduct.'" *Id.*, quoting *Schwartz v. Harp* 108 F.R.D. 279, 282 (C.D. Cal. 1985). Notably, "it has never
23 been the law in California that the class representative must have *identical* interest with the class
24 members." *Classen v. Weller*, 145 Cal. App. 3d 27, 46 (1983). In light of these standards, Plaintiff is
25 typical of class members.

26 Here, like other Class Members, Defendant employed Plaintiff in a non-exempt position during
27 the Class Period, and Plaintiff was subject to the same policies alleged to have impacted the entire class.
28 (Leviant Decl., ¶ 36.) Plaintiff and other Class Members share the same claims stemming from

1 Defendant's alleged violations of the Labor Code and relevant wage order. In addition, Defendant's
2 main defense, namely that its policies and practices fully comply with California law, apply equally to
3 the claims of all Class Members. Thus, Plaintiff is typical of the Class.

4 **4. Plaintiff and Plaintiff's Counsel Will Adequately Represent the Class.**

5 The adequacy requirement is met where the plaintiff is represented by counsel qualified to
6 conduct the litigation and the plaintiff's interest in the litigation is not antagonistic to class members'
7 interests. *McGhee v. Bank of America*, 60 Cal.App.3d 442, 451(1976). In other words, where the plaintiff
8 has adequate counsel, the plaintiff may represent the entire class absent any disabling conflicts of interest
9 that might hinder the plaintiff's ability to represent the class. *Id.*

10 In the Action, Plaintiff has no conflicts of interest with other Class Members and has agreed to
11 place Class interests above Plaintiff's own. (Leviant Decl., ¶ 39; Huerta Decl., ¶¶ 5-11.) Moreover,
12 Plaintiff's counsel are experienced in wage and hour class action litigation and have no conflicts of
13 interest with absent Class Members. (Leviant Decl., ¶¶ 21-26, 39.) As such, this Court should appoint
14 Plaintiff as Class Representative for the Class and appoint Plaintiff's Counsel as Class Counsel.

15 **5. Proceeding as a Class Action is Superior to Individual Actions**

16 Under the circumstances, proceeding as a class action is a superior means of resolving this
17 dispute, as the Class Members and the Court will derive substantial benefits. Class certification would
18 serve as the only means to deter and redress the alleged Labor Code violations. *See Linder v. Thrifty Oil*
19 *Co.* 23 Cal. 4th at 434 (relevant considerations include the probability that each class member will come
20 forward ultimately to prove his or her separate claim to a portion of the total recovery and whether the
21 class approach would actually serve to deter and redress the alleged wrongdoing). Furthermore,
22 individual actions arising out of the same operative facts would unduly burden the courts and could result
23 in inconsistent results, which may be avoided by class certification.

24 **6. The Proposed Class Notice Is Constitutionally Sound and Complies with**
25 **Rule 3.766(d) and (e)**

26 Notice requirements are set forth in Rules of Court, Rule 3.766. In determining the manner of
27 the notice, the court must consider the interests of the class, the type of relief requested, the stake of the
28 individual class members, the cost of notifying class members, the resources of the parties, the possible

prejudice to class members who do not receive notice, and the *res judicata* effect on class members. Rules of Court, Rule 3.766(e).

a) The Notice Procedure Satisfies Due Process

Plaintiff requests that the Court approve the proposed plan for giving notice to the Class and administering the Settlement. The notice process is set forth in the Settlement. The standard for determining the adequacy of notice is whether the notice has “a reasonable chance of reaching a substantial percentage of the class members.” *Cartt v. Sup. Ct.*, 50 Cal.App.3d 960, 974 (1975). California law vests the Court with broad discretion in fashioning an appropriate notice program. *Cartt*, 50 Cal. App. 3d at 973-74. There is no statutory or due process requirement that all class members receive actual notice, but in this matter, the Class Members will receive direct mailed notice. Direct mail notice to Class Members’ last known address is the best possible notice under the circumstances. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

As the Court of Appeal has explained, “[t]he notice given should have a reasonable chance of reaching a substantial percentage of the Class Members” *Cartt*, 50 Cal. App. 3d at 974. For class claims “for money damages or similar relief at law, notice sent by first class mail to the last known address of each member of the plaintiff class is sufficient.” *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811 (1985). Here, the proposed procedure includes safeguards, including, but not limited to, searches for address changes and the re-mailing of returned notices after skiptraces. As such, the proposed procedure provides a reasonable chance that Class members will receive notice.

b) The Notice is Accurate and Informative

The proposed Notice of Class Action Settlement should be approved for dissemination to the Class Members. It will be disseminated through direct mail to the last known address for each Class Member. It informs the Class Members of the terms of the settlement and their right to be excluded from the Settlement. If there are Class Members who wish to object to this proposed class action settlement, they will have the opportunity to file their objections and be heard at the Final Approval Hearing.

