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10 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
11 **FOR THE COUNTY OF LOS ANGELES**
12 **(UNLIMITED JURISDICTION)**

14 ANDREW BURDICK, on behalf of himself, and
all others similarly situated, and as an
15 “aggrieved employee” on behalf of other
16 “aggrieved employees” under the Labor Code
Private Attorneys General Act of 2004,

17 *Plaintiff(s),*

18
19 vs.

20 PEACH STATE ROOFING, INC., a Georgia
corporation; MARTIN KELLY, an individual;
21 CHRIS KELLY, and individual; and DOES 1
22 through 50, inclusive,

23 *Defendant(s).*
24

Case No. 20STCV20397

**PLAINTIFF ANDREW BURDICK’S
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION FOR PRELIMINARY
APPROVAL OF CLASS ACTION
SETTLEMENT**

Hearing Date: October 18, 2022
Hearing Time: 10:00 a.m.
Hearing Dept.: 14, The Honorable
Kenneth R. Freeman

Action filed: May 28, 2020



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

3 **I. INTRODUCTION**

4 Plaintiff Andrew Burdick (“Plaintiff”) submits this memorandum of points and authorities
5 in support of his unopposed motion for preliminary approval of the Joint Stipulation of Class
6 Action Settlement and Release of Claims (the “Settlement”)³, which provides for a Gross
7 Settlement Amount (“GSA”) of \$550,000.00 in compromise of all disputed claims on behalf of
8 all persons Defendants Peach State Roofing, Inc. and Martin Kelly employed as non-exempt,
9 hourly employees in California at any time between May 28, 2016 through April 15, 2021.
10 Through this Motion, Plaintiff respectfully requests for this Court to (1) provisionally certify the
11 below-defined Class for settlement purposes only under Code of Civil Procedure § 382; (2)
12 preliminarily approve the Settlement; (3) preliminarily appoint Plaintiff as Class Representative;
13 (4) appoint David Spivak of The Spivak Law Firm and Walter L. Haines of United Employees
14 Law Group as Class Counsel; (5) approve the proposed notice procedures and related forms; and
15 (6) schedule a final approval hearing.

16 This Court should grant Plaintiff’s motion because: (1) for settlement purposes, the
17 Settlement Class meets the requirements for class certification under Code of Civil Procedure §
18 382; (2) the Settlement warrants preliminary approval based on all indicia for fairness,
19 reasonableness, and adequacy; (3) for settlement purposes, Plaintiff is adequate to serve as Class
20 Representative; (4) Plaintiff’s attorneys are adequate to serve as Class Counsel; (5) the proposed
21 notice procedures, and related forms, fully comport with due process and adequately apprise Class
22 Members of their rights; and (6) a final approval hearing must be scheduled to allow Settlement
23 Class members an opportunity to be heard regarding the Settlement and to give it finality.
24 Accordingly, for the reasons detailed below, this Court should grant Plaintiff’s Motion in its
25 entirety and preliminarily approve the Settlement.

26 **II. BACKGROUND**

27 Defendants Peach State Roofing, Inc., Martin Kelly, and Chris Kelly (collectively
28 “Defendants”) have provided roofing and construction solutions to their customers, including
schools, government facilities, and many fortune-500 companies, nationwide since 1990. PSR

3 The Settlement is attached as Exhibit (“Ex.”) 1 to the Declaration of David Spivak (“DS”),
which is submitted herewith under a separate cover.



has 19 offices nationwide, two of which are in California. DS, ¶ 4. Defendants employed Plaintiff as an hourly roofer, technician, and laborer from about December of 2018 until November 14, 2019. *Id.*

A. The Claims and Procedural History

On April 02, 2020, Plaintiff notified Defendants and the California Labor and Workforce Development Agency (“LWDA”), pursuant to the California Private Attorneys General Act of 2004, California Labor Code sections 2698, *et seq.* (“PAGA”), of alleged Labor Code violations committed by Defendants. DS, ¶ 5, Ex. 2.

On May 28, 2020, Plaintiff filed a Class Action Complaint in the Los Angeles County Superior Court, Case No. 20STCV20397, against Defendants on behalf of himself and others similarly situated, alleging causes of action on a class-wide basis for: (1) Failure to Pay All Wages Earned for All Hours Worked (Lab. Code §§ 510, 1194, 1197, and 1198); (2) Failure to Provide Rest Breaks (Lab. Code §§226.7 and 1198); (3) Failure to Provide Meal Periods (Lab. Code §§226.7, 512 and 1198); (4) Failure to Indemnify (Lab. Code §§ 1198 and 2802); (5) Wage Statement Penalties (Lab. Code §§ 226 and 226.2); (6) Waiting Time Penalties (Lab. Code §§ 201-203); and (7) Unfair Competition (Bus. & Prof. Code §§ 17200, *et seq.*). DS, ¶ 6, Ex. 3. On June 15, 2020, Plaintiff filed his First Amended Complaint adding a claim under PAGA. DS, ¶ 6, Ex. 4.

B. Mediation

The Parties thereafter engaged in an informal, voluntary exchange of information in the context of privileged settlement discussions to facilitate an early mediation. Defendants produced Plaintiff’s entire personnel file (including policies and agreements he signed and acknowledged), copies of their relevant company written policies and more detailed time and payroll data for a random sample of putative class members specifically selected by Plaintiff’s counsel. DS, ¶ 7.

On April 15, 2021, following much of the foregoing informal discovery and exchange of information, the Parties participated in a mediation session presided over by Mediator Francis J. Ortman, an experienced class action mediator. During the mediation, the Parties had a full day of productive negotiations and reached agreement on a class-wide settlement during the second mediation session. During the mediation sessions, each side, represented by his/their respective counsel, recognized the risk of an adverse result in the Action and agreed to settle the Action and all other matters covered by this Agreement pursuant to the terms and conditions of this Agreement. DS, ¶ 8.



1 **III. OVERVIEW OF THE SETTLEMENT**

2 **A. Settlement Class Definition**

3 The Settlement defines the Class as all persons Defendants Peach State Roofing, Inc. and
4 Martin Kelly employed as non-exempt, hourly employees in California at any time between May
28, 2016 through April 15, 2021.

5 **B. Monetary Terms**

6 “Gross Settlement Amount” shall mean the Gross Settlement Amount of Five Hundred
7 Thousand Dollars and No Cents (\$550,000.00) payable by Defendants Peach State Roofing, Inc.
8 and Martin Kelly as provided by this Agreement, plus Defendants’ employer-side payroll taxes.
9 In no event will Defendants be required to pay more than the Gross Settlement Amount for
10 distribution to the Plaintiff, Class Counsel, Class Members, LWDA, and Settlement
11 Administrator. However, Defendants estimated for purposes of mediation that there were
12 approximately 2,737 total qualifying Work Weeks and 90 Class Members for the period of June
13 15, 2016 to March 24, 2021. These numbers would be expected to increase proportionately for
14 the passage of time between that date and the time of preliminary approval. At least 10 days before
15 the Settlement Administrator send out notice of the Settlement to Class Members, the Settlement
16 Administrator will advise Class Counsel of Defendants’ report of the total number of qualifying
17 Work Weeks and Class Members between May 28, 2016 and April 15, 2021. If the qualifying
18 Work Weeks and/or Class Members exceeds the above referenced qualifying Work Weeks and/or
19 Class Members reported by Defendants by more than 10%, i.e., exceeds 3,011 qualifying Work
20 Weeks and/or 99 Class Members (“Escalator Threshold”), the Maximum Settlement Amount will
21 increase by the difference between the Escalator Threshold and the additional qualifying Work
22 Weeks or Class Members over the Escalator Threshold. No other payment will be owed by
23 Defendants. Settlement sec. I.L. N.; III.B. “Net Settlement Amount” shall mean \$550,000.00
24 payable by Defendants pursuant to this Settlement, less: 1) the Class Representative Payment
25 approved by the Court; 2) the Class Counsel Fees Payment (one-third or 33 and 1/3% of Gross
26 Settlement Amount) and the Class Counsel Litigation Expenses Payment (of not more than
27 \$15,000.00) approved by the Court; 3) the Settlement Administrator’s reasonable fees and
28 expenses approved by the Court (not to exceed \$12,000.00); 4) the amount of \$3,000.00 paid to
the Labor Workforce Development Agency of California for the PAGA claim; 5) any other fees
or expenses (other than attorneys’ fees and expenses) incurred by Plaintiff in implementing the
terms and conditions of this Agreement as approved by the Court. Settlement sec. I.N.



