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on behalf of himself and all others similarly situated

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ALAMEDA

BOBBY RAY MCCOY on behalf of himself
and all others similarly situated,

Plaintiff,

vs.

JO-ANN STORES, LLC, and DOES 1 through
50, inclusive,

Defendants.

Case No.: RG20061158

ASSIGNED FOR ALL PURPOSES TO:
Judge: Hon. Brad Seligman
Dept.: 23

**PLAINTIFF'S NOTICE OF MOTION
AND MOTION FOR FINAL
APPROVAL OF CLASS ACTION
SETTLEMENT; MEMORANDUM OF
POINTS AND
AUTHORITIES;[PROPOSED] ORDER**

[Declarations of James R. Hawkins, Bobby
Ray McCoy and Evelin Reyes Filed
Concurrently Herewith]

Date: March 22, 2022
Time: 3:00 p.m.
Dept. 23

**Hearing Reservation Number
#- A-20061158-001**

PLEASE TAKE NOTICE THAT on March 22, 2022, or soon thereafter as possible, at
3:00 p.m. in Department 23 of the above-entitled court located at 1221 Oak Street, Alameda, CA
94612, Plaintiff Bobby Ray McCoy will and hereby does move the Court for final approval of the
class action settlement and all agreed-upon terms therein. This Motion, unopposed by Defendant Jo-

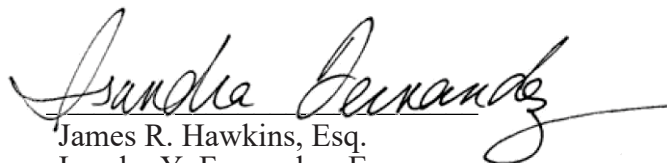
1 Ann Stores, LLC., seeks final approval of: (1) the Joint Stipulation of Class Action and PAGA
2 Settlement Agreement; (2) the Maximum Settlement Amount of One Million, Five Hundred
3 Thousand Dollars (\$1,500,000); (3) all settlement payments to individual Class Members; (4) the
4 Class Representative enhancement payment in the amount of Ten Thousand Dollars (\$10,000) to
5 the named Plaintiff Bobby Ray McCoy; (3) One Hundred Thousand Dollars (\$100,000) in PAGA
6 penalties; (4) costs of administering the Settlement paid to the Settlement Administrator, Simpluris,
7 Inc. in the amount of Fifteen Thousand Dollars (\$15,000); (5) an award of Five Hundred Thousand
8 Dollars (\$500,000) in attorneys' fees (i.e., 33 1/3% of the Gross Settlement Amount) in attorneys'
9 fees to Class Counsel, James Hawkins, ALPC, and costs of Thirteen Thousand One Hundred Eight
10 Dollars and Seventy-Six Cents (\$13,108.76)

11 This Motion is made pursuant to California Rules of Court Rule 3.769, which requires court
12 approval of the settlement of a putative class action. Further, this Motion, which is expected to be
13 unopposed by Defendant Jo-Ann Stores, LLC., will be based on the following: Memorandum of
14 Points and Authorities set forth herein; the Joint Stipulation of Class Action and PAGA Settlement
15 Agreement attached to the Declaration of James R. Hawkins as Exhibit 1; the Declarations of James
16 R. Hawkins, Bobby Ray McCoy and Evelin Reyes of Simpluris, Inc.; Declaration of James R.
17 Hawkin filed in support of Plaintiff's Motion for Preliminary Approval and such evidence or oral
18 argument as may be presented at the hearing, and on the complete records and file herein.

19
20 Respectfully submitted,

21 Dated: February 27, 2022

JAMES HAWKINS, APLC

22
23 

24 James R. Hawkins, Esq.
25 Isandra Y. Fernandez, Esq.
26 Attorneys for Plaintiff
27 Bobby Ray McCoy
28

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Through this unopposed motion, Plaintiff Bobby Ray McCoy (hereinafter “Plaintiff” or “Class Representative”), on behalf of a putative class (hereinafter “Class” or “Class Members”), seeks final approval of the class action settlement (“Settlement”) reached with Defendant Jo-Ann Stores, LLC (“Defendant” and/or “Jo-Ann Stores”).

On October 27, 2021, this Court preliminarily approved the settlement amount of One Million, Five Hundred Thousand Dollars (\$1,500,000) as being fair, adequate, and reasonable. Further, this Court preliminarily appointed Plaintiff's counsel, James Hawkins and Isandra Fernandez of James Hawkins APLC as class counsel, the named Plaintiff Bobby Ray McCoy as Class Representative, and provisionally certified the Settlement Class which consists of: all current and former non-exempt hourly paid employees of Defendant who occupied the positions of key holders, assistant managers, store managers, and freight supervisors at any time in the State of California from May 11, 2016 through October 27, 2021 ("Class Members"). The Court also preliminarily approved Simpluris, Inc. (Simpluris) as the Settlement Administrator.

On December 21, 2021, the parties notified the Class Members about the settlement through the Settlement Administrator, Simpluris (Reyes Decl. ¶ 8.) The deadline for requests for exclusions from and objections to the Settlement expired February 4, 2022, 45 days after the December 21, 2021 mailing (Settlement Agreement p. 3, ¶ 31) (Reyes Decl. ¶ 8, Exhibit A.)

The benefits conferred to the Settlement Class, as a result of this Settlement, are extremely favorable. Specifically, as previously set forth in Plaintiff's Motion for Preliminary Approval ("Preliminary Approval Motion"), this is a cash settlement with no reversionary aspect. Every Class Member who has not opted out of the Settlement will automatically be mailed an individual settlement payment. There is no claims filing process, and Class Members do not have to file a claim to be mailed a payment. Moreover, out of the 1,341 class members there are Zero (0) requests for exclusion, no disputes, and no objections to the settlement. (Reyes Decl. ¶¶ 6, 13-15.)

Additionally, in the event the Court approves the requested fees, costs and enhancements, the estimated *average* settlement share to be paid is Six Hundred Sixty-One Dollars and Thirty-Seven

1 Cents (\$661.37) and the *highest* estimated settlement share to be paid is approximately Two
2 Thousand Two Hundred and Seven Dollars and Sixty-Six Cents (\$2,207.66) (Reyes Decl. ¶ 12.)