Rule 3.769(f) of the Rules of Court provides as follows:

If the court has certified the action as a class action, notice of the final approval hearing must be given to the class members in the manner specified by the court. The notice must contain an explanation of the proposed settlement and procedures for class

1 members to follow in filing written objections to it and in arranging to appear at the
2 settlement hearing and state any objections to the proposed settlement.

3 Rules of Court, rule 3.769(f).

4 The Notice also fulfills the requirement of neutrality in class notices. 3 NEWBERG § 8.39. It
5 summarizes the proceedings and the terms and conditions of the proposed Settlement, in an informative
6 and coherent manner, in compliance with the Manual for Complex Litigation (“MANUAL”), (2d Ed.
7 1993), which states that “the notice should be accurate, objective, and understandable to Class Members .
8 ..” MANUAL, § 30.211. It makes clear that the Settlement does not constitute an admission of liability
9 by the Defendant and recognizes that this Court has not ruled on the merits. It also states that the final
10 settlement approval decision has yet to be made. Accordingly, the Notice complies with the standards of
11 fairness, completeness, and neutrality required of a combined settlement-certification class notice.

12 Upon the Court’s approval, the Notice of Class Action Settlement will be mailed by the
13 Administrator to each Class Member.

14 **B. The Court Should Preliminarily Approve the Settlement Because It Is a Fair,**
15 **Adequate, and Reasonable Compromise of Disputed Wage Claims in View of**
16 **Defendant’s Potential Liability Exposure and the Risks of Continued Litigation**

17 California courts favor settlement. *See, e.g., Stambaugh v. Superior Court*, 62 Cal. App. 3d 231,
18 236 (1976). Unlike most settlements, class action settlements involve a court approval process that exists
19 to prevent fraud, collusion, and unfairness to class members. *Malibu Outrigger Bd. of Governors v.*
20 *Superior Court*, 103 Cal.App.3d 573, 578-579 (1980). This approval process consists of preliminary
21 settlement approval, notice being given to class members, and a final fairness and approval hearing being
22 held at which class members may be heard with respect to the settlement. *Id.* For the reasons discussed
23 below, this Court should preliminarily approve the Settlement, allow the Parties to give notice to the
24 Class as proposed, and schedule a final fairness and final approval hearing.

25 **1. Class Action Settlements Are Subject to Review and Approval.**

26 Any settlement of class litigation must be reviewed and approved by the presiding court. Rules
27 of Court, Rule 3.769(a). Approval occurs in two steps: (1) an early (preliminary) review by the trial
28 court and (2) a subsequent (final) review after notice has been distributed to the class members. The

1 Preliminary Approval Hearing and Final Approval Hearing coincide with these two steps. The present
2 motion seeks *preliminary approval* and the setting of a Final Approval Hearing.

3 To evaluate a settlement, the trial court must receive “basic information about the nature and
4 magnitude of the claims in question and the basis for concluding that the consideration being paid for the
5 release of those claims represents a reasonable compromise.” *Kullar v. Foot Locker Retail, Inc.*, 168 Cal.
6 App. 4th 116, 133 (2008). However, the record need *not* contain an explicit statement of the maximum
7 theoretical amount that the class could recover:

8 Greenwell misunderstands *Kullar*, apparently interpreting it to require the record in all
9 cases to contain evidence in the form of an explicit statement of the maximum amount
10 the plaintiff class could recover if it prevailed on all its claims—a number which
11 appears nowhere in the record of this case. But *Kullar* does not, as Greenwell claims,
require any such explicit statement of value; it requires a record which allows “an
understanding of the amount that is in controversy and the realistic range of outcomes
of the litigation.”

12 *Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles*, 186 Cal. App. 4th 399, 409 (2010).

