

**JAMES HAWKINS APLC**

James R. Hawkins (192925)

Christina Lucio (253677)

9880 Research Drive, Suite 200

Irvine, CA 92618

Tel.: (949) 387-7200

Fax: (949) 387-6676

Email: James@jameshawkinsaplc.com

Email: christina@jameshawkinsaplc.com

Attorneys for Plaintiff KEVIN HARRIS,  
on behalf of himself and all others similarly situated

**SUPERIOR COURT OF THE STATE OF CALIFORNIA  
FOR THE COUNTY OF PLACER**

KEVIN HARRIS, individually and on behalf  
of himself and all others similarly situated,

Plaintiff,

v.

MCKESSON MEDICAL-SURGICAL INC., a  
Delaware Corporation; and DOES 1-50,  
inclusive,

Defendants.

Case No. S-CV-0044686

Assigned for All Purposes to:  
Hon. Garen Horst  
Dept.: 42

**PLAINTIFF'S NOTICE OF MOTION  
AND MEMORANDUM IN SUPPORT  
OF MOTION FOR:**

- (1) PRELIMINARY APPROVAL OF  
JOINT STIPULATION OF CLASS  
ACTION AND PAGA SETTLEMENT;**
- (2) APPROVAL OF NOTICE TO CLASS  
MEMBERS AND RELATED  
MATERIALS;**
- (3) APPROVAL OF SETTLEMENT  
ADMINISTRATOR; AND**
- (4) SETTING HEARING FOR FINAL  
APPROVAL OF SETTLEMENT**

Date: December 7, 2023  
Time: 8:30 a.m.

1  
2 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

3 **NOTICE IS HEREBY GIVEN** that on December 7, 2023 at 8:30 a.m. or as soon thereafter as  
4 the matter may be heard, in Department 42 of the Placer County Superior Court at the Hon. Howard G.  
5 Gibson Courthouse located at 10820 Justice Center Drive, Roseville, CA 95678, before the Honorable  
6 Garen Horst, Plaintiff Kevin Harris (“Plaintiff”), through his undersigned Class Counsel, will and hereby  
7 does move the Court for entry of the Proposed Order Granting Motion for Preliminary Approval of Joint  
8 Stipulation of Class Action and PAGA Settlement filed concurrently herewith:

9 1. Provisionally certifying the following Class for purposes of settlement: all current and  
10 former non-exempt employees of Defendant McKesson Medical-Surgical, Inc. (“Defendant”) in the  
11 State of California who hold/held delivery driver positions from April 3, 2016 to January 27, 2023  
12 (“Class Period”).

13 2. Preliminarily appointing Plaintiff Kevin Harris as Class Representative for purposes of  
14 settlement only;

15 3. Appointing James Hawkins and Christina Lucio of James Hawkins, APLC as Class  
16 Counsel for purposes of settlement;

17 5. Preliminarily approving the class action portion of the settlement as fair, adequate, and  
18 reasonable, and approving the PAGA portion of the settlement based upon the terms set forth in the Joint  
19 Stipulation of Class Action and PAGA Settlement Agreement (the “Settlement”), including payment by  
20 Defendant of the non-reversionary Gross Settlement Amount of \$925,000.00;

21 6. Preliminarily approving payment of reasonable attorneys’ fees and costs from the Gross  
22 Settlement Amount in an amount of up to one-third of the Gross Settlement Amount (estimated to be  
23 \$308,333.33), plus actual litigation costs up to \$20,000.00;

24 7. Preliminarily approving the Class Representative’s Service Payment to Plaintiff Kevin  
25 Harris in an amount of \$10,000.00 from the Gross Settlement Amount to compensate him for the burden,  
26 responsibility, time, effort, and risk involved in coming forward on behalf of the Class and for his general  
27 release of claims broader than the Class release;

28 8. Preliminarily approving payment to the LWDA of 75% of the \$64,750.00 allocated to

1 PAGA penalties, totaling \$48,562.50, from the Gross Settlement Amount;

2 9. Preliminarily approving ILYM Group, Inc. as the Settlement Administrator and further  
3 approving distribution of up to \$12,000.00 from the Gross Settlement Amount to cover the Settlement  
4 Administrator's expenses in administering this settlement;

5 10. Directing distribution to the Class of the Notice of Class Action and PAGA Settlement  
6 (the "Class Notice"), including notice of the opportunity to exclude oneself from, or object to, the  
7 settlement (except for its PAGA component); and

8 11. Setting a date for a final fairness hearing to determine, following dissemination of notice  
9 to the class, whether to grant final approval to the Settlement.

10 This motion is based upon this Notice of Motion and Motion; the Memorandum of Points and  
11 Authorities in Support thereof; the Declarations of James R. Hawkins, Esq., Christina M. Lucio, Esq.,  
12 and Kevin Harris in support thereof; the Joint Stipulation of Class Action and PAGA Settlement; the  
13 Proposed Order Granting Preliminary Approval of Class Action Settlement; the other records, pleadings,  
14 and papers filed in this action; and upon such other evidence or argument as may be presented to the  
15 Court at the hearing of this motion.

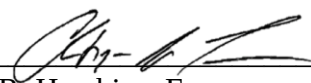
16 As this Motion is unopposed, Plaintiff also respectfully request relief from the page limit  
17 requirement set by California Rules of Court, Rule 3.1113(d).