3 In sum, the proposed Settlement, which is the product of diligent advocacy and negotiations
4 by Class Counsel, provides significant benefits to the Class and has been well received as a
5 favorable outcome. The Settlement of this action is fair, reasonable, and adequate, and in the best
6 interest of the Class. Accordingly, final approval of the Settlement should be granted.

7 **II. LITIGATION AND SETTLEMENT**

8 **A. Pleadings**

9 On May 11, 2020, Plaintiff Bobby Ray McCoy initiated this action in the Superior
10 Court for the County of Alameda, on behalf of himself and similarly situated persons, styled *Bobby*
11 *Ray McCoy v. Jo-Ann Stores, LLC*. Case no. RG20061158. The Complaint asserts causes of action
12 for; (1) failure to pay lawful wages owed; (2) failure to provide lawful meal periods or compensation
13 in lieu thereof; (3) failure to provide lawful rest periods or compensation in lieu thereof; (4) failure
14 to pay timely wages; (5) knowing and intentional failure to comply with itemized employee wage
15 statement provisions; (6) failure to indemnify employees; and (7) violations of the unfair
16 competition law (Bus. & Prof. Code § 17200 *et seq.*) (the “Action”). On June 9, 2020, Plaintiff filed
17 a First Amended Complaint adding a claim under PAGA (See Declaration of James R. Hawkins
18 “Hawkins Decl.” ¶ 2.) This Action was removed to Federal Court on July 9, 2020. Pursuant to the
19 Parties’ agreement, this case was subsequently remanded back to Alameda Superior Court on March
20 15, 2021 (Hawkins Decl. ¶ 3.)

21 **B. Discovery and Mediation**

22 Through informal discovery, Plaintiff and Jo-Ann Stores have exchanged extensive
23 documents and information related to the claims asserted. Defendant has produced thousands of
24 pages of information, including timecard records and wage reports of putative class members.
25 Defendant also provided to Plaintiff his complete personnel file, information regarding the number
26 of non-exempt employees during the relevant time period, and corporate documents reflecting
27 Defendant’s wage and hour policies and practices. (Hawkins Decl. ¶ 9.)

28 After conducting extensive informal discovery, exchanging relevant information and

1 engaging in numerous discussions regarding the claims alleged, on January 19, 2021, the parties
2 participated in a private mediation with Mediator Lou M. Marlin. During the course of the
3 mediation, the parties exchanged further information and documentation concerning Plaintiff's
4 claims, Jo-Ann Stores' defenses, and aggressively advocated for their respective positions (Hawkins
5 Decl. ¶ 10.)

6 At the conclusion of the mediation, the parties reached a settlement in this action for a
7 maximum settlement amount of \$1,500,000.00. In the ensuing months, the parties continued to
8 negotiate over the details of the Settlement, exchanged multiple drafts of the proposed settlement
9 release agreement and class notice documents and engaged in communications regarding the
10 settlement terms. The final terms and provisions of the settlement agreement were approved and
11 executed by all the parties on or about June 1, 2021. (Hawkins Decl. ¶ 11; Exhibit 1- Settlement
12 Agreement).

13 **C. The Preliminarily Approved Settlement**

14 On July 27, 2021, Plaintiff filed the Motion for Preliminary Approval of Class Action
15 Settlement ("Preliminary Approval Motion") and on October 18, 2021, filed a Supplement to the
16 Preliminary Approval Motion. On October 27, 2021, the Court entered the Order granting
17 preliminary approval appointing class counsel (James R. Hawkins and Isandra Fernandez of James
18 Hawkins APLC), the class representative (Bobby Ray McCoy,) and the Settlement Administrator
19 (Simpluris, Inc.) The Court also approved the proposed Notice of Proposed Class Action and Paga
20 Settlement (hereinafter referred to as "Class Notice"). Now that administration has been completed,
21 subject to the Court's final approval, the fees and expenses will be paid from the Maximum
22 Settlement Amount as follows:

23 1. Subject to Court approval, the law firm of James Hawkins, APLC shall be
24 paid \$500,000 in attorneys' fees (i.e. 33.33% of the Gross Settlement Amount) and litigation costs of
25 \$13,108.76. (Settlement Agreement p. 11, ¶ 53 (d)(i).)

26 2. Subject to Court approval, \$10,000 shall be paid to the named Plaintiff, Bobby
27 Ray McCoy, for his effort and work in prosecuting the actions on behalf of the class. (Settlement
28 Agreement p. 10, ¶ 53(c).)

1 3. Subject to Court approval, \$15,000 will be set aside from the Class Settlement
2 Amount to cover any of the Settlement Administrator’s costs of administering this Settlement.
3 (Settlement Agreement p. 3, ¶ 34; p.12, ¶. 53 (f))

4 4. Subject to Court approval, \$100,000 will be set aside from the Class
5 Settlement Amount for the PAGA penalties, of which 75% [\$75,000] will go to the California Labor
6 and workforce Development Agency (the “LWDA Payment”), and 25% [\$25,000] remain part of the
7 Net Settlement Amount and distributed to Settlement Class Members. Plaintiff will take all actions
8 required by California Labor Code § 2699 (I) (Settlement Agreement p. 12, ¶ 53 (e).)

9 5. Payment to Class Members shall be made based on percentage of the Net
10 Settlement Amount (“NSA”) which is the amount remaining after deducting amounts set forth in
11 paragraphs 2-5 above from the MSA. (Settlement Agreement p. 2, ¶ 19; p. 9, ¶ 53(b).) The Parties
12 make no representations as to the tax treatment or legal effect of the payments in this Agreement.
13 Settlement Class Members understand and agree that they will be responsible for the payment of any
14 taxes assessed on the Individual Settlement Payments that they receive. (Settlement Agreement p.6,
15 ¶ 48.)

16 6. Settlement Payments shall be allocated as follows for tax purposes: 25% shall
17 be attributed to wages, which will be reported on W-2 and subject to payroll tax withholding; 75% as
18 penalties, interest, and reimbursement of business expenses incurred, which shall be reported on an
19 IRS Form 1099 by the Settlement Claims Administrator. (Settlement Agreement p. 10, ¶ 53 (b)(ii).)