13 **2. The Parties Reached the Settlement Through Arms’ Length Negotiations**
14 **Between Experienced Counsel with the Assistance of a Highly-Qualified**
15 **Mediator After Sufficient Data Was Exchanged to Evaluate Settlement.**

16 A settlement is presumptively fair where it is reached through arms’ length bargaining, based on
17 sufficient discovery and investigation to allow counsel and the court to act intelligently, counsel is
18 experienced in similar litigation, and the percentage of objectors is small.² *Dunk*, 48 Cal.App.4th at 1802;
19 *In re Microsoft I-V Cases*, 135 Cal. App. 4th 706, 723 (2006); *7-Eleven Owners for Fair Franchising v.*
20 *Southland Corp.*, 85 Cal. App. 4th 1135, 1146 (2000). In deciding whether to approve a settlement, a
21 trial court has broad powers to determine whether it is fair under the circumstances of the case. *See, e.g.,*
22 *Mallick v. Superior Court*, 89 Cal. App. 3d 434, 438 (1979). In exercising these powers, the overriding
23 concern is to ensure that a proposed settlement is “fair, adequate, and reasonable.” *Dunk*, at 1801,
24 quoting *Officers for Justice v. Civil Serv. Comm’n of San Francisco*, 688 F.2d 615, 625 (9th Cir. 1982).

25 Relevant factors in making this determination, include, but are not limited to:

26
27 ² Because the fourth prerequisite for the presumption to arise cannot be addressed until the final
28 approval hearing, only the first three prerequisites are relevant at this preliminary stage of the settlement
approval process.

[T]he complexity and likely duration of further litigation, the risk of maintaining class action status through trial, the amount offered in settlement, the extent of discovery completed and the state of the proceedings, the experience and views of counsel, the presence of a governmental participant, and the reaction of the class members to the proposed settlement.

Id. These factors require balancing, are non-exhaustive, and, as such, trial courts should tailor the factors considered to each case and give due regard to “what is otherwise a private consensual agreement between the parties.” *Id.*

Here, the Settlement resulted from thorough, arms’ length negotiations between experienced counsel with the assistance of highly-regarded mediator. (Leviant Decl., ¶¶ 8-10.) With respect to the claims at issue in this case, Plaintiff obtained data from Defendant and then carefully reviewed that information. Counsel for Plaintiff also examined relevant policies and interviewed witnesses in detail about their work experiences and Defendant’s practices.

Based on the totality of that review, Plaintiff estimated the potential exposure and then estimated risk factors to adjust the reasonable expected outcome. The investigation and discovery that Plaintiff’s counsel conducted were sufficient to provide them with enough information to intelligently evaluate the estimated exposure in this action for purposes of negotiating the Settlement in view of the risks discussed below and are also sufficient to allow this Court to do the same. *See, e.g., Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 245 (2001).

3. The Settlement Represents a Fair, Adequate, and Reasonable Compromise of Class Members’ Claims Based on Defendant’s Estimated Liability Exposure Given the Risks Continued Litigation Would Entail.

A settlement is not judged against what might have been recovered had a plaintiff prevailed at trial and does not have to provide 100% of damages sought to be fair and reasonable. “In the context of a settlement agreement, the test is not the maximum amount plaintiffs might have obtained at trial on the complaint, but rather whether the settlement is reasonable under all of the circumstances.” *Wershba*, 91 Cal.App.4th at 250. Accordingly, because settlements involve compromise, even one that provides for substantially narrower relief than would likely be obtained if the suit were successfully litigated can be reasonable given that “the public interest may indeed be served by a voluntary settlement in which each side gives ground in the interest of avoiding litigation.” *Id.*, quoting *Air Line Stewards & Stewardesses*

1 *Ass'n, Local 550 v. American Airlines, Inc.*, 455 F.2d 101, 109 (7th Cir. 1972).