18 Respectfully submitted,

19  
20 **JAMES HAWKINS APLC**

21  
22 Dated: November 09, 2023

By:

  
\_\_\_\_\_  
James R. Hawkins, Esq.  
Christina Lucio, Esq.

24 *Attorneys for Plaintiff and the Putative Class*

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff Kevin Harris (“Plaintiff”) seeks preliminary approval of a non-reversionary  
4 \$925,000.00 Joint Stipulation of Class Action and PAGA Settlement (“Settlement”) entered with  
5 Defendant McKesson Medical Surgical, Inc. (“Defendant”) (collectively, the “Parties”). The Settlement  
6 was reached after two full-day mediation sessions with an experienced wage and hour mediator. The  
7 Settlement satisfies all of the criteria for preliminary approval under California law, and provides  
8 substantial relief to the class members while taking into consideration the risks and expenses of further  
9 litigation. It was the result of non-collusive, arm’s length, contentious, and informed negotiations  
10 between the parties, who were represented by experienced wage and hour class action counsel.

11 Plaintiff requests an order preliminarily approving the Settlement as fair, adequate, and  
12 reasonable; appointing Plaintiff as the Class Representative; appointing Plaintiff’s counsel as Class  
13 Counsel; provisionally certifying the Class; approving the Parties’ proposed Notice of Class Action and  
14 PAGA Settlement (the “Class Notice”); appointing ILYM Group, Inc. (“ILYM”) as the Settlement  
15 Administrator; and setting a schedule for proceedings with respect to final approval of the Settlement.

16 **II. BACKGROUND**

17 **A. THE COMPLAINT AND PROCEDURAL HISTORY**

18 On April 2, 2020, Plaintiff submitted a letter to the California Labor and Workforce  
19 Development Agency (“LWDA”) alleging that Defendant (1) failed to pay all wages for hours worked  
20 (including overtime and minimum wages); (2) failed to authorize and permit rest periods; (3) failed to  
21 timely pay wages owed at upon separation from employment; (4) failed to provide accurate itemized  
22 wage statements (5) failed to reimburse business expenses; and (6) violated the Unfair Competition Law.  
23 (Harris Decl. ¶ 2.)

24 On April 3, 2020, Plaintiff filed a putative class action complaint in Placer County Superior  
25 Court titled *Kevin Harris v. McKesson Medical-Surgical, Inc.*, Case No. SCV0044686, containing the  
26 same allegations as the LWDA letter (the “Class Complaint”). (Id.)

27 On June 8, 2020, Plaintiff filed a related representative complaint in Placer County Superior  
28 Court, titled *Kevin Harris v. McKesson Medical-Surgical, Inc.*, Case No. SCV0045007, seeking civil

penalties under the Private Attorneys General Act, Labor Code Section 2698 *et seq.* for the aforementioned Labor Code and Wage Order violations (the “PAGA Complaint”). (Id.)

The Parties agreed to mediation for the purpose of settling Plaintiff’s claims. (Lucio Decl., ¶ 5.) The Parties exchanged extensive formal and informal discovery, including time and pay records for a sizable sample of the Putative Class, and relevant policy documents. (Hawkins Decl., ¶ 17.) The Parties participated in two full-day mediation sessions with experienced employment law mediator Hon. Ronald Sabraw (ret.) on June 14, 2022 and December 14, 2022. (Lucio Decl., ¶ 5.) Though the Parties did not reach an agreement at mediation, the Parties continued negotiations with the assistance of the mediator. A Mediator’s Proposal was issued on December 19, 2022, which was accepted by the parties and memorialized in a Memorandum of Understanding (“MOU”), executed on May 22, 2023. (Id.) Thereafter, the Parties executed the Settlement. The Parties have stipulated to the filing of a First Amended Consolidated Complaint, consolidating the Class and PAGA actions pursuant to the Settlement. The Consolidated Complaint was filed on October 19, 2023.

**B. VALUATION OF PLAINTIFF’S CLAIMS**

Plaintiff’s claims include that Defendant (1) failed to pay all wages owed, including overtime; (2) failed to authorize and permit rest periods; (3) failed to timely pay wages owed upon separation from employment; (4) failed to provide accurate itemized wage statements; (5) failed to reimburse necessary expenses; (6) violated of the Unfair Competition Law; and (7) penalties pursuant to PAGA. (*See*, Hawkins Decl. ¶5.)

Prior to the second mediation in this action, Defendant settled a related action entitled *Torrez v. McKesson Medical-Surgical, Inc.*, San Bernardino County Superior Court, Case No. CIVDS1917976. The *Torrez* action released claims for Defendant’s alleged failure to provide complete and accurate wage statements to individuals who received an incentive payment under Defendant’s incentive payment plan, and statutory penalties for the forgoing violations and unfair competition. (Hawkins Decl. ¶ 18.) In addition to arguing the prior release of certain of the claims asserted, Defendant has strong defenses to Plaintiff’s claims including that the Class Members spent most of their time working in the field and that this fact presents obstacles to certification. Defendant contends that such employees are in charge of their own taking of rest periods and logging of hours worked. The fact that such rest periods are not