20 7. This is a non-reversionary settlement with no reversion to Jo-Ann Stores.
21 Thus, any unpaid cash residue or unclaimed or abandoned class member funds, plus any accrued
22 interest thereon will be sent to the State of California Controller’s Office Unclaimed Property
23 Division. (Settlement Agreement p. 10, ¶ 53 (b)(iv).)

24 **D. Dissemination of Class Notice**

25 On November 15, 2021, *Simpluris* received the mailing list containing Class Members’
26 names, most recent mailing address and telephone numbers, social security numbers, and pertinent
27 employment information for each Class Member during the Class Period (“Class List”) The Class
28 List contained data for one thousand three hundred forty-one (1,341) Class Members (Reyes Decl. ¶

6.) The mailing addresses contained in the Class List were processed and updated and the Notice Packets were mailed via First Class Mail to the 1,341 Class Members on December 21, 2021. (Salinas Decl. ¶¶ 7-8.) For the Notice Packets returned from the post office without a forwarding address, Simpluris performed an advanced address search (i.e. skip trace) on all of these addresses. To date, a total of 10 Notice Packets remain undeliverable (Reyes Decl. ¶ 9.)

E. The Settlement Provides Reasonable Compensation to Class Members

Even without the presumption of fairness and reasonableness, the Settlement clearly is within the range of reasonableness. Subject to Court approval, the total potential Net Settlement Fund is approximately \$886,891.24. All Class Members will be paid their portion of the Class Member Settlement Fund. The estimated *average* settlement share to be paid is \$661.37 and the *highest* estimated settlement share to be paid is approximately \$2,195.48 (Reyes Decl. ¶ 11-12.) The settlement for Settlement Class members is fair, reasonable and adequate, given the inherent risk of litigation, the risk relative to class certification and the costs of pursuing such litigation. (Hawkins Decl. ¶ 8.)

As discussed in Plaintiff's motion for preliminary approval and supplement to the said motion, the predominant claims in this action arise from alleged violations of California law with respect to meal and rest breaks, failure to pay all lawful wages owed and failure to reimburse business expense, along with derivative claims. Plaintiff alleges that due to the scheduling and workload requirements, he and class members were not provided compliant meal periods as, for example, they were frequently required to take on duty meal breaks and/or had their meal breaks interrupted, with 30-minute deductions being made from their recorded time regardless of whether or not the full 30-minute meal period was actually taken. The rest period violation claim is also based on allegations that due to the workload requirements, Plaintiff and putative class members were unable to take minimum ten-minute rest break for every four hours or major fraction thereof worked during their shifts. Plaintiff's expense reimbursement claims are premised on allegations that he and class members were required to use their personal phones in the performance of their job duties for which they did not receive compensation (Hawkins Decl. ¶ 4.)

Jo-Ann Stores adamantly denies Plaintiff's allegations and maintains that he and class

1 members were provided with the opportunity to take all meal and rest periods to which they were
2 entitled. With respect to the expense reimbursement claim, Defendant maintains that employees
3 were not required to use their phones. Additionally, in 2019, Defendant implemented a
4 reimbursement policy for personal devices in which ranged from \$25 for manager to \$5 for non-
5 exempt employees. Plaintiff did not receive reimbursement during his employment and also
6 contends that the \$5 monthly reimbursement is insufficient. Further, with respect to the meal period
7 claim, Defendant contends that Plaintiff and putative class member were paid meal break premiums
8 during the class period when, do the demands of the work shift, they were unable to take compliant
9 meal breaks. The analysis of payroll data confirms that Defendant paid meal break premiums.
10 However, Plaintiff contends that the meal break premiums paid do not account for all potential meal
11 break violations (Hawkins Decl. ¶ 5.)

12 Here, Defendant disputed that any of the claims had merit based upon its written policies.
13 Defendant also disputed the propriety of certification in this case and contends that its policies and
14 practices concerning the claims asserted in this lawsuit are compliant with California law.
15 Accordingly, it denies it has any liability for the claims asserted by Plaintiff. Given the nature of the
16 claims alleged, Defendant has also denied and continues to deny that the lawsuit is appropriate for
17 class treatment for any purpose other than for settlement purposes only (Hawkins Decl. ¶ 6.)

18 As also discussed in Plaintiff's preliminary approval motion and supplement to said motion,
19 based on documents and information produced by Defendant in discovery, in preparation for
20 mediation and during ensuing settlement negotiations, Plaintiff's counsel estimated a potential
21 liability of \$8,198,062 that may be owed to the putative class, assuming Plaintiff and the Class were
22 able to obtain an order certifying the class and were also able to prove all their claims (Hawkins
23 Decl. ¶ 7.)

24 Through his counsel, Plaintiff took into consideration the significant risk that class
25 certification could be denied on the central claims, or that a merits decision on the central claims
26 would not favor the Class. (Hawkins Decl. ¶ 8.) Plaintiff considered the expense and length of
27 continued proceedings necessary to continue the Action against Defendant through trial and any
28 possible appeals along with Defendant's financial position (*Id.*) Thus, the settlement for Settlement

1 Class members is fair, reasonable and adequate, given the inherent risk of litigation, the risk relative
2 to class certification and the costs of pursuing such litigation (*Id.*)

3 **III. FINAL SETTLEMENT APPROVAL IS APPROPRIATE**

4 The law favors settlement, particularly in class actions and other complex cases in which
5 substantial resources can be conserved by avoiding the time, cost and rigors of formal litigation. *City*
6 *of Seattle* 955 F.2d at 1276; *Potter v Pacific Coast Lumber Company*, (1951) 37 Cal. 2d. 592, 602-
7 603.; 4 NEWBERG §11.41. When faced with a motion for final approval of a class action settlement
8 under Code of Civil Procedure §382, a court inquires whether the settlement is “fair, adequate, and
9 reasonable.” See e.g., *Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles*, (2010) 186 Cal. App.
10 4th 399, 407-408; *Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 129-30; *Dunk v.*
11 *Ford Motor Company* (1996) 48 Cal.App.4th 1794, 1801.