2 With respect to the claims asserted on behalf of the Class in this case, there are serious risks that
3 support the reduced compromise amount. These risks include, but are not limited to: (i) the risk that
4 Plaintiff would be unable to establish liability for unpaid straight time or overtime wages, *see Duran v.*
5 *US Bank Nat'l Ass'n*, 59 Cal. 4th 1, 39 & n. 33 (2014) ("*Duran*"), *citing Dilts v. Penske Logistics, LLC*
6 2014 WL 205039 (S.D. Cal. 2014) (dismissing certified off-the-clock claims based on proof at trial); (ii)
7 the risk that Defendant's meal and rest period policies might not ultimately support class certification or
8 a class-wide liability finding, *see Duran*, 59 Cal. 4th at 14, n. 28 (citing Court of Appeal decisions
9 favorable on class certification issue without expressing opinion as to ultimate viability of proposition);
10 (iii) the risk that uncertainties pertaining to the ultimate legality of Defendant's policies and practices
11 could preclude class-wide awards of statutory penalties under Labor Code §§ 203 and 226(e); (iv) the
12 risk that individual differences between Class Members could be construed as pertaining to liability and
13 not solely to damages, *see Duran*, 59 Cal. 4th at 19; (v) the risk that any civil penalties award under the
14 PAGA could be reduced by the Court in its discretion, *see Labor Code § 2699(e)(1)*; (vi) the risk that
15 class treatment could be deemed improper as to one or more claims, except for settlement purposes; (vii)
16 the risk that lengthy appellate litigation could ensue; and (viii) the risk that violation rate estimates would
17 prove much lower than expected. (Leviant Decl., ¶ 16.) These risks are non-exhaustive.

18 In light of the uncertainties of protracted litigation, the settlement amount reflects a fair and
19 reasonable recovery for the Class Members. (Leviant Decl. ¶¶ 13-20.) The settlement amount is, of
20 course, a compromise figure. (Leviant Decl. ¶ 17.) By necessity it took into account risks related to
21 liability, damages, and the defenses asserted by Defendant. (*Id.*) Moreover, each Class Member will be
22 given the opportunity to opt-out of the Settlement, allowing those who feel they have claims that are
23 greater than the benefits they can receive under this Settlement to pursue their own claims. (*Id.*) For the
24 approximately 669 members of the Class, the average **gross** recovery is approximately **\$1,345.00** per
25 class member, and the estimated average **net** recovery for each Class Member is approximately **\$740.00**.
26 (*Id.*) Given that Defendant could challenge certification and liability, this is a significant sum to have
27 achieved in settlement. Moreover, a Class Member who worked a greater number of weeks for
28 Defendant will receive a larger share of the Settlement than a Class Member who worked for a shorter

1 amount of time during the class period. (*Id.*)

2 After analyzing the claims in this matter, Plaintiff has concluded that the value of this Settlement
3 is fair, adequate, and reasonable. (Leviant Decl., ¶ 18.) The Class Settlement Amount of **\$900,000** is
4 82% of the **\$1,094,100.89** estimate of *risk-adjusted* recovery (excluding interest) at this stage in the
5 litigation. On that basis, it would be unwise to pass up this settlement opportunity. This assessment is
6 based on a carefully constructed model of the current fair value of the case, using estimated risks,
7 average wage rates, numbers of employees, and the amount of time covered by the class period. (*Id.*)

8 The maximum calculated plausible exposure is **\$5,228,254.00**, including PAGA penalties and **no**
9 **discount applied to any class claim.** (*Id.*)

- 10 • The reasonably estimated exposure for unpaid off-the-clock work (responding to
11 occasional text messages related to job assignments) over the class period was estimated
12 to be **\$126,537.00**, but with chances of certification and proof of liability (40% and 40%
13 respectively) for a risk-adjusted exposure of **\$20,245.92**.
- 14 • The reasonably estimated exposure for unpaid wages due to miscalculation of the
15 overtime and premium rate of pay over the class period was calculated to be **\$167,887.00**,
16 with chances of certification and proof of liability (75% and 40% respectively) for a risk-
17 adjusted exposure of **\$50,366.10**.
- 18 • The reasonably estimated exposure for rest break violations over the class period was
19 calculated at **\$657,693.00**, but with low chances of certification and proof of liability
20 (25% and 20% respectively) for a risk-adjusted exposure of **\$32,884.65** (based on a
21 missed break every week period for 100% of the class).
- 22 • The reasonably estimated exposure for meal break violations over the class period was
23 calculated at **\$254,499.50**, with chances of certification and liability risks (30% and 20%
24 respectively) resulting in a risk-adjusted exposure of **\$15,269.97** (based on those facial
25 non-compliant meal periods in data that were not paid a premium and assuming
26 employees chose to take non-compliant meal periods in 75% of those noted violations,
27 given that Defendant paid over \$387,196 in premiums for other meal period issues).
- 28 • Risk-adjusted penalty recoveries for wage statement and Labor Code § 203 penalties

were estimated to be approximately **\$219,000** and **\$268,053.00**, respectively, on maximum exposures of **\$730,000.00** and **\$893,510.00**, respectively. The certification and liability risk factors are contingent upon the underlying wage claims and are assumed to be the same as those for the overtime and premium rate error claim for that reason.