1 **C. Timing of Payments**

2 The Settlement Administrator shall establish a Settlement Account for distributing
3 Settlement Shares and Payments identified in this Agreement. Within ten (10) calendar days of
4 the Effective Date, Defendants shall pay the Gross Settlement Amount into the Settlement
5 Account. Settlement IV.J. Within ten (10) calendar days of receipt of the Gross Settlement
6 Amount, the Settlement Administrator shall pay Settlement Shares, from the Settlement Account
7 to all Class Members (who do not submit valid requests to be excluded from the Action). The
8 Settlement Administrator shall pay each Settlement Share by sending a check in the appropriate
9 amount to the Class Member at the address indicated in the list of Class Member names and
10 addresses provided by Defendants, or as subsequently determined by the Settlement
11 Administrator to be the correct address. Settlement sec IV.K.

12 **D. Calculation of Settlement Shares**

13 The Settlement Administrator shall assign to each Class Member a “Settlement Ratio,”
14 which shall be a fractional number comprised of (a) that Class Member’s Individual Work Weeks
15 as the numerator, and (b) the aggregate total of all Class Members’ Individual Work Weeks as
16 the denominator. The Settlement Administrator shall assign to each Class Member the
17 “Settlement Share” which shall be calculated by multiplying that Class Member’s Settlement
18 Ratio by amount allocated to Class Members from the Net Settlement Amount. Settlement sec.
19 III.D.

20 **E. Apportionment of Settlement Shares**

21 The settlement shares are allocated 33.33% to wages (for which employment taxes will
22 be deducted and W-2s issued) and 66.66% to penalties (for which 1099s will be issued).
23 Settlement sec. III.E.

24 **F. The Releases**

25 The Parties agree that it is their intent that the resolution set forth in this Settlement will
26 release any further attempt, by lawsuit, administrative claim or action, arbitration, demand, or
27 other action of any kind by each and all of the Settlement Class Members (including participation
28 to any extent in any representative or collective action), against Defendants Peach State Roofing,
Inc. and Martin Kelly and all of their present and former parent companies, subsidiaries, divisions,
concepts, related or affiliated companies and their shareholders, officers, directors, employees,
agents, attorneys, insurers, successors and assigns, and any individual or entity that could be liable
for any of the Released Claims, and Defendants’ counsel of record in these Action (“Released



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Parties”), arising during the period May 28, 2016 through April 15, 2021, are limited to any and all claims under state, federal, or local law, whether statutory or common law arising out of the claims expressly pleaded the Actions and all other claims, such as those under the California Labor Code, Wage Orders, regulations, and/or other provisions of law, that could have been pleaded based on the facts pleaded in the Action for: (i) failure to provide rest breaks; (ii) failure to provide meal periods; (iii) failure to pay all wages earned for hours worked at the correct rates of pay; (iv) failure to indemnify; (v) wage statement penalties; (vi) waiting time penalties; (vii) unfair competition; and (viii) civil penalties under PAGA (“Released Claims”). This release will not take effect until Defendants have paid the Gross Settlement Amount in full per this Settlement Agreement. Settlement sec. V.A.

G. Notice and Claims Process and Procedures

After the Court enters its order granting Preliminary Approval of the Settlement, every Class Member will be provided with a “Class Notice.” Within fourteen (14) days after the Court grants Preliminary Approval of the Settlement, Defendants shall provide to the Settlement Administrator: (a) An electronic database of all Class Members, last known mailing address, Social Security number, and Defendants’ employee identification number (“Class Members’ Data”); (b) Corresponding to each Class Member’s name, Defendants shall provide a figure indicating the total number of Work Weeks during the Class Period in which that Class Member was employed by Defendants as a Class Member. That number of Work Weeks shall be referred to as that Class Member’s “Individual Work Weeks;” and (c) If any of the Class Members’ Data are unavailable to Defendant, Defendants will so inform Class Counsel and the Parties will make their best efforts to reconstruct or otherwise agree upon the Class Members’ Data prior to when it must be submitted to the Settlement Administrator. Class Members’ Data will otherwise remain confidential and will not be disclosed to anyone, except as necessary to applicable taxing authorities, or pursuant to Defendants’ express written authorization or by order of the Court. Within fourteen (14) days after receiving the Class Members’ Data, or as soon thereafter as it can do so, the Settlement Administrator will mail the Class Notice to all identified Class Members via first-class U.S. mail using the mailing address information provided by Defendant, unless modified by any updated address information that the Settlement Administrator obtains in the course of administration of the Settlement. If a Class Notice is returned because of an incorrect address, the Settlement Administrator will promptly, and not later than ten (10) days from receipt



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1 of the returned Class Notice, search for a more current address for the Class Member and re-mail
2 the Class Notice to the Class Member. The Settlement Administrator will use the Class Members'
3 Data and otherwise work with Defendants' Counsel and Class Counsel to find a more current
4 address. The Settlement Administrator will be responsible for taking reasonable steps, consistent
5 with its agreed-upon job parameters, court orders, and fee, to trace the mailing address of any
6 Class Member for whom a Class Notice is returned as undeliverable by the U.S. Postal Service.
7 These reasonable steps shall include the tracking of all undelivered mail; performing address
8 searches for all mail returned without a forwarding address; and promptly re-mailing to Class
9 Members for whom new addresses are found. If the Class Notice is re-mailed, the Settlement
10 Administrator will note for its own records and notify Class Counsel and Defendants' Counsel of
11 the date and address of each such re-mailing as part of a weekly status report provided to the
12 Parties. Settlement sec. IV.B.

13 **1. Class Member Disputes**

14 If a Class Member disputes his/her estimated Settlement Share, the Class Member may
15 produce evidence to the Settlement Administrator for the Class Period. In order for the dispute to
16 be considered, he/she must follow the directions on the Class Notice. To be valid and timely, all
17 disputes and supporting documents must be postmarked by the date specified in the Class Notice
18 (no less than 60 days from the initial mailing of the Class Notice by the Settlement Administrator).
19 A Class Member may use the Work Weeks Dispute form (Exhibit C to this Settlement), though a
20 Class Member is not obligated to do so to request exclusion from the Settlement. Settlement sec.
21 IV.C.

22 **2. Opting Out**

23 A Class Member may request to be excluded from the effect of this Agreement, and any
24 payment of amounts under this Agreement, by timely mailing a letter to the Settlement
25 Administrator stating that the Class Member wants to be excluded from this Action. This letter
26 must include the Class Member's name, address, telephone number, and signature. To be valid
27 and timely, the request to be excluded must be postmarked by the date specified in the Class
28 Notice (no less than 60 days from the initial mailing of the Class Notice by the Settlement
Administrator). A Class Member may use the Exclusion Request form (Exhibit B to this
Settlement), though a Class Member is not obligated to do so to request exclusion from the
Settlement. A Class Member who properly submits a valid and timely request to be excluded from
the Action shall not receive any payment of any kind in connection with this Agreement or this



1 Action, shall not be bound by or receive any benefit of this Agreement, and shall have no standing
2 to object to the Settlement. A request for exclusion must be mailed to the Settlement
3 Administrator at the address provided on the Class Notice. The Settlement Administrator shall
4 transmit the request for exclusion to counsel for the Parties. Settlement sec. IV.D.1.