recorded inherently makes certification more difficult. Defendant also argued that they promulgated lawful policies. As to the overtime claim, Defendant contended that it lawfully paid all overtime and that its incentives were a percentage of total earnings which it contended did not need to be separately factored into the regular rate of pay. Defendant also contended that to the extent any employee used his or her cellular phone, it was a matter of preference and not Defendant's requirement because Defendant provided a Zebra communication/GPS device to Class Members for communication and GPS purposes. Defendant also argued that many of the members of the Class of drivers were subject to DOT regulations and were not subject to California law regarding overtime and breaks. Further, Defendant contended that Plaintiff's penalty claims are not meritorious because Defendant had a good faith belief that their conduct was lawful, and that Plaintiff would fail on his underlying claims. (See, Hawkins Decl. ¶¶ 6-11.) Plaintiff estimated Defendant's maximum liability to be approximately \$4,837,343.61 exclusive of PAGA, and \$9,278,743.61 inclusive of PAGA. In light of the foregoing challenges, however, Plaintiff calculated Defendant's realistic, risk-adjusted exposure at approximately \$3,078,795.31, inclusive of PAGA. Each risk-adjusted claim is separately valued as follows: Rest period premiums: \$555,785.21; Unpaid wages due to off-the-clock work: \$63,668.76; Unpaid wages due to improperly calculating the regular rate of pay: \$18,100.92; Wage Statement penalties: \$11,350.00; Waiting Time Penalties: \$407,511.00; Unreimbursed business expenses: \$86,479.41; and PAGA penalties (\$50 per pay period): \$1,935,900. (See, Hawkins Decl. ¶ 14.) Thus, the Settlement will provide approximately 30% of Defendant's realistic maximum exposure in immediate relief to the Class Members. (Id. ¶ 15.)

### **III. SUMMARY OF THE PROPOSED SETTLEMENT**

The non-reversionary Gross Settlement Amount ("GSA") of \$925,000.00, includes (1) the fees and expenses of the Settlement Administrator, estimated to be up to \$12,000.00; (2) a Class Representative Service Award of \$10,000.00; (3) attorneys' fees of up to one-third of the GSA (i.e., \$308,333.33); (4) litigation expenses and costs incurred of Plaintiff's Counsel of no more than \$20,000.00; and (5) deductions for the PAGA Settlement Amount in the amount of \$48,562.50.<sup>1</sup> (See,

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<sup>1</sup> This figure represents 75% of the PAGA Fund of \$64,750.00, which will be paid to the LWDA. The remaining 25%, or \$16,187.50 will be paid pro rata to the PAGA Employees.

Settlement, Section D.5.)

After all Court-approved deductions from the GSA, the Net Settlement Amount (“NSA”) of approximately \$509,916.67 will be distributed on a “checks cashed” basis to the Class Members based on the number of pay periods each Class Member worked during the Class Period. In addition, each PAGA Employee’s share of the remaining PAGA Fund (25% or \$16,187.50) will be distributed based on the number of individual PAGA Employee’s total Pay Periods worked during the PAGA Period. (Settlement, Section D.5.) If the settlement is finally approved the average individual class settlement payment per Class Member will be \$2,246.33<sup>2</sup> on a net basis and \$4,074.89<sup>3</sup> per Class Member on a gross basis. This amount compares very favorably to other class action settlements.<sup>4</sup>

Class Members will be provided with notice of the Settlement, its terms, their individual settlement amount, and their right to opt out, object, appear at the fairness hearing or challenge their number of pay periods worked as set out in the Class Notice. (Settlement, Section C.5.)

Class Participants shall have 180 days to cash their checks. Any funds associated will be sent to the State of California’s Unclaimed Property Fund. (See, Settlement, Section D.7.)

All Individual Settlement Payments will be allocated as follows: (i) twenty percent (20%) will be allocated as wages for which IRS Forms W-2 will be issued and all applicable withholdings shall be made; and (ii) eighty percent (80%) will be allocated as non-wages, for which IRS Forms 1099-MISC will be issued. The portion of all Individual Settlement Payments derived from the PAGA Settlement Amount will be allocated entirely as penalties, for which IRS Forms 1099-MISC will be issued. (Id., Section D.9.)

In exchange for the GSA, Class Members will release the Released Parties from, respectively, the Released Class Claims and Released PAGA Claim. The “Released Parties” are:

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<sup>2</sup> \$509,916.67 Net Settlement Amount / 227 Class Members = \$2,246.33.

<sup>3</sup> \$925,000.00 Gross Settlement Amount / 227 Class Members = \$4,074.89.

<sup>4</sup> See, *Salguero v. Deliv, Inc.*, Case No. 19STCV32534 (Los Angeles County Superior Court, 2021) (\$635,000.00 class action and PAGA settlement for 3,021 class members with average payment on a gross basis of \$210.20); *Sanderson v. A Bright Future*, Case No. 34-2019-00252816-CU-OE-GDS (Sacramento County Superior Court, 2020) (\$105,000.00 class action and PAGA settlement for 471 class members with an average payment on a gross basis of \$222.93); *Ortegon-Ramirez v. Cedar Fair, L.P.*, Case No. 1-13-CV-254098 (Santa Clara County Superior Court, 2015) (\$4,750,000.00 class action and PAGA settlement for 31,425 class members with an average payment on a gross basis of \$151.15).

1 Defendant and any of its former and present parents, subsidiaries, affiliates,  
2 insurers, insurance policies, and benefit plans; each of the former and present  
3 officers, directors, employees, equity holders (partners, shareholders, holders of  
4 membership interests, etc.), agents, representatives, administrators, fiduciaries, and  
attorneys of the entities described in this sentence; and any other predecessors,  
5 successors, transferees, and assigns of each of the persons and entities described in  
6 this sentence through the Release Period.