12 **A. This Court Preliminarily Found This Settlement to be Fair, Reasonable and**
13 **Adequate and Nothing Has Changed to Disturb That**

14 Before granting preliminary approval of a class action settlement, courts must determine that
15 the proposed settlement is fair, reasonable, and adequate — and not a product of fraud, overreaching,
16 or collusion. Cal. R. Ct. 3.769 (g); Cal. Civ. Pro. Code § 382; *Dunk v. Ford Motor Co.*, *supra*, 48
17 Cal.App.4th at 1801. Courts must presume that a settlement is fair, reasonable, and adequate, and
18 thus appropriate for preliminary approval when the following three factors are satisfied: (1) the
19 parties reached settlement after arms-length negotiations; (2) counsel conducted sufficient
20 investigation and discovery to allow themselves and the court to act intelligently; and (3) counsel is
21 experienced in similar litigation *Id.* at 1802. See also *7-Eleven Owners for Fair Franchising v.*
22 *Southland Corp.*, (2000) 85 Cal. App. 4th 1135, 1146. Further, as discussed below, although not
23 determinative, courts consider the percentage of objectors in determining whether a presumption of
24 fairness exists. *Id.* There is no question that these factors are satisfied here. The parties conducted
25 sufficient amount of discovery and participated in a private mediation and numerous conferences of
26 counsel that ultimately led to an arms-length settlement that provides for substantial recovery.
27 Moreover, out of 1,341 class members presumed to have received the Notice Packets, there were no
28 requests for exclusion from, no disputes with, or objections to, the Settlement (Reyes Decl. ¶¶ 13-

15.)¹

1. The Settlement Resulted from Non-Collusive, Arms-Length Negotiations

There certainly is no collusion between the parties. The involvement of a neutral third-party mediator is a factor that favors approval and evidences the presumptive fairness of the arms-length negotiations. Indeed, courts should give considerable weight to the competency and integrity of counsel and the involvement of a neutral mediator in assuring themselves that a settlement agreement represents an arms-length transaction entered without self-dealing or other potential misconduct. *Kullar v. Foot Locker, supra*, 168 Cal. App. 4th at 129. Here, after extensive discovery, discussions, exchange of information and review of records, the parties engaged in a mediation session with a well-respected and highly knowledgeable wage and hour mediator Lou M. Marlin (Hawkins Decl. ¶¶ 9, 10.)

2. The Settlement is Supported by Substantial Investigative and Discovery Efforts

As discussed in the preliminary approval papers, supporting declaration and herein, Class Counsel analyzed a significant amount of information that Defendant produced in response to informal discovery requests in preparation for mediation (Hawkins Decl. ¶¶ 7, 9.) The parties have conducted significant investigation of the facts and law during the prosecution of the Action. Class Counsel's research enabled them to pinpoint the relevant issues and claims and to assess potential liability and damages. These efforts resulted in the parties having a clear view of the strengths and weaknesses of their respective cases and achieving a resolution on favorable terms, as was evidenced during mediation and leading to Settlement.

3. Class Counsel is Experienced in Similar Litigation

The endorsement of qualified and well-informed counsel of the settlement as fair is entitled to significant weight. *See Dunk, supra*, 48 Cal.App.4th at 1802. As discussed in the preliminary approval papers and set forth in the Declaration of Class Counsel, Class Counsel has represented, mediated and settled other employee class actions in wage and hour litigation and have knowledge

¹ Out of 1,341 class members to whom the Notice Packets were mailed, 10 remain undeliverable. (Reyes Decl. ¶ 9.)

1 of the strengths and weaknesses of the claims against Defendant and the benefits of the proposed
2 settlement under the circumstances of the case. (Hawkins Decl. ¶¶ 13-14.) Class Counsel contends
3 that the Settlement is fair, adequate, reasonable, and in the best interests of the Class as a whole.

4 **4. Class Members' Positive Reaction to the Settlement Favors Final**
5 **Approval**

6 Finally, courts look at the reaction of class members to determine if a settlement that directly
7 affects their interests should be approved as fair, adequate, and reasonable. As already discussed
8 herein, out of 1,341 class members presumed to have received the Notice Packets, there are no
9 requests for exclusion from the Settlement (Reyes Decl. ¶ 13.) Further, a court may appropriately
10 infer that a class action settlement is fair, adequate, and reasonable even when class members object
11 to it. Indeed, a court may approve a class action settlement as fair, adequate, and reasonable even
12 over the objections of a significant percentage of class members. *See Boyd v. Betchel Corp.*, (D.C.
13 Cal 1976) 485 F. Supp. 610, 624. *Reed v. General Motors* (5th Cir. 1983) 703 F.2d 170, 174; *In re*
14 *Wash. Pub. Power Supply System Sec. Litig.* (D. Ariz. 1989) 720 F. Supp. 1379, 1394. There are no
15 objections to the Settlement which the Court should construe as a further indication of Class
16 Members' support for the Settlement as fair, adequate, and reasonable (Reyes Decl. ¶ 14.)

17 **IV. CLASS REPRESENTATIVE ENHANCEMENT IS REASONABLE**

18 The settlement provides for an enhancement award to be paid to the Class Representative.
19 The purpose is to provide an additional incentive payment, taking into consideration the risks, time
20 and effort in coming forward to fulfill all the duties associated with being a class representative.
21 Awarding incentive awards to compensate named plaintiffs in class actions has been specifically
22 recognized. See, e.g. *Clark v. American Residential Services, LLC*, (2009) 175 Cal App 4th 785, 804
23 (incentive awards to named plaintiff appropriate for participation in class action); *Bell v Farmers*
24 *Ins. Exchange*, (2004) 115 Cal App 4th 715, 726 (upholding "service payments" to named plaintiffs
25 for their efforts in bringing class case).

26 As stated by the Court of Appeal in the *Cellphone Termination Fee Cases*: incentive awards
27 are "intended to compensate class representatives for work done on behalf of the class, to make up
28 for financial or reputational risk undertaken in bringing the action, and, sometimes, to recognize

1 their willingness to act as a private attorney general." *Cellphone Termination Fee Cases*, (2010) 186
2 Cal. App. 4th 1380, 1394 (approving an incentive award of \$10,000).