3. Objecting

5 The Class Notice will provide that any Class Member who does not request exclusion
6 from the Action and who wishes to object to the Settlement should submit an objection in writing
7 to the Settlement Administrator not later than 60 days after the Settlement Administrator mails
8 the Class Notice. The written objection to the Settlement should set forth the grounds for the
9 objection and the other information required by this paragraph. The objection should be mailed
10 to the Settlement Administrator at the address provided on the Class Notice. The Settlement
11 Administrator shall transmit the objections to counsel for the Parties' attorneys. Counsel will
12 promptly file such objection with the Court. The written objection should state the objecting Class
13 Member's full name, address, and the approximate dates of his or her employment with
14 Defendants. The written objection should state the basis for each specific objection and any legal
15 support in clear and concise terms. The written objection also should state whether the Class
16 Member intends to formally intervene and become a party of record in the action, and upon
17 formally intervening, appear and argue at the Final Approval Hearing. Regardless of whether an
18 objecting Class Member complies with the objection procedure encouraged above, the Court will
19 provide a Class Member with the opportunity to speak at the final approval hearing regardless of
20 whether he or she has filed an appearance or submitted a written opposition beforehand. If the
21 objecting Class Member does not formally intervene in the action and/or the Court rejects the
22 Class Member's objection, the Class Member will still be bound by the terms of this Agreement.
23 Settlement sec. IV.D.2.

H. Uncashed Checks

24 Any check issued by the Settlement Administrator to Class Members who do not timely
25 and validly opt out shall be negotiable for one hundred and eighty (180) calendar days. Those
26 funds represented by checks returned as undeliverable and those checks remaining un-cashed for
27 more than 180 days after issuance (collectively, "Voided Settlement Checks"), plus any interest
28 that has accrued on those funds, will be paid to the California Unclaimed Property Fund.
Settlement sec. IV.L.



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1 **IV. CERTIFICATION OF THE CLASS IS APPROPRIATE**

2 Under Code of Civil Procedure § 382, a class may be certified if: (1) it is ascertainable
3 and its members are too numerous for joinder to be practical; (2) the representative and absent
4 class members share a community of interest and questions of law and fact common to the class
5 predominate over questions unique to individual class members; (3) the representative's claims
6 are typical of the class' claims; and (4) the representative will fairly and adequately represent the
7 class' interests. *See, e.g., Richmond v. Dart Industries, Inc.* (1981) 29 Cal.3d 462, 470. Moreover,
8 in the settlement context, the Court can use a lesser standard to determine the appropriateness of
9 a settlement class as opposed to a litigated class certification. *Dunk v. Ford Motor Co.* (1996) 48
10 Cal.App.4th 1794, 1807. As explained below, all of these requirements are met in this case.

11 **A. The Settlement Class Is Objectively Ascertainable**

12 A class is ascertainable when it may be readily identified without unreasonable expense
13 or time by reference to official records. *Rose v. City of Hayward* (1981) 126 Cal.App.3d 926, 932
14 (citing *Hypolite v. Carlson* (1975) 52 Cal.App.3d 566, 579). Plaintiff maintains that the above-
15 defined Class is ascertainable because its members may be identified by reference to Defendants'
16 records and Defendants have agreed to share the relevant information from their records to
17 facilitate the settlement process. DS, ¶ 9; Settlement, § IV.B.1. Therefore, the Settlement Class is
18 ascertainable.

19 **B. The Membership of the Settlement Class Is Sufficiently Numerous**

20 The Settlement Class has sufficiently numerous members to render joinder impractical.
21 No set number is required as a matter of law to maintain a class action. *Hebbard v. Colgrove*
22 (1972) 28 Cal.App.3d 1017, 1030. Defendants estimate that there are approximately 90 Class
23 Members. DS, ¶ 10. Plaintiff maintains that it would be impractical and economically inefficient
24 to require each Class Member to separately maintain an individual action or be joined as a named
25 plaintiff in this action. The California Supreme Court has upheld a class of as few as 10
26 individuals. *See Bowles v. Superior Court* (1955) 44 Cal.2d 574. In light of these considerations,
27 the Settlement Class' membership is sufficiently numerous. DS, ¶ 10. *See Daar v. Yellow Cab*
28 *Co.* (1967) 67 Cal.2d 695.

C. Class Members Share a Well-Defined Community of Interest

The community of interest requirement "embodies three factors: (1) predominant common
questions of law or fact; (2) class representatives with claims or defenses typical of the class; and
(3) class representatives who can adequately represent the class." *Sav-On Drug Stores, Inc. v.*



1 *Superior Court* (2004) 34 Cal. 4th 319, 326. It “does not mandate that class members have
2 uniform or identical claims.” *Capitol People First v. Dept. of Developmental Servs.* (2007) 155
3 Cal. App. 4th 676, 692. Rather, courts focus on the defendant’s internal policies and “pattern and
4 practice . . . in order to assess whether that common behavior toward similarly situated plaintiffs
renders class certification appropriate.” *Id.* (citing *Sav-On*, 34 Cal. 4th at 333).

5 To justify certification, the class proponent “must show ... that questions of law or fact
6 common to the class predominate over the questions affecting the individual members” *See*,
7 *Arenas v. El Torito Rests., Inc.*, 183 Cal. App. 4th 723, 732 (2010) (citing *Washington Mut. Bank*,
8 *FA v. Superior Court*, 248 Cal. 4th 906, 913 (2001)). In light of the more lenient standard for
9 certification of a settlement class, the Parties agree that for the purposes of the Settlement only,
the claims of the Class Members all stem from the same sources. DS, ¶ 11.

10 In this case, Plaintiff asserts all class members were subject to the same or similar
11 operations and employment policies, practices, and procedures. The claims arise from
12 Defendants’ alleged policy-driven failure to pay wages, failure to provide meal periods, failure to
13 authorize and permit rest periods, failure to indemnify for business expenses, failure to issue
14 proper wage statements, failure to timely pay wages, and related labor law violations, all of which
15 Plaintiff claims constitute unfair business practices and give rise to PAGA penalties. Plaintiff
16 asserts that common questions include, but are not limited to: (1) Whether Defendants failed to
17 pay all wages earned to class members for all hours worked at the correct rates of pay; (2) Whether
18 Defendants failed to provide the class with all meal and rest periods in compliance with California
19 law; (3) Whether Defendants failed to pay the class one additional hour of pay on workdays they
20 failed to provide the class with one or more meal or rest periods in compliance with California
21 law; (4) Whether Defendants failed to indemnify the class for all necessary business expenditures
22 incurred during the discharge of their duties; (5) Whether Defendants knowingly and intentionally
23 failed to provide the class with accurate wage statements; (6) Whether Defendants willfully failed
to provide the class with timely final wages; and (7) Whether Defendants engaged in unfair
competition within the meaning of Business and Professions Code section 17200, *et seq.*, with
respect to the class. DS, ¶ 11. Therefore, common questions predominate.

24 **D. Plaintiff Is Typical of the Settlement Class**

25 The class representative must be similarly situated to the rest of the purported class. *See*
26 *Classen v. Weller* (1983) 145 Cal. App. 3d 27, 46 (stating “it has never been the law in California
27



1 that the class representative must have identical interests with the class members. The only
2 requirements are ... that the class representative be *similarly situated*”) (emphasis in original); *See*
3 *also* Newberg, § 3:29 (typicality “focuses on whether there exists a relationship between the
4 Plaintiff’s claims and the claims alleged on behalf of the class”). Plaintiff contends that his claims
5 are typical for the purposes of certifying the Settlement Class. Plaintiff asserts that he, like absent
6 Class Members was subject to the same relevant policies and procedures governing his
7 compensation, hours of work and meal and rest periods. Because Plaintiff contends that he was
8 subject to the same general course of conduct as absent Class Members, resolving the common
9 questions as they apply to Plaintiff will determine Defendants’ *prima facie* liability to all Class
10 Members. Moreover, Plaintiff’s claims could potentially be subject to the same primary
11 affirmative defenses as those of absent Class Members. Accordingly, Plaintiff’s claims are typical
12 of the Class. DS, ¶ 12.