"Release Period" means the period from April 3, 2016 through March 31, 2023. (Settlement,  
7 Section D.11.) The "Released Class Claims" are:

8 Any and all claims, rights, demands, liabilities, and causes of action, whether  
9 known or unknown, arising from the same set of operative facts as those set forth  
10 in the operative Complaint, or in Plaintiffs LWDA letters, including those claims  
11 which could have been asserted based on the facts alleged in the operative  
12 Complaint or LWDA letters, through the Release Period, including claims for:  
failure to provide rest periods; failure to pay minimum, regular, and overtime  
wages; failure to timely pay wages during employment and/or upon termination;  
improperly itemized wage statements; unreimbursed business expenses; unfair  
competition; and violations of the California Labor Code Private Attorneys General  
Act, California Labor Code §§ 2698 et seq.

13 (Settlement, Section A.) The "Released PAGA Claims" are:

14 [A]ll PAGA Claims that were actually alleged or could have been alleged based  
15 upon the facts set forth in the operative Complaint or based upon the facts set forth  
16 in the April 3, 2020 LWDA letter by the named Plaintiff on behalf of the State of  
California, himself, and the PAGA Employees. The release of the Released PAGA  
Claims shall be effective from April 3, 2019 to March 31, 2023.

17 (Id.)

18 Subject to Court approval, the parties agree to engage ILYM Group, Inc. as the Settlement  
19 Administrator. (Settlement, Section C.4.)

20 Within twenty-one (21) calendar days following entry of the Preliminary Approval Order,  
21 Defendant will provide the name, last known mailing address, last known telephone number (if  
22 available), social security number, and the respective Pay Periods that each Class Member worked  
23 during the Class Period, and the number of pay periods worked by each PAGA Employee in the PAGA  
24 Period in a readable MS Excel spreadsheet ( collectively "Class List and Data"). The Class List and Data  
25 will be used for settlement notification and settlement administration only and shall not be used for any  
26 other purpose. The Settlement Administrator shall provide reasonable and appropriate administrative,  
27 physical, and technical safeguards for any personally identifiable information ("PII") that it receives  
28 from Defendant; and promptly provide Defendant with notice if PII is subject to unauthorized access,

1 use, disclosure, modification, or destruction. (Settlement, Section C.5.) Prior to mailing, the Settlement  
2 Administrator will perform a search based on the National Change of Address Database for information  
3 to update and correct for any known or identifiable address changes. Any Class Notice returned to the  
4 Settlement Administrator as non-deliverable on or before the Response Deadline will be sent promptly  
5 via regular First-Class U.S. Mail to the forwarding address affixed thereto and the Settlement  
6 Administrator will indicate the date of such re-mailing on the Notice. If no forwarding address is  
7 provided, the Settlement Administrator will promptly attempt to determine the correct address using a  
8 computerized skip-trace of the Class Member involved, and will then perform a single re-mailing. Those  
9 Class Members who receive a re-mailed Notice Packet, whether by skip-trace or by request, will have  
10 an additional ten (10) calendar days after the Response Deadline to submit a Request for Exclusion or  
11 an Objection to the Settlement. (Id.) Within fourteen (14) calendar days after receiving the Class List  
12 and Data from Defendant, the Settlement Administrator shall mail the Class Notice in the form approved  
13 by the Court in its Preliminary Approval Order to all Class Members via regular First-Class U.S. Mail,  
14 using the most current, known mailing addresses identified in the Class and PAGA Employee Data. (Id.)

15 All Class Members will be mailed a Notice Packet containing (i) information regarding the  
16 claims; (ii) a summary of the Settlement's principal terms; (iii) the Class definition; (iv) the total number  
17 of Pay Periods each Class Member worked for Defendant during the Class Period; (v) each Class  
18 Member's estimated Individual Settlement Payment and the formula for calculating the payment; (vi)  
19 the dates which comprise the Class Period; (vii) instructions on how to submit Requests for Exclusion  
20 or Objections; (viii) the Response Deadline by which Request for Exclusion or Notice of Objection to  
21 the Settlement must be postmarked or faxed; and (ix) the claims to be released. (Id.)

22 Notice of final judgment shall also be given to the Class by way of a posting on the settlement  
23 administrator's website. Cal. Rules of Court, Rule 3.771(b); (Hawkins Decl., Ex. 2.) The Class Notice  
24 provides the web address for class members to access the final judgment. (Id.)

25 **IV. PROVISIONAL CERTIFICATION OF THE SETTLEMENT CLASS UNDER THE**  
26 **LESSER STANDARD OF SCRUTINY FOR SETTLEMENT-ONLY CERTIFICATION**  
27 **IS APPROPRIATE**

28 California Rule of Court 3.769(d) provides that the Court may make an order approving  
certification of a provisional settlement class at the preliminary approval stage. It is well-established that

trial courts should use a “lesser standard of scrutiny” for determining the propriety of certifying a settlement class, as opposed to a litigation class. *Dunk v. Ford Motor Co.* 9 (“*Dunk*”), 48 Cal. App. 4th 1794, 1807 n.19 (1996). The reasons include that no trial is anticipated in a settlement, so the case management issues inherent in determining if the class should be certified need not be confronted; and the trial court’s fairness review of the settlement protects the interests of the absent class members. *Id.*; see also *Officers for Justice v. Civil Serv. Comm’n*, 690 F.2d 615, 633 (1979) (“Th[e] relationship between the certification determination and the merits of the case is further attenuated within the context of the settlement evaluation process . . . . [C]ertification issues raised by class action litigation that is resolved short of a decision on the merits must be viewed in a different light.”); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1987). As discussed below, for the purposes of this settlement only, the parties ask this Court to provisionally certify the Class, as defined above, under Cal. Civ. Proc. Code § 382.