- The reasonably estimated exposure for unreimbursed expenses (occasional tool purchases by some employees and cell phone usage by some employees) over the class period was calculated at **\$173,115.00**, with chances of certification and liability risks (50% and 50% respectively) resulting in a risk-adjusted exposure of **\$43,278.75**.
- Performing risk-adjusted valuations for all claims yields a total value in the range of **\$649,098.39**, excluding PAGA. (*Id.*)
- PAGA penalties were calculated as having a maximum realistic exposure of **\$2,225,012.50**, but a risk adjusted value of **\$445,002.50**, after factoring in risks of reduction in penalties pursuant to Court discretion and the high risk of the inability to prove violations for all aggrieved employees.

The Leviant Declaration sets forth claim valuation in additional detail. (*See*, Leviant Decl., ¶ 18.)

This result here is fully supportable as reasonable. First, it is important to recognize the wilfulness finding required for Labor Code §§ 203 and 226 is challenging to establish. (Leviant Decl., ¶ 19.) Second, rest break and meal period claims have been challenging to certify for many years, even after *Brinker*. (Leviant Decl., ¶ 19.) Third, the certification rates in California are lower than conventional wisdom holds. *See*, H. Scott Leviant, *Second Interim Report on class actions in California sheds new light on certification* (February 19, 2010), www.thecomplexlitigator.com, available at <http://www.thecomplexlitigator.com/post-data/2010/2/19/second-interim-report-on-class-actions-in-california-sheds-n.html>; *see also*, *Findings of the Study of California Class Action Litigation, 2000-2006*, available at <http://www.courtinfo.ca.gov/reference/documents/class-action-lit-study.pdf> (finding, at page 5, and in Table 9, at page 15, that only 21.4% of all class actions were certified either as part of a settlement *or* as part of a contested certification motion).

Here, the estimated certification probabilities are *above* the average rate at which cases were certified in California over the study years, based upon data available through the California Courts

1 websites. (Leviant Decl., ¶ 19.) In sum, well *under* 20% of all cases filed as proposed class actions are
2 ultimately certified by way of a *contested* motion. (*Id.*) The recovery is almost **18%** of the maximum
3 plausible recovery (estimated to be approximately **\$5,228,254.00**, including PAGA), which falls within
4 the expected outcome under the likelihood of success metric. (*Id.*) It would also be appropriate to
5 evaluate the result by examining only the premium wages at issue (approximately \$1,206,616.50, with
6 no risk reduction), excluding penalties and interest; the settlement is about 75% of the premium wages
7 (unpaid wages, meal period premiums, and rest break premiums) at maximum realistic exposure values.³
8 This Settlement achieves the goals of the litigation.

9 **4. The Proposed Method for Allocating Settlement Funds Is Fair, Adequate,**
10 **and Reasonable.**

11 The proposed method of allocating the Settlement Fund to Class Members also is fair and
12 reasonable. As noted, the parties agreed to allocate the Settlement Fund between all Class Members
13 based on time worked by the Class Member during the Class Period, in relation to the total amount of
14 time worked by all participating Class Members collectively during the class period. This proposed
15 method is fair and reasonable because each Class Member's actual potential damages vary based on the
16 number of workweeks he or she actually worked (e.g., Lab. Code § 226.7 provides for an extra hour of
17 pay at the employee's regular rate of pay for each violation, resulting in a higher potential damage when
18 a higher number of incidents occur). A Class Member who worked a greater number of weeks for
19 Defendant will receive a larger payment under the Settlement than a Class Member who worked for a
20 shorter amount of time during the relevant period. (Leviant Decl., ¶¶ 11, 17.)
21
22
23

24
25 ³ The exclusion of interest and penalties from the fairness evaluation is proper because, first, PAGA
26 penalties are discretionary (*see* Lab. Code § 2699(e)(2) (the court in its discretion "may award a lesser
27 amount than the maximum civil penalty amount specified by this part...")), and, second, courts evaluate
28 the strength of a proposed settlement without taking potential penalties or interest into consideration. *See*
Rodriguez v. West Publishing Corp., 563 F.3d 948, 955 (9th Cir. 2000); *see also Miller v. CEVA*
Logistics U.S.A., Inc., 2015 WL 729638, at *7 (E.D. Cal. Feb. 19, 2015) (court utilized calculation of a
defendant's exposure exclusive of interest and penalties to determine whether the settlement fell within
the range of possible approval).