13 **E. Plaintiff Will Adequately Represent the Settlement Class**

14 The adequacy requirement is met where the plaintiff is represented by counsel qualified
15 to conduct the litigation and the plaintiff’s interest in the litigation is not antagonistic to the class’
16 interests. *McGhee v. Bank of America* (1976) 60 Cal.App.3d 442, 451. In other words, where the
17 plaintiff has adequate counsel, the plaintiff may represent the entire class absent any disabling
18 conflicts of interest that might hinder the plaintiff’s ability to represent the class. DS, ¶ 13.

19 First, Class Counsel have supplied the Court with declarations to show that they are
20 adequate to represent the Settlement Class and that they have significant experience in
21 employment litigation generally, and wage and hour and employment-related class action
22 litigation specifically. *See* DS, ¶¶ 14-22; Declaration of Walter L. Haines (“Haines Decl.”) ¶ 3.
23 Thus, Plaintiff’s counsel are adequate to serve as Class Counsel.

24 Second, Plaintiff contends that he is an adequate class representative. Plaintiff and the
25 Class Members have strong and co-extensive interests in this litigation because they all worked
26 for Defendants during the relevant time period, allegedly suffered the same alleged injuries from
27 the same alleged course of conduct, and there is no evidence of any conflict of interest between
28 Plaintiff and the Class Members. DS, ¶ 14. Moreover, Plaintiff has demonstrated his commitment
to the Settlement Class by, among other things, retaining experienced counsel, providing counsel
with documents and extensively speaking with them to assist in identifying the claims asserted in
this case, assisting them in identifying witnesses, as well as exposing himself to the risk of



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1 attorneys' fees and costs awards against him if this lawsuit had been unsuccessful. DS, ¶ 14. Thus,
2 Plaintiff is adequate to serve as settlement class representative. Accordingly, this Court should
3 find that Plaintiff and his counsel are adequate to represent the Settlement Class as required under
4 Code of Civil Procedure § 382.

5 **F. Class Action Treatment Is the Superior Means For Resolving The Claims**
6 **Of The Class Members**

7 Plaintiff further contends that a class action is also superior to other means adjudicating
8 the issues in this action. The predominance of common legal and factual questions shows that this
9 Court could fairly adjudicate the claims of Class Members through a single class action. In view
10 of the *theoretical* alternatives that proposed class members could potentially utilize—
11 representative PAGA action (where there is less relief available), individual civil lawsuits or wage
12 claims through the Division of Labor Standards Enforcement (where there would be relatively
13 little money at stake, but the claims would be time-consuming to litigate)—a class action is plainly
14 superior to all of them. Thus, this consideration supports conditional class action treatment for
15 purposes of this Settlement only. DS, ¶ 23.

16 **V. INTRODUCTION THE COURT SHOULD GRANT PRELIMINARY**
17 **APPROVAL BECAUSE THE SETTLEMENT IS FAIR, ADEQUATE, AND**
18 **REASONABLE**

19 **A. Legal Standard**

20 A class action settlement requires court approval. California Rules of Court (“CRC”),
21 Rule 3.769 provides three steps for approval: (1) Preliminary approval after submission of a
22 written motion for preliminary approval, the proposed class settlement, and the proposed class
23 notice; (2) Issuance of notice of settlement to class members; and (3) A final settlement approval
24 hearing where class members may be heard regarding the settlement, and at which evidence and
25 argument concerning the fairness, adequacy, and reasonableness of the settlement is presented.
26 The decision to approve or reject a class settlement is committed to the Court’s broad discretion.
27 *Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 128. The decision to approve
28 class settlement may be reversed only upon a showing of “clear abuse of discretion.” *Id.*

B. The Settlement Is Presumptively Fair

In assessing preliminary approval, a court evaluates if the settlement process has certain
indicia of fairness. A “presumption of fairness exists where (1) the settlement is reached through
arm’s-length bargaining; (2) investigation and discovery are sufficient to allow counsel and the
court to act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage



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1 of objectors is small.” *Kullar*, 168 Cal. App. 4th at 128, quoting *Dunk v. Ford Motor Co.*, (1996)
2 48 Cal.App.4th at 1794.

3 The class settlement here satisfies all of these factors. DS, ¶ 24. The Settlement resulted
4 from thorough, arms’ length, negotiations between experienced counsel with the assistance of a
5 respected mediator after sufficient discovery was exchanged to assess the relative strengths and
6 weaknesses of their respective cases and Defendants’ estimated exposure. *Id.*

7 Plaintiff contends that Defendants failed to compensate him and the putative class
8 members ("PCMs") for all hours worked at the correct rates of pay. He also contends Defendants
9 required him and the PCMs to perform certain duties off the clock without compensation. Plaintiff
10 further contends that Defendants failed to provide him with timely meal periods or any rest breaks.
11 Plaintiff contends that Defendants made him and the PCMs use their personal cellphone for work
12 purposes and purchase their own tools without reimbursement. Finally, he contends Defendants
13 provided him with wage statements that were false and misleading. DS, ¶ 25. Plaintiff prepared
14 “damages” estimates in advance of the mediation. DS, ¶ 25, Ex. 5. In advance of the mediation,
15 Plaintiff determined Defendants’ maximum exposure for restitution and penalties to be
16 approximately \$2,102,345.72 (consisting of \$734,428.33 in unpaid wages, \$232,645.00 in missed
17 meal period premium wages, \$218,686.30 in missed rest break premium wages, \$100,263.75 in
18 unreimbursed expenses, \$66,000.00 for wage statement penalties, \$280,500.00 for waiting time
19 penalties, and \$341,220.00 for civil penalties). Plaintiff calculated the damages based on the
20 number of workweeks and pay periods provided by Defendants, Plaintiff’s reports, and the sample
21 data. *Id.* Plaintiff also considered the possibility that Defendants could launch a *Pick Up Stix*
22 campaign and pursue individual release agreements from the Class Members. Defendants also
23 represented that they had interviewed all of Defendants’ current employees regarding Plaintiff’s
24 claims, all of whom would provide declarations, under penalty of perjury, that were favorable to
25 Defendants with respect to the relevant factual issues at issue in Plaintiff’s action. Plaintiff’s
26 Counsel applied discounts to the maximum exposure to account for all other risks discussed
27 below. While it is difficult to assign anything but crudely-determined percentages of risk to any
28 of the claims, it is safe to say that the risk that a *Pick Up Stix* campaign would preclude recovery
for such employees is substantial and alone justifies a significant discount because Defendants
would likely by trial have gathered releases from the majority of the Class Members. A settlement



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1 for approximately 26.00% of the potential recovery is a proportion substantially in excess of
2 recovery proportions sanctioned by existing case law.⁴ *Id.*

3 Plaintiff's initial estimates do not realistically account for the risks outlined below or the
4 risk that a class will not be certified. DS, ¶ 25. Therefore, Plaintiff believes a class settlement for
\$550,000.00 is fair and reasonable. *Id.*

5 **C. The Settlement Satisfies the Kullar Factors for Approval**

6 The *Kullar* case sets forth several factors a court should consider in determining whether
7 to approve a class settlement. These factors include: (1) the strength of plaintiff's case; (2) the
8 risk, expense, complexity and likely duration of further litigation; (3) the risk of maintaining class
9 action status through trial; (4) the amount offered in settlement; (5) the extent of discovery
10 completed and stage of the proceedings; (6) the experience and views of counsel; (7) the presence
11 of a governmental participant; and (8) the reaction of the class members to the proposed
12 settlement. 168 Cal.App.4th at 128. As demonstrated herein, the Settlement satisfies each of these
factors.