**A. NUMEROSITY AND ASCERTAINABILITY.**

Numerosity is met if a proposed class is so large that joinder of all members would be impracticable. See, Cal. Code Civ. Proc. § 382. Ascertainability is met if the class members can be identified and given notice of the litigation without unreasonable time or expense. See *Medraza v. Honda of N. Hollywood*, 166 Cal. App. 4th 89, 101 (2008); see also, *Sevidal v. Target Corp.*, 189 Cap.App.4th 905 (2010). The Class consists of approximately 227 individuals who have been identified through Defendant’s records. (See, Settlement, § D.13.) Thus, the class is ascertainable, and large enough that joinder would be impractical.

**B. WELL-DEFINED COMMUNITY OF INTEREST.**

The community of interest requirement has three elements: “(1) predominant 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.” *Linder v. Thrifty Oil Co.*, 23 Cal.App.4th 429, 435 (2000).

**1. Commonality**

To justify certification, the class proponent must show that questions of law or fact common to the class predominate over the questions affecting the individual members. See *Arenas v. El Torito Rests., Inc.*, 183 Cal. App. 4th 723, 732 (2010) (citing *Washington Mut. Bank v. Superior Court*, 24 Cal.

4th 906, 913 (2001). Plaintiff was a driver for Defendant during the relevant time period. He attests that he believes that he was subject to the same common policies as the other Class Members. (Harris Decl. ¶ 4.) Indeed, Plaintiff contends that the Class was subject to common minimum wage, overtime, rest period<sup>5</sup>, wage statement, reimbursement, and final pay policies as he was and Defendant produced evidence which Plaintiff contends supports a finding of certain common policies, handbooks, and practices. (Hawkins Decl., ¶ 5.) While Defendant reserves its rights if the litigation were to continue, the Parties agree for the purposes of this settlement only that Plaintiff's allegations meet the commonality requirement. (Hawkins Decl., ¶ 7.)

## 2. Typicality

Typicality “focuses on whether there exists a relationship between the plaintiff's claims and the claims alleged on behalf of the class.” 4 *Newberg on Class Actions* (“Newberg”) § 3:13 (2002). As indicated above, Plaintiff is a member of the Class he seeks to represent. Plaintiff was a driver for Defendant during the relevant time period. He attests that he believes that he was subject to the same common policies as the other Class Members. (Harris Decl. ¶ 4.) The Parties agree for settlement purposed only that Plaintiff's claims regarding Defendant's compensation, break, reimbursement, final pay, and wage statement policies that are at the core of the lawsuit are typical of the Class. (See, Lucio Decl. ¶ 8.)

## 3. Adequacy of Representation

The proposed class representative must establish that he or she will adequately represent the proposed class. See, *Barboza v. West Coast Digital GSM, Inc.*, 179 Cal. App. 4th 540, 546 (2009). Specifically, Plaintiff is adequate to represent the class because he was employed by Defendant during the Class Period, experienced the same wage and hour practices as the rest of the class, understood his duties as class representatives, has been willing to undergo the risk of litigation, and has no conflicts of interest with the other Class Members. (See, generally, Harris Decl.)

Adequacy may be established by the fact that counsel are experienced practitioners. See *Local*

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<sup>5</sup> See e.g., *Cahilig v. IKEA U.S. Retail LLC*, Case No. 2:19-cv-01182-CJS-AS, Dkt. No., 48, at pp. 4-5 (finding commonality for settlement purposes in class action lawsuit challenge an on-premises rest break policy)

1 *Joint Exec. Bd. of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc.*, 244 F.3d 1152, 1162 (9th  
2 Cir. 2001). Here, Plaintiff alleges, and Defendant does not dispute, for purposes of this settlement, that  
3 Plaintiff and the Class are represented by counsel with extensive experience in wage-and-hour litigation,  
4 including class actions. (Lucio Decl. ¶¶11-18; Hawkins Decl., ¶¶ 29-38.)

5 4. Superiority

6 Plaintiff asserts that certification of the Class for settlement purposes is superior here because  
7 there will be a global resolution of all claims at once, which fosters judicial economy. Class certification  
8 is also vastly superior to litigation of numerous individual claims because most of the claims are too  
9 small to practically litigate outside of the class context. (Hawkins Decl. ¶ 39.)