3 The class representative enhancement payment is intended to compensate named Plaintiff
4 Bobby Ray McCoy as the class representative for his willingness to accept the responsibility of
5 representing the interests of all class members. The purpose is to provide an incentive payment,
6 taking into consideration the risks, time and effort expended by him in coming forward to provide
7 invaluable information and to litigate this matter on behalf of all Class Members. The enhancement
8 payment is also in consideration for executing a general release of all his claims against Jo-Ann
9 Stores (Declaration of Bobby Ray McCoy ("McCoy Decl." ¶ 10.)

10 Plaintiff also risked potential judgment against him if this case had been unsuccessful. In
11 class action losses, class representatives are deemed the losing party that is liable for the prevailing
12 party's costs. *Earley v. Superior Court*, (2000) 79 Cal. App. 4th 1420, 1433-1434. Finally, Plaintiff
13 also risked this lawsuit having a negative impact on future employment opportunities, as prospective
14 employers may be less inclined to hire an employee who has served as a class representative.
15 (McCoy Decl. ¶¶ 7, 9.) *See, e.g. Staton v. Boeing*, 327 F.3d 938, 977 (9th Cir. 2003) As such,
16 Plaintiff respectfully requests that this Court approve the Class Representatives enhancement
17 payment in the amount of \$10,000.

18 **V. CLASS COUNSEL'S REQUEST FOR ATTORNEYS FEE AWARD IS**
19 **REASONABLE**

20 Subject to court approval, this settlement amount of \$1,500,000.00 includes Class Counsel's
21 attorneys' fees of \$500,000. Plaintiff and class members are entitled to recover their attorneys' fees
22 and costs. (Labor Code §2802; Code Civ. Proc. §1021.5(a); *Earley v. Super. Ct.*, (2000) 79
23 Cal.App.4th 1420. A fee award is justified when class benefits are obtained via settlement. *Maria P.*
24 *v. Riles*, (1987) 43 Cal.3d 1281, 1290-91; *Westside Cmty. for Indep. Living, Inc. v. Obledo*, (1983)
25 33 Cal.3d 348, 352-53.

26 Fee awards may be based on (1) the percentage-of-the-benefit method; or (2) the lodestar
27 plus multiplier method. *See Wershba v. Apple Computer, Inc.* (2001) 91 Cal. App. 4th 224, 254;
28 *Lealao v. Beneficial California, Inc.* (2000) 82 Cal.App.4th 19, 27. Both methods are proper in

1 California, although courts often use a lodestar-multiplier method as a check against the
2 reasonableness of a percentage fee award. (See, e.g., *Serrano v. Priest (Serano III)*, (1977) 20
3 Cal.3d 25, 48-49 fn. 23; *People ex rel. Dept. of Transportation v. Yuki*, 31 (1995)Cal. App. 4th 1754,
4 1769-1772; *Salton Bay Marina, Inc. v. Imperial Irrigation Dist.*, (1985)172 Cal. App. 3d 914, 954.

5 **A. Class Counsel's Requested Fees Are Reasonable Under Lodestar/Multiplier**
6 **Method**

7 The lodestar-multiplier method begins with a calculation of time spent and reasonable hourly
8 compensation of each attorney and paralegal who worked on the case. Then to compensate counsel
9 for risk, quality, and result, courts commonly apply a "multiplier" to the lodestar in awarding
10 attorneys' fees. California courts often increase the base lodestar with a multiplier after considering:
11 (1) the continuing obligation of plaintiff's counsel to devote time and effort to the litigation; (2) the
12 extent to which the litigation precluded other employment by the attorneys; (3) the contingent nature
13 of the fee agreement, both from the point of view of eventual success on the merits and securing an
14 award; (4) the experience, reputation, and ability of the attorneys who performed the services, and
15 the skill they displayed in litigation; (5) the amount involved and the results obtained on behalf of
16 the class by plaintiff's counsel; and (6) the reaction of the class members. See, e.g. *Serrano, supra*,
17 20 Cal. 3d at 49; *Dunk v. Ford Motor Co.*, *supra*, 48 Cal. App. 4th at 1810 n.21. However, no rigid
18 formula applies and each factor should be considered only "where appropriate." See *Dept. of Transp.*
19 *v. Yuki*, (1995) 31 Cal. App. 4th 1754, 1771; See also *Serrano, supra*, 20 Cal.3d at 49.

20 **1. Time and Effort**

21 Class Counsel, who are experienced wage and hour class action attorneys, have put a
22 significant number of hours in this case. Class Counsel had to conduct substantial investigation,
23 research numerous issues and review and analyze policies, independently analyze time records, and
24 wage statements, as well as dedicate substantial time to analyze data, time records and payroll
25 records and discuss with class members. (Hawkins Decl. ¶¶ 9-10, 16-20.) Those efforts, along with
26 negotiating the settlement, attempting to obtain preliminary approval preparing and filing the final
27 approval papers, required a significant amount of time and labor. (*Id.*) Since prior to the inception of
28 the filing of this lawsuit on May 11, 2020, the total amount of attorney time and paralegal time

1 estimated to have been expended, and also estimated to be expended in finalizing this matter, is
2 218.5. Class Counsel's base lodestar total equates to attorney fees of \$168,475 (Hawkins Decl. ¶¶
3 19, 20.)

4 **2. Extent Litigation Precluded Other Employment**

5 Inherent to class action litigation is the amount of time and labor required to properly
6 adjudicate the case. From start to Settlement, judgment or verdict, class action litigation commands
7 commitment, an extensive amount of time, labor and resources to successfully litigate. Although this
8 litigation did not conclusively preclude other employment it did impact Class Counsel's ability to
9 take on other class action cases. Class Counsel is a boutique law firm with few attorneys and staff.
10 (Hawkins Decl. ¶ 16.)