13 **1. Evaluation of Plaintiff's Case**

14 **a. Risks Associated with the Unpaid Wages Claim**

15 There is a risk that Plaintiff's recovery for unpaid wages would be extremely limited at
16 best, largely because Defendants' written policies throughout the relevant time period prohibited
17 off-the-clock work. DS, ¶ 27. Off-the-clock claims are difficult where a defendant requires in its
18 written policies that all work must take place while clocked in. *See Jong v. Kaiser Foundation*
19 *Hospital* (2012) 226 Cal.App.4th 391 (employer must have notice of off-the-clock work for it to
20 be compensable). *Id.* In their written employment policies, Defendants mandate that employees
21 must record all time worked accurately on their time records and strictly prohibit employees from
performing any work off-the-clock. DS, ¶ 27. Moreover, while Defendants dispute that off-the-
clock work occurred, they contend that any time spent off the clock was *de minimis*. The

22
23 ⁴ *See, e.g., In re Newbridge Networks Sec. Litig.*, 1998 WL 765724 at *2 (D.D.C. Oct. 23, 1998)
24 (“[A]n agreement that secures roughly six to twelve percent of a total trial recovery . . . seems to
be within the targeted range of reasonableness.”); *Wise v. Ulta Salon, Cosmetics & Fragrance,*
25 *Inc.* 2019 WL 3943859 at *8 (E.D. Cal. Aug. 21, 2019) (granting preliminary approval where the
proposed allocation to settle class claims was at least 9.53 percent); *Bravo v. Gale Triangle, Inc.*,
26 2017 WL 708766 at * 10 (C.D. Cal. Feb 16, 2017) (“a settlement for fourteen percent recovery
of Plaintiffs’ maximum recovery is reasonable”); *In re Omnivision Techs., Inc.*, 559 F.Supp.2d
27 1036, 1042 (N.D. Cal. 2008) (approving settlement amount that “is just over 9% of the maximum
potential recovery asserted by either party.”).



1 California Supreme Court in *Troester v. Starbucks Corp.* (2018) 5 Cal. 5th 829, 835 suggested
2 that irregular and minute periods of time may still be subject to a *de minimis* defense even if
3 compensable. (Stating that “We do not decide whether there are circumstances where
4 compensable time is so minute or irregular that it is unreasonable to expect the time to be
5 recorded.”). Following *Troester*, Defendants contend that the *de minimis* doctrine may apply here
6 because the time spent off the clock were minute and insignificant. Accordingly, a large award of
penalties seems unlikely with respect to this claim. *Id.*

7 The difficulty inherent in proving that off-the-clock work occurred poses a significant
8 hurdle to Plaintiff. Plaintiff will rely on declarations and witness statements to prove this claim.
9 Generally, a court will not certify a class unless it can determine an appropriate classwide
10 methodology. *See, e.g., Duran v. U.S. Bank National Assn.* (2014) 59 Cal. 4th 1. Here, Plaintiff
11 may rely heavily on anecdotal evidence to prove the off-the-clock work claim, especially given
12 the lack of records indicating when such off-the-clock work may have taken place. Individualized
13 inquiries would need to be conducted person-by-person, day-by-day, to determine if an individual
14 in fact worked “minutes” off-the-clock on a “regular” basis. Accordingly, there is a significant
15 risk that the Court would consider this evidentiary showing insufficient as a classwide
methodology. DS, ¶ 28.

16 **b. Risks Associated with the Meal Period Claims**

17 There are risks to Plaintiff’s meal period claim. DS, ¶ 29. Defendants contend that, to
18 establish a violation for missed meal periods, a plaintiff must do more than show that a meal break
19 was not taken. *Brinker*, 53 Cal. 4th at 1004. So long as an employer provides employees with a
20 “reasonable opportunity” to take a duty-free meal period, it has no further duty to “police meal
21 breaks and ensure no work thereafter is performed.” *Id.* at 1040-41. *Id.* Instead, a plaintiff must
22 show the employer impeded, discouraged, or prohibited the employee from taking a proper break,
23 or otherwise failed to release the employee of all control. *Id.* “Thus, the crucial issue with regard
to the meal break claim is the reason that a particular employee may have failed to take a meal
break.” *Washington v. Joe’s Crab Shack* (N.D. Cal. 2010) 271 F.R.D. 629, 641. *Id.*

24 Defendants contend they did not impede or discourage Plaintiff, or any other employees,
25 from taking their meal or rest periods. DS, ¶ 30. Defendants’ policies mandate that employees
26 take at least a 30-minute, uninterrupted meal periods and record the beginning and ending time
27 of their meal breaks each day on their time records. *Id.* The time records that comprise the random



sample Defendants produced to Plaintiff for purposes of mediation show that meal periods were taken the vast majority of the time. *Id.* Of the time records that show a late, short or no lunch, individualized evidence may be necessary to determine whether they occurred due to conduct of the Defendants or each of the employees concerned. Accordingly, there is a significant risk that the value of Plaintiff's meal period claim would be substantially reduced at trial. *Id.*

c. Risks Associated with the Rest Break Claims

There are risks to Plaintiff's rest period claim. DS, ¶ 31. Employers are not required to record rest periods and such periods are paid. *Id.* Defendants contend they provided non-exempt employees the opportunity to take rest periods in accordance with California law. Further, Defendants' written policies on meal and rest periods are consistent with the Wage Order. *Id.* Thus, unlike meal periods, where there are often records showing whether an employee clocked out or not, there is no such evidence to prove a missed rest period or that the employer refused to authorize and permit one. *Id.* Managing such claims at trial has become exceedingly difficult. *Id.* Plaintiff will depend on sample witness testimony and surveys to prove the claims. *Id.* While a victory with such evidence is certainly possible, relevant caselaw makes such claims risky from a trial management and due process perspective. *Id.*, *See Duran v. U.S. Bank National Assn.*, (2014) 59 Cal. 4th 1, 31 (explaining "[I]f sufficient common questions exist to support class certification, it may be possible to manage individual issues through the use of surveys and statistical sampling."); *Tyson Foods, Inc. v. Bouphakeo* (2015) 136 S.Ct. 382; *Comcast Corporation v. Behrend* (2013) 133 S.Ct. 1426.

d. Risks Associated with the Failure to Indemnify Claim

There is a risk that the Court may consider Plaintiff's claims as to Defendants' alleged failure to indemnify for business expenses to be individual in nature and thus decline to certify the class. DS, ¶ 32. Plaintiff alleges that Defendants required Plaintiff and the Class Members to use their personal items including cellular phones and tools and failed to indemnify them for these business expenses. *Id.* Defendants presented evidence that they have supplied their employees with tools, equipment, and other supplies and had an expense reimbursement policy. As such, there is a risk that the Court may consider Plaintiff's claims to be individual in nature and unfit for class wide resolution. *Id.*

e. Risks Associated with the Statutory "Wage Statement" Penalty Claims

Plaintiff also asserts claims for wage statement violations, untimely wage violations, and



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1 PAGA penalties. Under Labor Code section 226, wage statements must include various
2 information, including the applicable rates of pay, corresponding hours worked, and gross pay.
3 DS, ¶ 33.