10 **V. THE COURT SHOULD PRELIMINARILY APPROVE THE SETTLEMENT, WHICH**  
11 **IS FAIR, ADEQUATE, AND REASONABLE**

12 **A. CLASS ACTION SETTLEMENTS ARE SUBJECT TO JUDICIAL REVIEW AND APPROVAL**  
13 **UNDER THE CALIFORNIA RULES OF COURT.**

14 The law favors settlement. *Bush v. Superior Court*, 10 Cal. App. 4th 1374, 1382 (1992). This is  
15 particularly true in class actions where substantial resources can be conserved by avoiding the time, cost,  
16 and rigors of litigation. However, a class action may not be settled without the Court's approval. Cal. R.  
17 Ct. 3.769(a). The California Rules of Court set forth the procedures for court approval of a class action  
18 settlement: (1) the Court preliminarily approves the settlement; (2) class members receive notice as  
19 directed by the Court; and (3) the Court conducts a final approval hearing to inquire into the fairness of  
20 the proposed settlement. See Cal. R. Ct. 3.769(c), (e)-(g).

21 The decision to approve or reject a proposed settlement lies within the Court's sound discretion.  
22 See, *Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 234-35 (2001). Nevertheless, in  
23 considering a potential settlement for approval, a court is not to turn the approval hearing "into a trial or  
24 rehearsal for trial on the merits. . . . [or] to reach any ultimate conclusions on the contested issues of fact  
25 and law which underlie the merits of the dispute." *Officers for Justice*, 690 F.2d at 625.

26 The Court's ultimate duty is to determine whether the settlement is fair, adequate, and  
27 reasonable. See, *Dunk*, 48 Cal. App. 4th at 1801 (setting forth the "fair, adequate, and reasonable"  
28 standard) (citing *Officers for Justice*, at 625; *Cho v. Seagate Tech. Holdings, Inc.*, 177 Cal. App. 4th  
734, 742 43 (2009) (a trial court must approve a class action settlement agreement, but only after

determining that it is ““fair, adequate and reasonable,”” considering factors such as the ““risk, expense, [and] complexity”” of continued litigation) (citations omitted). The Court enjoys broad discretion in making its fairness determination, and should consider factors including, but not limited to:

[T]he strength of plaintiffs’ case, the risk, expense, complexity and likely duration of further litigation, the risk of maintaining class action status through trial, the amount offered in settlement, the extent of discovery completed and the stage of the proceedings, the experience and views of counsel . . . and the reaction of the class members to the proposed settlement.

*Dunk*, 48 Cal. App. 4th at 1801.

The above factors are not exclusive, “. . . and the court is free to engage in a balancing and weighing of factors depending on the circumstances of each case.” *Wershba*, 91 Cal. App. 4th at 245. However, in doing so, the Court must give “[due] regard to what is otherwise a private consensual agreement between the parties.” *Id.* The inquiry must be limited “to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties.” *Id.* (citation and internal quotation marks omitted).

At the preliminary approval stage, the Court need only determine that the settlement falls within the “range of possible judicial approval,” so that notice to the class and the scheduling of the fairness hearing are worthwhile. *See Newberg* at § 11:25. Indeed, the Court should grant preliminary approval if there are no “grounds to doubt its fairness or other obvious deficiencies . . . and [the settlement] appears to fall within the range of possible approval.” *Manual For Complex Litigation* (Third) § 30.41 (1995); *see Dunk*, 48 Cal. App. 4th at 1802. 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 of objectors is small.” *Dunk*, 48 Cal. App. 4th at 1802 (citing *Newberg* § 11:41). As shown below, the settlement falls well within the range of approval because there are no grounds to doubt its fairness.

**B. THE SETTLEMENT IS THE RESULT OF SERIOUS, INFORMED, NON-COLLUSIVE NEGOTIATIONS AND REFLECTS A FAIR COMPROMISE OF CLAIMS AND RISK FACTORS.**

The settlement was the product of extensive arm’s length, intensive, negotiations after two full-day mediations with Hon. Ronald Sabraw (ret.) serving as the neutral, followed by additional negotiations aided by the neutral culminating in a Mediator’s proposal accepted by the Parties. Though

cordial and professional, the settlement negotiation was adversarial and non-collusive in nature. The settlement reached is the product of substantial effort by the parties and their counsel. (Lucio Decl. ¶ 5; Hawkins Decl. ¶ 17)

Although Plaintiff and his counsel believed that there was a strong possibility of certifying the claims, they recognized the potential risk, expense, and complexity posed by litigation, such as unfavorable decisions on class certification, summary judgment, at trial and/or on the damages awarded, and/or on an appeal that can take several more years to litigate. (Lucio Decl., ¶ 6, Hawkins Decl., ¶ 17). The resulting Settlement was based on calculations, risk assessment, and non-collusive negotiation; it takes the risks identified above and others into account in arriving at the settlement amount of \$925,000.00. (See, Hawkins Decl., ¶¶ 5-14.)

**C. THE EXTENT OF THE PRE-LITIGATION DISCOVERY AND INVESTIGATION WAS MORE THAN SUFFICIENT TO PERMIT PRELIMINARY APPROVAL OF THE SETTLEMENT.**

The parties thoroughly investigated and evaluated the factual and legal strengths and weaknesses of this case before reaching the settlement. (See Hawkins Decl., ¶¶ 5-14.) As described above, the settlement was only reached after two full-day mediation sessions, extensive formal and informal discovery, investigation, research, thorough calculations and risk evaluation, substantial exchanges of documents, a thorough evaluation of a sampling of payroll records, and an exchange of other information required to evaluate the claims at issue. (Id. ¶ 17.)