11 **3. Contingent Nature of the Agreement**

12 In *Ketchum v. Moses* (2001) 24 Cal. 4th 1122, 1132, the court noted, the economic rationale
13 for contingency cases has been explained as follows: "A contingent fee must be higher than a fee for
14 the same legal services paid as they are performed. As discussed further below, the contingent fee
15 compensates the lawyer not only for the legal services he renders but also for the loan of those
16 services. The implicit interest rate on such a loan is higher because the risk of default (the loss of the
17 case, which cancels the debt of the client to the lawyer) is much higher than that of conventional
18 loans." (Posner, *Economic Analysis of Law* (4th ed. 1992) pp. 534, 567.) "A lawyer who both bears
19 the risk of not being paid and provides legal services is not receiving the fair market value of his
20 work if he is paid only for the second of these functions. If he is paid no more, competent counsel
21 will be reluctant to accept fee award cases." *Id.*

22 **4. Experience, Reputation, and Ability of Plaintiff's Counsel**

23 As also set forth in the Declaration of James R. Hawkins submitted in support of the
24 Preliminary Approval Motion and discussed herein, Class Counsel's skill and experience in
25 litigating wage and hour class actions, in state and federal forums, contributed to the results obtained
26 on behalf of the putative class members. (Hawkins Decl. ¶¶ 13-17.)

27 **5. Results Obtained on Behalf of the Class by Plaintiff's Counsel**

28 The award of attorney fees should reflect the successful outcome of the case *Hensley v.*

1 Eckerhart, (1983) 461 U.S. 424,440. As already discussed herein and in the preliminary approval
2 motion, this case involves numerous and difficult issues largely precluding a clear-cut outcome as to
3 liability. There also were significant class certification issues concerning whether individual issues
4 predominate and whether class member declarations and statistical samplings can support
5 certification. Defendants recognized the uncertainty of Plaintiff's claims and vigorously disputed
6 liability, Class Counsel's ability to obtain certification, and the amount of damages. Nevertheless,
7 despite the obstacles as already discussed in the preliminary approval motion and herein, Class
8 Counsel obtained significant financial compensation for the class members. All class members who
9 did not opt out of the Settlement will receive payment. The *highest* settlement share to be paid is
10 approximately \$2,207.66 and the estimated *average* settlement share to be paid is \$661.37 (Reyes
11 Decl.¶ 12.)

12 Further, as also discussed, Plaintiff would have faced significant legal and factual obstacles
13 in demonstrating that Class certification was appropriate. Despite the complexity of the case, Class
14 Counsel have, through the investment of substantial effort, and the resources of their boutique law
15 firm, been able to secure an outstanding Settlement on behalf of the Class Members.

16 **6. Reaction of Putative Class Members**

17 As already discussed herein, the reaction of the Class Members has been positive.
18 Specifically, not one of the Class Members objected to Class Counsel's request for attorneys' fees,
19 nor did anyone request exclusion, or dispute the Settlement, which also provides compelling
20 evidence that the request is fair, adequate and reasonable.

21 In sum, based on the six factors discussed above, Class Counsels' lodestar in this action
22 should be enhanced by application of a multiplier. Additionally, by settling this case prior to trial
23 rather than continuing to litigate issues that remain somewhat unsettled, counsel obtained
24 exceptional results for the class at far less expense to the parties, the counsel and to this Court.

25 Accordingly, a positive multiplier of Class Counsel's lodestar is further warranted. "Considering
26 that our Supreme Court has placed an extraordinarily high value on settlement, it would seem
27 counsel should be rewarded, not punished, for helping to achieve that goal." *Lealao, supra*, 82 Cal.
28 App. 4th at 52. Multipliers of two to four are commonplace in California class actions and can range

1 even higher. *Wershba*, *supra*, 91 Cal. App. 4th at 255; *In re California Indirect Purchases* (October
2 22, 1998) WL1031494 at * 10, fn 5. In this case, a 2.96 multiplier applied to the total lodestar
3 amount is all that is required to reach the agreed upon class counsel fee of \$500,000.

4 **B. Class Counsel's Requested Fee Is Reasonable Under the Percentage of the**
5 **Benefit Method**

6 **1. Attorney's Fees Should be Based Upon the Total Benefit to the Class**

7 The primary benefit of the percentage method is that it focuses on the benefit conferred on
8 the class as a result of the efforts of Class Counsel. Awarding Class Counsel fees based on a
9 percentage of the recovery has the advantages of eliminating the incentive for attorneys to increase
10 hours unnecessarily, encouraging early settlement of disputes, and preserving judicial resources
11 otherwise used to monitor attorneys' billable hours. See *In re Activision Sec. Litig.*, (N.D. Cal. 1989)
12 723 F. Supp. 1373, 1378-79; *MANUAL FOR COMPLEX LITIGATION* 4th ed. § 14.121 (2004) ("in
13 practice, the lodestar method is difficult to apply, time consuming to administer, inconsistent in
14 result. . . capable of manipulation,... [and] creates inherent incentive to prolong the litigation"); See
15 also *In re Quantum Health Resources, Inc.* (C.D.Cal. 1997) 962 F. Supp. 1254, 1256 (noting that
16 lodestar "creates an incentive to keep litigation going in order to maximize the number of hours
17 included in the court's lodestar calculation.")

18 The percentage of fund method survives in California class action cases. *Laffitte v Robert*
19 *Half Intern, Inc.* (2016) 1 Ca. 4th 480, 506.[See also. *Chavez v. Netflix, Inc.*, (2008) 162 Cal. App.
20 4th 43 at 65, 66; *Consumer Cause, Inc. v. Mrs. Gooch's Natural Food Markets, Inc.*, (2005) 127 Cal.
21 App. 4th 387, 397 [the common fund doctrine is "frequently applied in class actions when the efforts
22 of the attorney for the named class representatives produce monetary benefits for the entire class"];
23 *Wershba v. Apple Computer, Inc.*, *supra*, 91 Cal. App. 4th at 254.