4 Here, Plaintiff's wage statement claim has the same underlying risks as the above claims,
5 as it is derivative of them. *Id.* On their face, the wage statements issued by Defendants comply
6 with the requirements of Labor Code § 226. Further, to the extent that Plaintiff claims Defendants'
7 wage statements were inaccurate because they did not include wages or premium payments that
8 they contend Defendants should have paid, Plaintiff's claims were subject to additional risk, as
9 case law suggested that such premium payments are not to be considered wages, and therefore do
10 not give rise to claims under section 203. *Id. See Jones v. Spherion Staffing, LLC*, 2012 U.S. Dist.
11 LEXIS 112396 at * 26 (C.D. Cal. Aug. 7, 2012) (no claim for Labor Code section 203 penalties
12 based on meal period claims because "the underlying violation that gives rise to a section 226.7
13 [meal period] claim is not the nonpayment of wages"); *Nguyen v. Baxter Healthcare Corp.* 2011
14 U.S. Dist. LEXIS 141135 at * 24 (C.D. Cal. Nov. 28, 2011) (holding that Section 226(a) does not
15 even cover meal period premium pay). Accordingly, the *Jones* and *Nguyen* decisions will likely
16 foreclose this claim. Moreover, the Court of Appeal's decision in *Naranjo v. Spectrum Security*
17 *Services, Inc.* (2019) 40 Cal.App.5th 444, holding that a defendant's failure to pay meal premiums
18 does not give rise to violations of Labor Code sections 226 or 203, was pending before the
19 California Supreme Court when the Parties negotiated this Settlement. *Naranjo v. Spectrum*
20 *Security Services, Inc.* 2020 Cal. LEXIS 167. On May 23, 2022, the California Supreme Court
ultimately issued their decision in *Naranjo* and reversed in part the judgement of the Court of
Appeal, insofar as it held that premium pay did not support relief under Labor Code sections 203
and 226. DS, ¶ 33.

21 **f. Risks Associated with The Waiting Time Penalties Claim**

22 Plaintiff's claims for untimely wages is predicated on Labor Code §§ 201, 202, and 203.
23 Defendants could argue based on the *Jones* and *Nguyen* decisions, *supra*, that meal or rest
premium pay is not a "wage" for purposes of Labor Code section 203 penalties. Further, in the
24 recent decision *Ferra v. Loews Hollywood Hotel, LLC* (2019) 40 Cal.App. 5th 1239, the Court of
25 Appeal held that unlawful meal and rest periods under section 226.7 cannot serve as a basis for
26 recovery of penalties under section 203. *Id.* at 1252 ("We conclude that the administrative and
27 legislative history of the statute indicates that . . . the Legislature intended section 226.7 first and



1 foremost to *compensate* employeesSection 226.7’s additional hour of pay is a premium wage
2 . . .not a penalty.”)(internal citations and quotation marks omitted). Under the *Loews* decision, it
3 is highly unlikely that the Court will permit untimely wage penalties for Defendants’ alleged
4 failure to provide meal and rest period penalties. DS, ¶ 34.

5 **g. Risks Associated With the PAGA Claim**

6 Regarding PAGA, a court has discretion to award a lesser amount than the maximum
7 penalty. Lab. Code § 2699(e)(2); *Thurman v. Bayshore Transit Management, Inc.* (2012) 203
8 Cal.App.4th 1112, 1135 (reducing PAGA award). As set forth above, Defendants have posed
9 valid defenses to the Labor Code claims underlying Plaintiff’s PAGA allegations. Thus, the
10 PAGA claims likewise face significant uncertainty. DS, ¶ 35. There is a risk that the Court would
11 consider the maximum civil penalty available to be confiscatory. This is particularly the case
12 considering Defendants’ financial condition. *Id.* Moreover, the current COVID-19 pandemic
13 could motivate the Court to further reduce the penalty award to avoid what it may consider a
14 confiscatory taking. *Id.*

15 This uncertainty increases Plaintiff’s risk of pursuing the PAGA claims and required a
16 significant discount for settlement purposes. DS, ¶ 36. For mediation purposes, Plaintiff’s counsel
17 estimated a maximum exposure of approximately \$687,720.00 in civil penalties. This estimate
18 did not take into account any of the risks discussed above and assumed a violation for every single
19 pay period. *Id.* Plaintiff’s counsel also assessed multiple penalties for the same pay period for the
20 same alleged violations of different Labor Code provisions and derivative violations. *Id.* Although
21 two federal district court decisions held that “stacking” PAGA penalties in this fashion may be
22 appropriate to determine the amount in controversy for purposes of removal jurisdiction,
23 Plaintiff’s counsel is not aware of any California state courts awarding plaintiffs multiple PAGA
24 penalties for the same violation for the same pay period under different Labor Code provisions.
25 *Id.* This may be because the PAGA does not provide for what many employers characterize as
26 claim splitting and not merely stacking. *Id.*

27 Plaintiff is aware of only two significant awards under the PAGA in a contested
28 proceeding, both issued by federal district courts.⁵ DS, ¶ 37. PAGA penalty awards are often

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26 ⁵ In *Bernstein v. Virgin Am., Inc.* (N.D. Cal. 2019) U.S. Dist. LEXIS 13253, the court awarded
27 civil penalties under the PAGA of approximately \$25 million, representing a 25% reduction from
28 plaintiff’s claim for approximately \$33 million. *Bernstein* represents a unique set of
circumstances that is distinguishable from the case at hand. Notably, the plaintiffs in *Bernstein*



1 small even for egregious, intentional violations of the Labor Code.⁶ *Id.* For instance, on October
2 24, 2017, the Los Angeles Superior Court awarded a prevailing PAGA plaintiff, represented by
3 very experienced counsel, civil penalties totaling only \$50.00. *Shields v. Security Paving*
4 *Company, Inc.*, LA Superior Court case no. BC492828. Further, in *Carrington v. Starbucks Corp.*
5 (2018) 30 Cal.App.5th 504, 529, the Court of Appeal affirmed judgment which provided for a
6 PAGA penalty of only \$5 per pay period for the defendant's meal period violations. A similar
result could occur here. DS, ¶ 38.

7 Also, at the time the Parties settled the case, the United States Supreme Court had
8 announced that, in the near future, it would hear the matter of *Viking River Cruises, Inc. v.*
9 *Moriana*, No. 20-1573, and decide whether or not to overrule the California Supreme Court's
10 decision in *Iskanian v. CLS Transportation* (2014) 59 Cal.4th 348 that a private arbitration
11 agreement cannot deprive an employee of his right to sue under PAGA in a court of law. The
12 Supreme Court in *Moriana* ultimately held that the employer could enforce the arbitration
13 agreement as to the employee's individual PAGA claim and that the employee lacked standing to
14 maintain her representative PAGA claims. *Viking River Cruises, Inc. v. Moriana*, 142 S. Ct. 1906
(2022), reh'g denied, No. 20-1573, 2022 WL 3580311 (U.S. Aug. 22, 2022).⁷ DS, ¶ 39.

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17 suffered a particularly sizeable injury – the court found that the defendant's policies caused
18 damages to the plaintiffs in excess of \$45 million. *Id.* at 20. Additionally, the defendants in
19 *Bernstein*, who the court noted had received "millions of dollars from the state of California" to
20 train their flight attendants, engaged in glaring violations of the labor code, such as failing to
21 compensate its flight attendants for work performed outside of "block time" (time during which
the aircraft is moving), including time spent participating in pre-flight briefings, boarding
passengers, and deplaning. *Bernstein v. Virgin Am., Inc.* (N.D. Cal 2017) 227 F. Supp. 3d 1049,
1055-1058. Indeed, the defendant's liability was so clear in *Bernstein* that the case was resolved
on the plaintiffs' motion for summary judgment. *Bernstein v. Virgin Am., Inc.* (N.D. Cal. 2019)
U.S. Dist. LEXIS 13253.

22 In *Robert Magadia v. Wal-Mart Assocs.* (N.D. Cal. 2019) 384 F. Supp. 3d. 1058, the court
23 awarded approximately \$102 million in damages, primarily based on the defendants' failures to
comply with the requirements of California Labor Code section 226.