1 **5. The Proposed Enhancement Payment to Plaintiff Is Fair, Adequate, and**
2 **Reasonable and Warrants Preliminary Approval.**

3 The proposed enhancement payment of \$5,000 to Plaintiff is intended to recognize the
4 substantial initiative and significant efforts on behalf of the Class. Courts routinely approve incentive
5 awards to compensate named plaintiffs for the services they provide and the risks they incur during class
6 action litigation, often in much higher amounts than that sought here. *See, e.g., Bell v. Farmers Ins.*
7 *Exchange*, 115 Cal. App. 4th 715, 726 (2004) (upholding “service payments” to named plaintiffs for
8 their efforts in bringing the case); *Van Vranken v. Atlantic Richfield Co.*, 901 F. Supp. 294 (N.D. Cal.
9 1995) (approving a \$50,000 enhancement award). Plaintiff contributed time to the prosecution of this
10 matter, including assistance prior to the mediation with information and substantial time conferring with
11 counsel over the course of this litigation and before it was filed. (Leviant Decl., ¶ 32; Huerta Decl., ¶¶
12 14-20.) The enhancement also recognizes the risks Plaintiff undertook on behalf of the Class to be
13 personally liable for all costs incurred regardless of the success of the litigation or class certification, as
14 well as the personal risk of facing intrusive discovery and potential disclosure to future employers that
15 Plaintiff sued an employer, making future employment prospects uncertain. The accompanying
16 Declaration of Plaintiff confirms his involvement and supports appointment as the Class Representative.

17 **6. The Proposed Award of Attorneys’ Fees and Costs Is Also Fair, Adequate,**
18 **and Reasonable and Merits Preliminary Approval.**

19 The California Supreme Court removed any lingering doubt about the use of the percentage of
20 the fund method to award attorney’s fees in California Courts:

21 We join the overwhelming majority of federal and state courts in holding that when
22 class action litigation establishes a monetary fund for the benefit of the class members,
23 and the trial court in its equitable powers awards class counsel a fee out of that fund, the
24 court may determine the amount of a reasonable fee by choosing an appropriate
25 percentage of the fund created. The recognized advantages of the percentage method—
26 including relative ease of calculation, alignment of incentives between counsel and the
27 class, a better approximation of market conditions in a contingency case, and the
28 encouragement it provides counsel to seek an early settlement and avoid unnecessarily
 prolonging the litigation (See pt. I, *ante*; *Lealao, supra*, 82 Cal.App.4th at pp. 48–49, 97
 Cal.Rptr.2d 797; *Rawlings v. Prudential–Bache Properties, Inc., supra*, 9 F.3d at p.
 516)—convince us the percentage method is a valuable tool that should not be denied
 our trial courts.

1 *Laffitte v. Robert Half Intern. Inc.*, 1 Cal. 5th 480, 503 (2016).⁴ Thus, this Court may and, as strongly
2 encouraged by the California Supreme Court, *should* award attorney’s fees to Plaintiff’s counsel based
3 upon the percentage of the fund methodology.

4 Setting *Laffitte* aside, whether the once-again-confirmed percentage of the fund method or the
5 lodestar method is used, the outcome is roughly the same: “[F]ee awards in class actions average around
6 one-third of the recovery’ regardless of ‘whether the percentage method or the lodestar method is used.’”
7 *Amaro v. Anaheim Arena Mgmt., LLC*, 69 Cal. App. 5th 521 (2021) (quoting *Chavez v. Netflix, Inc.*, 162
8 Cal.App.4th 43, 66, fn. 11 (2008)). This is also consistent with counsels’ experience in class cases. Here,
9 Plaintiff’s attorneys intend to request attorneys’ fees of up to \$300,000.00 (one-third of the GSA), and
10 costs capped at \$25,000 (which includes payment for mediation, filing fees, legal research fees, and other
11 standard expenses). (Leviant Decl., ¶ 31.) Given the efforts and risks involved, as well as the results
12 achieved, these amounts are within the range of reasonableness and warrant *preliminary approval*.