24 **2. The Contingent Nature of Class Counsel's Representation Supports the**
25 **Requested Fees Based on 33.33% (One Third) of the MSA**

26 Further, the contingent nature of Class Counsel's representation also warrants the requested
27 attorney fees based on the percentage of the common fund. The risks in taking on any class action
28 are enormous especially in regards to wage-and-hour class actions because the wage laws are still

1 developing and a change in the law could wipe out a plaintiff's recovery. Litigating a class action
2 through trial takes years and requires the investment of hundreds of thousands of dollars. Attorneys
3 willing to undertake this risk deserve appropriate compensation. As elaborated by the California
4 Supreme Court in *Graham v. Daimler Chrysler Corp.*, (2008) 34 Cal. 4th 553, 579-580, counsel
5 should be awarded a fee enhancer for taking on contingent cases because a "contingent fee
6 compensates the lawyer not only for the legal services he renders but for the loan of those services.
7 The implicit interest rate on such a loan is higher because the risk of default (the loss of the case,
8 which cancels the debt of the client to the lawyer) is much higher than that of conventional loans."

9 As the California Supreme Court specifically explained:

10 A contingent fee must be higher than a fee for the same legal services paid as they are
11 performed. The contingent fee compensates the lawyer not only for the legal services
12 he renders but for the loan of those services. The implicit interest rate on such a loan
13 is higher because the risk of default (the loss of the case, which cancels the debt of the
14 client to the lawyer) is much higher than that of conventional loans. A lawyer who
15 both bears the risk of not being paid and provides legal services is not receiving the
16 fair market value of his work if he is paid only for the second of these functions. If he
17 is paid no more, competent counsel will be reluctant to accept fee award cases.

18 *Id.* at 580.(citing *Ketchum v. Moses*,(2001) 24 Cal. 4th 1122, 1132-33).

19 In the legal marketplace, an attorney whose compensation is entirely dependent on success –
20 who takes a significant risk – should and does expect a significantly higher fee than an attorney who
21 is paid a market rate as the case goes along, win or lose. *See, e.g., Rader v. Thrasher*, (1962) 57 Cal.
22 2d 244, 253 (“[a] contingent fee contract, since it involves a gamble on the result, may properly
23 provide for a larger compensation than would otherwise be reasonable” (citation omitted); *Salton*
24 *Bay Marina v. Imperial Irrig. Dist.*, (1985) 172 Cal. App. 3d 914, 955 (contingent nature of the
25 litigation is a relevant factor in determining a reasonable attorney fee award).

26 Class Counsel represented the class members in this matter and has borne the entire risk and
27 costs of litigation on a pure contingency basis. To date, Class Counsel has not received any
28 compensation and expended litigation costs on behalf of the class. Class action contingency cases
are inherently risky. Upon retention, Class Counsel makes a commitment to litigate the case through
trial. These types of cases can take years, hundreds of hours of work and cost an enormous amount
of money; these risks are known upon retention. The risks involved coupled with the contingency
basis of this case further support Class Counsel’s request for attorneys’ fees and costs (Hawkins

Decl. ¶ 20.)

3. **Additional Factors Re: Contingency Market Rate Justify the Requested Fee Award**

Further, important public policies underlie a court's determination of a motion for attorneys' fees in class actions. Employees who are wronged by employer's violation of state and federal labor laws should have access to counsel with the ability and resources necessary to litigate complex cases. See e.g. *Say-On Drug Stores, Inc. v. Superior Court*, (2004) 34 Cal. 4th 319, 340 (enforcement of labor laws and class action device both matters of public policy); Our legal system places unique reliance on private litigants to enforce substantive provisions of employment law through class actions. See e.g. *Gentry v. Superior Court*, 42 Cal. 4th 443, 450-6 (2007) (confirming the public importance of private enforcement of overtime laws through class actions); *Lealao*, 82 Cal. App. 4th (legal system relies on private litigants to enforce substantive provisions of law through class and derivative actions; attorneys providing the essential enforcement services must be provided incentives roughly comparable to those negotiated in the private bargaining that takes place in the legal marketplace).

As the California Court of Appeal recognized in *Thayer v. Wells Fargo Bank, supra*, 92 Cal. App. 4th at 839: "Adequate fee awards are perhaps the most effective means of achieving [the] salutary goal [of encouraging 'private attorney general actions and] [c]ourts should not be indifferent to the realities of the legal marketplace or unduly parsimonious in the calculation of such fees." See also *Lealao*, 82 Cal.App.4th at 53 (cautioning against fee awards that are too small and therefore "chill the private enforcement essential to vindication of many rights..."). At a minimum, attorneys providing these substantial benefits should be paid an award equal to the amount negotiated in private bargaining that take place in the legal marketplace. *Deposit Guaranty Nat. Bank, Jackson, Miss. v. Roper*, (1980) 445 U.S. 326, 338; *Lealao*, 82 Cal. App. 4th at 49-50.

4. **Class Counsel's Requested Fee Award is Well Within California's Benchmark Awards and Thus Reasonable Under the Percentage of the Benefit Method**

Class Counsel's request for 33 1/3% of the monetary fund recovered is California's standard benchmark and well within the range customarily approved by the California courts in comparable

1 class actions and other class actions as well as with contingency contracts negotiated by plaintiffs
2 and their counsel. “Empirical studies also show that regardless of whether the percentage method or
3 the lodestar method is used, fee awards in class actions average around one-third of the recovery.”
4 *See e.g. Chavez v. Netflix, Inc.*, *supra* 162 Cal. App. 4th at 66 fn.11; *In re California Indirect*
5 *Purchases* (October 22, 1998) WL1031494 at * 9(citing to *In re Milk Antitrust Litigation* (L.A. Sup.
6 Ct. 1998) Civ. Case No. BC070061 (33 1/3% award); *In re Facsimile Paper Antitrust Litigation*
7 (San Francisco Sup. Ct. 1997) Civ. Case No. BC0070061 (33 1/3% award) *In re Liquid Carbon*
8 *Dioxide Cases* (San Diego Sup.Ct.1996) J.C.C.P. 3012 (33 1/3% award); *Romero v Producers Dairy*
9 *Food, Inc.* (E.D. Cal. Nov. 14, 2007) WL 3492841 at * 4 (“fee awards in class actions average
10 around one-third of the recovery.” (quoting *Newberg on Class Actions* § 14.6 (4th ed.2007)

11 Moreover, the percentage should be measured against the full fund established by the
12 settlement and not upon the total value of the net settlement fund. *Williams v. MGM-Pathe*
13 *Communications Co.*, (9th Cir. 1997)129 F.3d 1026, 1027. This method recognizes that the efforts
14 of class counsel established the entire settlement, including non- monetary benefits, for the benefit of
15 the class. *Id.* In the Ninth Circuit’s decision in *Williams*, the parties settled class action claims in
16 favor of the class for a total settlement fund of \$4.5 million, and the district court awarded class
17 counsel attorneys’ fees based upon “the class members’ claims against that fund. *Williams*, 129 F.3d
18 at 1027. The class counsel in *Williams* contended that the district court erred and should have
19 calculated their fee as one-third of the entire \$4.5 million settlement fund. *Id.* The Ninth Circuit
20 agreed with class counsel and determined that the district court’s award of a fee based solely upon
21 the claims against the settlement fund was an abuse of its discretion.