24 ⁶ In 2012, Plaintiff's Counsel tried *Ghrdilyan v. RJ Financial, Inc.*, Los Angeles Superior Court
case number BC430633. In *Ghrdilyan*, the employer underpaid commission overtime wages. The
25 plaintiff sought in excess of \$9 million in civil penalties under the PAGA. After a bench trial, the
26 Honorable Judge Ronald M. Sohigian awarded approximately \$325,000 in civil penalties under
the PAGA.

27 ⁷ The California Supreme Court recently granted review and ordered briefing in *Adolph v. Uber*
Technologies, Inc. (Cal. Sup. Ct. Case No. S274671) on the question whether a plaintiff continues



1 **h. Risks Associated With A Pick-Up Stix Campaign**

2 An employer enjoys the right to settle a putative class member’s disputed wage claims
3 individually, without the consent or involvement of class counsel. DS, ¶ 40. (See *Chindarah v.*
4 *Pick Up Stix, Inc.* (2009) 171 Cal. App. 4th 796. *Id.* As discussed above, Defendants may launch
5 a “pick off” settlement campaign to pursue individual release agreements from the Class
6 Members, thereby potentially narrowing the size of the Settlement Class – 69 members - until it
7 is no longer numerous enough for class certification. *Id.* Plaintiff, then, may not have sufficient
8 number of employees to represent. This led to a significant reduction of claim value in settlement
9 negotiations. *Id.*

10 While the evidence gathered through Plaintiff’s discovery supports the merits of the
11 claims asserted in this lawsuit, Plaintiff and his counsel recognize that continued litigation
12 presents significant risks that support a downward departure from Defendants’ estimated liability
13 exposure. DS, ¶ 41. In view of the risks, the Settlement reflects Plaintiff’s estimate of the total
14 amount of damages, monetary penalties or other relief that the Class could reasonably expect to
15 be awarded at trial, taking into account the likelihood of prevailing and other attendant risks. *Id.*
16 It also represents a fair, adequate, and reasonable compromise amount for these claims and
17 warrants preliminary approval. *Id.*, *Torrisi v. Tucson Elec. Power Co.* (9th Cir. 1993) 8 F.3d 1370,
18 1376 (the financial condition of defendant predominated in assessing the reasonableness of
19 settlement); *Spann v. J.C. Penney Corp.* (C.D. Cal. 2016) 211 F. Supp. 3d 1244, 1256 (uncertainty
20 concerning defendant’s financial stability “strongly supports the reasonableness of the
21 settlement”); *Laguna v. Coverall N. Am., Inc.*, Case No. 12-55479 (9th Cir. June 3, 2014) 2014
22 WL 2465049, * 3.

23 **2. Allocation of the PAGA Payment**

24 The settlement of PAGA penalties in the sum of \$4,000.00, of which 75% (\$3,000.00)
25 will be paid to the LWDA and 25% (\$1,000.00) will be distributed to the Class, is reasonable and
26 appropriate under the circumstances. DS, ¶ 42. The Parties negotiated a good faith amount for
27 PAGA penalties to be paid to the LWDA and to the Class. *Id.* The portion to be paid to the LWDA
28 was not the result of self-interest at the expense of other Class Members. *Id.* Where settlements
“negotiate[] a good faith amount” for PAGA penalties and “there is no indication that this amount

to have standing to pursue the remedies available to the LWDA even if compelled to arbitrate his
individual PAGA claim.



1 was the result of self-interest at the expense of other Class Members,” such amounts are generally
2 considered reasonable. *Hopson v. Hanesbrands Inc.* (N.D. Cal. Apr. 3, 2009) No. CV-08-0844
3 EDL, 2009 WL 928133, at *9. Likewise, where the employer did not act willfully, and made good
4 faith attempts to comply with wage and hour laws, a reduction or lesser penalty is warranted
5 because imposing maximum PAGA penalty for each violation would have been unjust, arbitrary,
6 and oppressive. *Id. Carrington v. Starbucks Corp.* (2018) 30 Cal.App.5th 504, 528-529 (affirming
7 trial court’s award of only 10% of maximum PAGA penalty for meal break violations). *Id.* The
8 amount to be paid to the LWDA comports with PAGA settlement amounts approved by other
9 courts. See, e.g., *Chu v. Wells Fargo Investments, LLC* (N.D. Cal., Feb. 16, 2011) 2011 WL
10 67245, 81 (approving PAGA payment of \$7,500 to LWDA out of \$6.9 million common fund);
11 *Lazarin v. Pro Unlimited, Inc.* (N.D. Cal., July 11, 2013) 2013 WL 3541217 (approving PAGA
12 payment of \$7,500 to LWDA out of \$1.25 million common fund settlement); *Hopson v.*
13 *Hanesbrands, Inc.* (N.D. Cal. Aug. 8, 2008) 2008 WL 3385452, at *1 (approving PAGA
14 settlement of 0.3% or \$1,500); see *Nordstrom Com. Cases* (2010) 186 Cal.App.4th 576, 589
15 (approving PAGA settlement and release that allocated \$0 to PAGA claim). Courts have also
16 approved settlements for \$20,000 or less. See, e.g., *Hicks v. Toys ‘R’ Us–Delaware, Inc.*, (C.D.
17 Cal. Sept. 2, 2014) 2014 WL 4703915, at *1 (approving \$5,000 PAGA payment in a case
18 involving \$4 million settlement); *Franco v. Ruiz Food Prods., Inc.* (E.D. Cal. Nov. 27, 2012)
19 2012 WL 5941801 at *14 (approving PAGA penalties of \$10,000 as part of \$2.5 million
20 settlement); *Garcia v. Gordon Trucking* (E.D. Cal. Oct. 31, 2012) 2012 WL 5364575, at *3
21 (approving PAGA payment of \$10,000 as part of \$3.7 million common-fund settlement). *Id.*

22 **3. Presence of Governmental Participant**

23 As required under Labor Code section 2699(l)(2), Plaintiff will provide notice of this
24 settlement to the LWDA. DS, ¶ 51, Ex. 11.

25 **4. Reaction of Class Members to Proposed Settlement**

26 If the settlement is preliminarily approved, Class Members will be provided with the Class
27 Notice (attached as Exhibit A to the Settlement) and an opportunity to object. DS, ¶ 48. The
28 parties’ proposed notice fully complies with California Rules of Court 3.766(d) and 3.769(f) and
will allow Class Members to make informed responses to the proposed settlement. *Id.*

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1 **VI. THE SETTLEMENT FAIRLY, ADEQUATELY, AND REASONABLY**
2 **COMPENSATE CLASS MEMBERS BECAUSE IT WILL PAY EACH CLASS**
3 **MEMBER BASED ON THE POTENTIAL EXTENT OF HIS OR HER INJURY**
4 **COMPARED TO OTHER CLASS MEMBERS**

5 The Individual Settlement Payments will be paid to each Class Member based on his or
6 her eligible Work Weeks compared to the total Work Weeks. DS, ¶ 47, Settlement § III.D.
7 Because this method compensates Class Members based on the extent of their potential injuries,
8 in that Class Members who worked for Defendants longer would have been subject to more
9 alleged violations, it is fair, adequate, and reasonable. *Id.*

10 **VII. ALLOCATION FOR CLASS COUNSEL'S FEE AWARD AND ATTORNEYS'**
11 **FEES AND COSTS AWARD FOR LITIGATION EXPENSES IS APPROPRIATE**

12 The Settlement states Class Counsel may seek attorneys' fees of \$183,333.00 (one-third
13 of the GSA) and up to \$15,000.00 for actual reasonable litigation costs and expenses incurred in
14 prosecuting the Action. Settlement § 43. These amounts are reasonable, given the facts and
15 circumstances of the case. DS, ¶¶ 43-44.