13 **7. The Proposed Payment to the Administrator Is Fair and Reasonable**

14 In deciding whether to approve a proposed settlement, a court must determine if the proposed
15 settlement is fair under the circumstances of the case. *Mallick*, 89 Cal.App.3d at 438. In exercising this
16 power, the overriding concern is to ensure that a proposed settlement is “fair, adequate, and reasonable.”
17 *Dunk*, 48 Cal.App.4th at 1801 (internal quotations omitted). ILYM Group, Inc., which was selected due
18 to its competitive bid, estimates that administration can be performed for **\$14,375.00**. In counsel’s
19 experience, based on similar wage-and-hour actions, an estimated cost of **\$14,375.00** is a fair and
20 reasonable amount for administration fees and should be preliminarily approved. (Leviant Decl., ¶ 34.)

21 **8. The PAGA Allocation is Reasonable**

22 “In determining whether the proposed settlement falls within the range of reasonableness,
23 perhaps the most important factor to consider is plaintiffs’ expected recovery balanced against the value
24 of the settlement offer.” *Cotter v. Lyft, Inc.*, 176 5 F. Supp. 3d 930, 935 (N.D. Cal. 2016) (internal
25

26 ⁴ The Supreme Court also corrected the misconception that *Dunk* should be viewed as expressing
27 doubt about the use of the percentage method: “The *Dunk* court, while finding the percentage method
28 inapplicable to the settlement before it due to the lack of a readily valued common fund, did not purport
to bar its usage generally in common fund cases.” *Laffitte*, 1 Cal. 5th at 501.

1 quotation omitted). Significantly, the ultimate decision as to the amount of penalties is always up to the
2 discretion of the Court. Labor Code § 2699(e)(2) states: “In any action by an aggrieved employee
3 seeking recovery of a civil penalty available under subdivision (a) or (f), a court may award a lesser
4 amount than the maximum civil penalty amount specified by this part if, based on the facts and
5 circumstances of the particular case, to do otherwise would result in an award that is unjust, arbitrary and
6 oppressive, or confiscatory.”

7 The PAGA allocation is reasonable because the settlement of the underlying wage and hour
8 claims is robust and serves the deterrent purpose of the PAGA statute. *O’Connor v. Uber Technologies,*
9 *Inc.*, 201 F.Supp.3d 1110, 1135 (N.D. Cal. 2016) (“By providing fair compensation to the class members
10 as employees and substantial monetary relief, a settlement not only vindicates the rights of class
11 members as employees, but may have a deterrent effect upon the defendant employer and other
12 employers, an objective of PAGA.”); *see also Visceral v. Mistras Group*, 2016 WL 5907869 *9 (N.D.
13 Cal. 2016) (“Applying O’Connor’s sliding scale approach, settlement of the PAGA claim may be
14 substantially reduced below its standalone settlement value without sacrificing its statutory purposes
15 because the non PAGA settlement is relatively substantial.”)

16 In addition, there is no evidence that a court or a commissioner had informed Defendant that its
17 conduct violated the Labor Code. *Amaral v. Cintas Corp.*, 163 Cal. App. 4th 1157, 1209 (2008); *Willis v.*
18 *Xerox Bus. Servs., LLC*, 2013 WL 6053831, *7-8 (E.D. Cal. 2013) (“Under California law, courts have
19 held that employers are not subject to heightened penalties for subsequent violations until and unless a
20 court or commissioner notified the employer that it is in violation of the Labor Code.”) And in *Cotter*,
21 the court found a significant reduction of the PAGA claim would be appropriate because “[t]his does not
22 appear to be a case where a company has deliberately sought to evade the law.” *Cotter*, 176 F. Supp. 3d
23 at 941. Here, Defendant can state a strong case that, as the Court concluded in *Cotter*, its efforts to
24 devise compliant operational policies do not indicate an organization that has deliberately sought to
25 evade the law. This is a very significant risk factor.