22 Ninth Circuit courts have applied *Williams* in a variety of contexts, including claims-
23 made settlements without a minimum or maximum recovery. *See, e.g., Browning v. Yahoo! Inc.*,
24 (N.D. Cal. Nov. 16, 2007) WL 4105971 at *13–14(claims-made settlement with no minimum or
25 maximum recovery); *Young v. Polo Retail*, (N.D. Cal. Mar. 28, 2007) WL 951821 at*14-24 (same);
26 *Lopez v. Youngblood*, (E.D. Cal. Sept. 1, 2011) WL 10483569 at *32–43 (reversionary common
27 fund with maximum recovery only). *Hopson v. Hanesbrands Inc.*, (N.D. Cal. Apr. 3, 2009) 09
28 WL 928133 at *11; *Glass v. UBS Financial Services*, (N.D. Cal. Jan. 26, 2007) WL 221862 at

1 *16) (same). In sum, Class Counsels' request for an award of attorney's fees in the amount of 33 1/3
2 % of the maximum settlement amount is reasonable.

3 **VI. CLASS COUNSEL'S REQUESTED COSTS ARE REASONABLE**

4 Class Counsel has not only expended substantial time in diligently prosecuting this Action,
5 but they have also expended considerable resources during litigation with no guarantee that their
6 costs would be reimbursed. The Settlement provides for reasonable actual costs of up to \$18,000.00.
7 (Settlement Agreement p. 11, ¶ 53 (d)(i)) The attorney cost amount incurred is \$13,108.76, thus
8 Class Counsel respectfully requests that the Court approve the incurred amount as per the Settlement
9 Agreement. (Hawkins Decl. ¶ 21 and Exh. 2)

10 **VII. THE SETTLEMENT ADMINISTRATOR'S REQUESTED EXPENSES ARE**
11 **REASONABLE**

12 Simpluris was retained to administer the notice and claims process. Simpluris's duties
13 included, among other things: a) preparing, printing and mailing of the class notice packets and b)
14 receiving and reviewing claims and exclusion requests. (Reyes Decl. ¶ 3.) In the preliminary
15 moving papers, Plaintiff requested that, as per the Settlement Agreement, the Settlement
16 Administrator be awarded costs of administering the settlement in an amount not to exceed \$15,000.
17 As per Simpluris, the costs of administering the settlement are \$15,000.00 and should be awarded.
18 (Reyes Decl. ¶ 16.)

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1 **VIII. CONCLUSION**

2 For all of the foregoing reasons, Plaintiff requests that the Court (1) grant final approval of
3 this Settlement and approve distribution to the settlement Class Members, (2) approve payment of
4 \$100,000 in payment of PAGA penalties, (3) approve Settlement Administrator costs in the amount
5 of \$15,000 (4) approve Class Counsel's request for an award of \$500,000 in attorneys' fees and
6 \$13,108.76 in costs, and (5) approve the request for \$10,000.00 enhancement payment to the named
7 plaintiff and class representative Bobby Ray McCoy. Finally, Plaintiff requests that the Court enter
8 the [Proposed] Judgment and Final Order Approving Settlement of Class Action submitted
9 concurrently herewith.

10
11
12 Dated: February 28, 2022

Respectfully submitted,

JAMES HAWKINS, APLC

13
14 
15 James R. Hawkins, Esq.
16 Isandra Y. Fernandez, Esq.
17 Attorneys for Plaintiff
18 Bobby Ray McCoy
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PROOF OF SERVICE, COUNTY OF ORANGE

I am a resident of the State of California, County of Orange. I am over the age of eighteen years and not a party to the within action. My business address is 9880 Research Drive., Suite 200, Irvine, California 92618.

On February 28, 2022, I served on the interested parties in this action the following document(s) entitled:

- **PLAINTIFF'S NOTICE OF MOTION AND MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT; MEMORANDUM OF POINTS AND AUTHORITIES;[PROPOSED] ORDER**
- **DECLARATION OF JAMES R. HAWKINS IN SUPPORT OF MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT**
- **DECLARATION OF EVELIN REYES REGARDING NOTICE AND SETTLEMENT ADMINISTRATION**
- **DECLARATION OF BOBBY RAY MCCOY IN SUPPORT OF MOTION FOR FINAL APPROVAL**
- **[PROPOSED] ORDER AND JUDGMENT GRANTING FINAL APPROVAL OF CLASS ACTION SETTLEMENT**

[XX] BY ELECTRONIC SERVICE: Based on a court Order or an agreement by the parties to accept service by e-mail or electronic transmission, I caused the document(s) to be sent from the email address Nicole@jameshawkinsapl.com to the persons at the e-mail addresses listed in the Service List below. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

SERVICE LIST

MICHAEL J. NADER, SBN 200425 michael.nader@ogletree.com RABIA Z. REED, SBN 317288 rabia.reed@ogletree.com OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C. 500 Capitol Mall, Suite 2500 Sacramento, CA 95814 Attorneys for Defendant	Labor and Workforce Development Agency Attn: PAGA Administrator 1515 Clay Street, Ste 801 Oakland, CA 94612 http://www.dir.ca.gov/Private-Attorneys-General-Act
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1 [XX] **STATE:** I declare under penalty of perjury, under the laws of the State of
2 California, that the above is true and correct.

3 Executed on February 28, 2022, at Irvine, California

4 
5 Nicole Miccolis