**D. THE RISKS INHERENT IN CONTINUED LITIGATION ARE GREAT.**

To assess the fairness, adequacy, and reasonableness of a class action settlement, the Court also should consider “[t]he strength of plaintiff’s case, the risk, expense, complexity and likely duration of further litigation, [and] the risk of maintaining class action status.” See *Dunk*, 48 Cal. App. 4th at 1801. As described above, Defendant has strong defenses to Plaintiff’s claims, which create a real possibility that the claims might not be certified and/or might fail on the merits. (See, Hawkins Decl., ¶¶ 6-11.) Proceeding with litigation would impose a significant risk of no recovery as well as ongoing, substantial additional expenditures of time and resources. (Id., ¶¶ 19-20.) If settlement were not achieved, continued litigation of the claims would take a substantial amount time and possibly confer no benefit on Class Members. By contrast, the settlement will yield a prompt, certain, and substantial recovery for the Class,

1 which also benefits the parties and the Court. In considering these risks, the choice was overwhelmingly  
2 in favor of settlement. (Id.)

3 **E. PLAINTIFF’S COUNSEL IS EXPERIENCED IN WAGE-AND-HOUR LITIGATION.**

4 The view of the attorneys conducting the litigation is entitled to significant weight in deciding  
5 whether to approve the settlement. *Ellis v. Naval Air Rework Facility*, 87 F.R.D. 15, 18 (N.D. Cal. 1980),  
6 *aff’d*, 661 F.2d 939 (9th Cir. 1981); *Kullar v. Foot Locker Retail, Inc.*, 168 Cal. App. 4th 116, 128 (2008)  
7 (court must take into account “the experience and view of counsel”).

8 Plaintiff’s Counsel are experienced in wage-and-hour class actions. (Lucio Decl. ¶¶11-18;  
9 Hawkins Decl., ¶¶ 29-38.) The Parties’ counsel agree that this settlement is fair and reasonable in light  
10 of the nature of the claims, realistic risk adjusted value of damages, complexities of the case, the state  
11 of the law, and uncertainties of class certification and litigation. (See, generally, Lucio Decl.; Hawkins  
12 Decl.) Class Counsel find this settlement is fair, adequate, and reasonable and in the best interests of  
13 Class Members, and should be preliminarily approved. (Id.)

14 **F. THE SETTLEMENT IS WITHIN THE RANGE OF REASONABLENESS**

15 In order to determine whether a class settlement is fair, adequate, and reasonable, courts must be  
16 provided with “basic information about the nature and magnitude of the claims in question and the basis  
17 for concluding that the consideration being paid for the release of those claims represents a reasonable  
18 compromise.” *Kullar, supra*, 168 Cal.App.4th at 133. A settlement is not judged against what might  
19 have been recovered had a plaintiff prevailed at trial, nor does the settlement have to provide 100% of  
20 the damages sought to be fair and reasonable. *Wershba, supra*, 91 Cal.App.4th at pp. 246, 250. Here,  
21 the proposed \$925,000.00 settlement is an excellent result and achieves a substantial benefit to Class  
22 Members. Plaintiff’s counsel reached the proposed Settlement only after carefully considering the case’s  
23 strengths, weaknesses, expense, and complexity. (Hawkins Decl., ¶ 19; Lucio Decl., ¶ 9.)

24 In light of the claims and defenses, the Parties faced uncertainty that had to be taken into  
25 consideration when weighing potential settlement of the claims. Where both sides face significant  
26 uncertainty, the attendant risks favor settlement. *Hanlon v. Chrysler Corp.* (9th Cir. 1998) 150 F.3d  
27 1011, 1026. Even if “the relief afforded by the proposed settlement is substantially narrower than it  
28 would be if the suits were to be successfully litigated,” that is no bar to settlement because “the public

1 interest may indeed be served by a voluntary settlement in which each side gives ground in the interest  
2 of avoiding litigation.” *Id.* at p. 250 (quoting *Air Line Stewards, Local 550 v. American Airlines, Inc.*  
3 (7th Cir. 1972) 455 F.2d 101, 109.)

4 As set forth in the accompanying declaration of James R. Hawkins, Plaintiff’s counsel has  
5 satisfied the so-called “Kullar standard” by providing the Court with a detailed evaluation of the  
6 settlement value of the claims that were alleged in this lawsuit. (See, Hawkins Decl., ¶ 12.)

7 **G. THE CLASS NOTICE PLAN CONFORMS TO ALL APPLICABLE STATUTES AND RULES**

8 The Court has wide discretion in approving the means of providing notice, so long as the class  
9 representative “provide(s) meaningful notice in a form that should have a reasonable chance of reaching  
10 a substantial percentage of class members.” *Archibald v. Cinerama Hotels*, 15 Cal. 3d 853, 861 (1976).  
11 Here, the Parties’ notice plan is that notice of the Settlement will be disseminated directly to the Class  
12 Members by first class mail by the Settlement Administrator within 35 days after the Preliminary  
13 Approval date. (See Settlement, Section C.5.)