26 To assess the fairness, adequacy, and reasonableness of a class action settlement, the court should
27 also consider the expense, complexity and likely duration of further litigation. *Dunk*, 48 Cal. App. 4th at
28 1801. Here, the expense, complexity and likely duration of future litigation was to some extent an

1 unknown. However, what is certain is that to adequately establish the foundational violations that would
2 support a substantial penalty award, tremendous time and expense would be invested. To adequately
3 establish that aggrieved employees experience the alleged violations, and at what frequency, most of the
4 aggrieved employees would need to be interviewed in a systematic fashion and their testimony cataloged
5 in way sufficiently meaningful to permit the submission of summary evidence at trial, such as via survey.
6 *First*, the burdensome nature of such a process would be expensive and time-consuming. *Second*, the
7 individuals already interviewed confirmed substantial risk that the Court would either substantially
8 reduce any penalty ultimately awarded *or* conclude that the conduct was insufficient to support a penalty
9 award. *Third*, it would be essentially impossible to formulate an objectively reliable means of
10 summarizing testimonial experiences, other than by an extraordinarily detailed survey. And formulating
11 such a survey would have been important, since frequency of violations would need to be established
12 before any penalties could be recovered. At least as to claims such as meal period and rest break
13 violations, the decisions of aggrieved employees are a major factor in assessing liability. In sum, the
14 evidence collected to date leads Plaintiff to conclude that, to the extent violations occurred, a fact which
15 Defendant disputes, the violations were ***not*** systematic and ***not*** uniform across all of Defendant's
16 estimated 365 employees who worked during the PAGA period. Alternatively, direct testimony would
17 have been required from as many of the roughly **365** aggrieved employees as could be obtained, which
18 would be, at best, very difficult. Proof of this sort gives rise to a manageability argument that could
19 substantially reduce the size of the aggrieved employee group.

20 Finally, the PAGA allocation is fair. The LWDA is receiving \$60,000. The Class is receiving,
21 net, an estimated \$495,625.00 for the releases of eight other theories of recovery (inclusive of the
22 \$20,000 as the aggrieved employees' share of the PAGA Allocation). The proportion is tipped slightly
23 in favor of the Class Members, but not markedly so. An allocation to the LWDA equal to 12% of the
24 Net Settlement Amount is not unfair and satisfies policies underlying California's wage and hour laws.

25 **VI. THE COURT SHOULD SCHEDULE A FINAL FAIRNESS HEARING**

26 The last step in the settlement approval process is the fairness hearing, where the Court makes a
27 final determination about the propriety of settlement. Plaintiff requests that the fairness hearing in this
28 case be scheduled for about 135 days after issuance of the Court's Order granting preliminary approval

1 of the Settlement. Under the Settlement, the Defendant will have 14 days to provide the mailing data to
2 the Settlement Administrator, which will then have 30 days to mail out class notice. Class Members
3 have 60 days after mailing of the notice to submit exclusions or objections (with a 14-day extension
4 available for late-returned and re-mailed notices). Plaintiff proposes that the final approval hearing be
5 scheduled for the first available date that is 165 days or later after preliminary approval is granted.

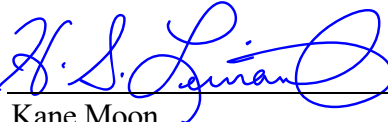
6 **VII. CONCLUSION**

7 For all the foregoing reasons, because the Class meets the requirements for certification, because
8 the Settlement bears all requisite indicia of fairness, reasonableness, and adequacy, and because the
9 proposed notice procedure and forms comport with Rule 3.766 and due process, this Court should grant
10 this Motion for Preliminary Approval, adopt the [Proposed] Order Granting Preliminary Approval of
11 Class Action Settlement submitted herewith, and schedule a Final Fairness Hearing.

12 Respectfully submitted,

13 Dated: March 22, 2022

MOON & YANG, APC

14 By: 
15 Kane Moon
16 H. Scott Leviant
17 Lilit Tunyan
18 Mariam Ghazaryan

Attorneys for Plaintiff

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the State of California, County of Los Angeles. I am over the age of 18 and not a party to the within suit; my business address is 1055 W. 7th Street, Suite 1880, Los Angeles, CA 90017.

On the date indicated below, I served the document described as: **PLAINTIFF'S NOTICE OF MOTION AND MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT; MEMORANDUM OF POINTS AND AUTHORITIES** on the interested parties in this action by sending ☐ the original [or] ☒ a true copy thereof ☒ to interested parties as follows [or] ☐ as stated on the attached service list:

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☒ **BY ELECTRONIC SERVICE:** Based on a court order or an agreement of the parties to accept electronic service, I caused the documents to be sent to the persons at the electronic service addresses listed above via third-party cloud service CASEANYWHERE. I did not receive an error message.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this **March 22, 2022** at Los Angeles, California.

H. Scott Leviant
Type or Print Name


Signature