16 Trial courts have "wide latitude" in assessing the value of attorneys' fees and their
17 decisions will "not be disturbed on appeal absent a manifest abuse of discretion." *Lealao v.*
18 *Beneficial Cal., Inc.* (2000) 82 Cal. App. 4th 19, 41. Indeed, it is long settled that the "experienced
19 trial judge is the best judge of the value of professional services rendered in his court." *Ketchum*
20 *v. Moses* (2001) 24 Cal. 4th 1122, 1132. California law provides that attorney fee awards should
21 be equivalent to fees paid in the legal marketplace to compensate for the result achieved and risk
22 incurred. *Laffitte v. Robert Half Intl, Inc.* (2016) 1 Ca1. 5th 480, 503 (citing *Lealao, supra*, 82
23 Cal.App.4th at p. 48-49). The Supreme Court has recently approved fees equal to one-third (1/3)
24 of the common fund. *Laffitte, supra*, 1 Ca1. 5th 480. Many courts have similarly approved fee
25 awards equal to or greater than the percentage requested here. *See, e.g., In re Pacific Enterprises*
26 *(9th Cir. 1995) 47 F.3d 373, 379 (award of 33% of the common fund); In re Activision (N.D.*
27 *Cal. 1989) 723 F.Supp. 1373, 1375 (32.8% of the common fund); In re Ampicillin Antitrust*
28 *Litig. (D.D.C. 1981) 526 F.Supp. 494, 498 (45% of settlement fund).*

The amount of fees and costs requested are commensurate with (1) the risk Class Counsel
took in bringing the case, (2) the extensive time, effort and expense dedicated to the case, (3) the
skill and determination Class Counsel has shown, (4) the results Class Counsel achieved, (5) the
value of the Class Counsel achieved for the class, and (6) the other cases Class Counsel turned
down to devote time to this matter. DS, ¶ 44. Class Counsel interviewed and obtained information



1 from putative class members, met and conferred with Defendants' counsel on numerous
2 occasions, reviewed and analyzed hundreds of pages of data and documents provided by
3 Defendants and obtained through other sources, researched applicable law, and provided
4 estimates of "damages" for purposes of settlement discussions, among other tasks. *Id.*

5 Class Counsel have borne all the risks and costs of litigation and will receive no
6 compensation until recovery is obtained. DS, ¶ 45. Class Counsel are well-experienced in wage-
7 and-hour class action litigation and used that experience to obtain a fair result for the Class. *Id.*
8 Considering the amount of the attorney fees requested, the work performed, and the risks incurred,
9 the requested fees and costs are reasonable and should be awarded. *Id.*

10 **VIII. THE CLASS REPRESENTATIVE PAYMENT TO PLAINTIFF SHOULD BE**
11 **PRELIMINARILY APPROVED BECAUSE IT IS FAIR, ADEQUATE, AND**
12 **REASONABLE**

13 Courts routinely approve incentive awards to compensate named plaintiffs for the services
14 they provide and the risks they incur during class action litigation, often in much higher amounts
15 than that sought here. *See, e.g., Bell v. Farmers Ins. Exchange* (2004) 115 Cal.App.4th 715, 726
16 (upholding "service payments" to named plaintiffs for their efforts in bringing the case); *Van*
17 *Vranken v. Atlantic Richfield Co.* (N.D.Cal. 1995) 901 F.Supp. 294 (approving \$50,000
18 enhancement award). The Settlement provides that Plaintiff may seek a Class Representative
19 Payment of \$15,000.00. This amount is entirely reasonable given Plaintiff's efforts in this action
20 and the risks he undertook on behalf of Class Members. DS, ¶ 46. Plaintiff has devoted many
21 hours advancing the interests of the Settlement Class. Plaintiff has done this by, among other
22 things, retaining experienced counsel, providing them with information about his work history
23 with Defendants and Defendants' policies and practices with respect to the wage and hour claims
24 at issue, participating in mediation, and being actively involved in the settlement process to ensure
25 a fair result for the Settlement Class as a whole. In doing this, Plaintiff has been exposed to
26 significant risks, including the risk of an order to pay Defendants' attorneys' fees and costs if this
27 action had been unsuccessful (*See* Labor Code §§ 218.5-218.6). The efforts and risks that Plaintiff
28 undertook on behalf of the Settlement Class shows that the proposed Class Representative
Payment is fair, adequate, and reasonable, and thus warrants preliminary approval. DS, ¶ 46.

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1 **IX. THE PROPOSED SETTLEMENT ADMINISTRATION COSTS SHOULD BE**
2 **PRELIMINARILY APPROVED BECAUSE THEY ARE FAIR, ADEQUATE, AND**
3 **REASONABLE**

4 With regard to the settlement administration costs provision, it is reasonable. Before
5 agreeing to ILYM Group, Inc. and its bid of \$4,989.00, the Parties sought and reviewed bids from
6 other reputable third-party administrators which provided higher bids. DS, ¶ 49*50, Exs. 8-10.
7 Thus, the settlement administration costs provision should be given preliminary approval.

8 **X. THE PROPOSED NOTICE AND SETTLEMENT ADMINISTRATION PLAN**
9 **SHOULD BE APPROVED BECAUSE IT IS REASONABLY CALCULATED TO GIVE**
10 **ACTUAL NOTICE TO CLASS MEMBERS AND SUFFICIENT TIME TO EXERCISE**
11 **THEIR RIGHTS**

12 This Court should approve the proposed plans for giving notice to the Settlement Class
13 and administering the Settlement. The standard for determining the adequacy of notice is whether
14 the notice has “a reasonable chance of reaching a substantial percentage of the class members.”
15 *Cartt v. Superior Court* (1975) 50 Cal.App.3d 960, 974. The notice process includes multiple
16 measures to ensure that as many Class Members as practicable receive actual notice of the
17 Settlement and have enough time to exercise their rights. The Settlement requires distribution of
18 the Notice by First Class U.S. mail only. Settlement, § IV.B.2. Although there are current
19 employee Class Members, it is uncertain whether Defendants’ records of their contact information
20 include email addresses and Class Members, who perform all of their work away from a desk, are
21 not in a position to check their emails. As such, notice by mail alone is fair, adequate, and
22 reasonable. DS, ¶ 48.

23 With respect to its content, “[The] notice given to the class must fairly apprise the class
24 members of the terms of the proposed compromise and of the options open to dissenting class
25 members.” *Trotsky v. Los Angeles Fed. Sav. & Loan Assn.* (1975) 48 Cal.App.3d 134, 151-152.
26 The purpose of the notice in class settlement context is to give class members sufficient
27 information to decide whether they should accept the benefits offered, opt out and pursue their
28 own remedies, or object to the settlement. *Id.* The Notice (Exhibit A to the Settlement) provides
Class Members with all pertinent information that they need to fully evaluate their options and
exercise their rights under the Settlement. Specifically, it clearly and concisely explains, among
other things: (1) what the Settlement is about; (2) who is a Settlement Class Member; (3) how
Class Counsel will be paid; (4) how to submit an exclusion request not to be bound by the
Settlement; (5) how to object to the Settlement; (6) how the Settlement will be allocated; (7) how



1 payments to Class Members will be calculated; (8) how the disputes will be resolved; and (9) the
2 individual Settlement Class Member's estimated payment. Additionally, the Class Notice will
3 include the number of Work Weeks a Class Member had during the Class Period. Accordingly,
4 the Notice should be approved because it describes the Settlement with sufficient clarity and
5 specificity to explain to Class Members what this action is about, their rights under the Settlement,
and how to exercise those rights. DS, ¶ 48.

6 **XI. CONCLUSION**

7 For the reasons stated above, this Court should grant Plaintiff's Motion in its entirety and
8 adopt the proposed order submitted concurrently herewith.

9 Respectfully submitted,

10 THE SPIVAK LAW FIRM

11
12 Dated: September 16, 2022

By:



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