14 The contents of the Class Notice are in compliance with Cal. R. Ct. 3.766(d), because the Notice  
15 includes (1) a detailed explanation of the case, including the basic contentions or denials of the parties,  
16 and the basic terms of the Settlement; (2) a statement that the court will exclude the member from the  
17 class if the member requests by a specified date; (3) a procedure for the member to follow in requesting  
18 exclusion from the class; (4) an explanation that members of the Class can participate in the Settlement  
19 by doing nothing; (5) a statement that the judgment, whether favorable or not, will bind all members  
20 who do not request exclusion; and (6) a statement that any member who does not request exclusion may,  
21 if the member so desires, object to the settlement either in writing or by court appearance. (See Hawkins  
22 Decl., Ex. 2.) In addition, the manner of giving notice is in compliance with Cal. R. Ct. 3.766(e) because  
23 the Notice (1) is likely to reach a majority of the Class Members; (2) contains the type of relief requested  
24 by the Class; (3) details the individual settlement payments for Class Members; (4) is the most cost  
25 efficient way of providing notice to the Class; and (5) has no prejudice to the Class because if a Class  
26 Member does not receive the Class Notice he/she will still receive his/her Individual Settlement  
27 Payment.

28 **H. THE ATTORNEYS’ FEES UNDER THE SETTLEMENT ARE FAIR**

1 Class Counsel is requesting one third of the GSA in attorneys' fees, totaling \$308,333.33. (*See*,  
2 Hawkins Decl. ¶ 13.) Fees of up to 1/3 (33.33%) of the common fund are reasonable for a trial court to  
3 award as attorney fees in class action settlements. *See Laffitte v. Robert Half Int'l Inc.*, 1 Cal. 5<sup>th</sup> 480,  
4 506 (2016) (Finding that the percentage of fund method is proper in California, and affirming a fee  
5 request of 1/3 of the common fund). The Court further clarified that trial courts have discretion to  
6 conduct a lodestar cross-check, or use other means to evaluate the reasonableness of a requested fee. *Id.*  
7 In other class action cases, courts have approved fees at 1/3 of the common fund.<sup>6</sup> Accordingly,  
8 attorneys' fees of 1/3 of the common fund are reasonable and should be preliminarily approved here.

9 **I. THE CLASS REPRESENTATIVE'S SERVICE AWARD IS FAIR AND APPROPRIATE**

10 The Settlement provides for a Class Representative Service Award of \$10,000 to Plaintiff Kevin  
11 Harris. (Hawkins Decl., ¶¶ 24-25.) The proposed award is reasonable given the time and effort that  
12 Plaintiff devoted to this case, including making himself available for two full-day mediation sessions  
13 and having his deposition taken. Plaintiff provided valuable assistance to Class Counsel. (*Id.*; Harris  
14 Decl. ¶ 6.) At no time did the Plaintiff have a guarantee of any personal benefit as a result of this case.  
15 (*Id.*) He assumed significant risk in bringing this action — namely, had he lost, he could have been liable  
16 for Defendant's costs. (*Id.*) The proposed award is similar to service awards typically in employment  
17 class actions.<sup>7</sup>

18 **VI. THE COURT SHOULD APPOINT ILYM GROUP, INC. AS SETTLEMENT**  
19 **ADMINISTRATOR**

20 The parties propose that the Court appoint ILYM Group, Inc. to serve as the Settlement  
21 Administrator. (*See*, Settlement, Section C.4.) ILYM is experienced in administering class action  
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23  
24 <sup>6</sup> *See e.g., Stuart v. RadioShack Corp.*, No. C-07-4499 EMC, 2010 WL 3155645 (N.D. Cal. Aug. 9, 2010) (approving fee  
25 award of 1/3 of the total maximum settlement and noting that the fee award of 1/3 of the total settlement was "well within  
26 the range of percentages which courts have upheld as reasonable in other class action lawsuits"); *Wilson v. Kiewit Pacific*  
*Co.*, No. 09-cv-03630, ECF No. 119 (N.D. Cal. 2012) (approving fee award of 1/3 of the common fund); *Romero v.*  
*Producers Dairy Foods, Inc.*, No. 1:05cv0484 DLB, 2007 WL 3492841, at \*4 (E.D. Cal. Nov. 14, 2007) (awarding fees of  
1/3 of common fund in a wage and hour class action).

27 <sup>7</sup> *See, e.g. Aniezue v. The Sherwin-Williams Company*, No. 37-2020-00025415-CU-OE-CTL (San Diego County Superior  
28 Court, 2023) (approving \$10,000 service award on \$1.6 million gross settlement); *Fuentes v. Apex Contracting and*  
*Restoration Inc.*, No. 37-2022-00001417-CU-OE-CTL (San Diego County Superior Court, 2023) (approving \$10,000  
service award on \$250,000 settlement).

1 settlements, and has estimated its fees for this settlement, not to exceed \$12,000. (Id.) If the actual  
2 settlement administration expenses are less than \$12,000, the difference will be added to the NSA and  
3 distributed to the Class.

4 **VII. THE COURT SHOULD SCHEDULE A FINAL APPROVAL HEARING**

5 The last step in the approval process is the formal hearing, whereby proponents of the settlement  
6 may explain and describe its terms and conditions and offer argument in support of approval, and Class  
7 Members or their counsel may be heard in support of or in opposition to the settlement. The parties  
8 propose that the Court schedule a hearing for final approval of the settlement, including Plaintiff's  
9 request for attorneys' fees, costs, and the service award, at the earliest available date at least 150 days  
10 after preliminary approval.

11 **VIII. CONCLUSION**

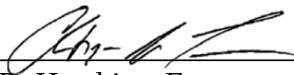
12 For all of the foregoing reasons, Plaintiff respectfully requests that the Court grant his motion  
13 for preliminary approval of the Joint Stipulation of Class Action and PAGA Settlement.

14  
15 Respectfully submitted,

16 **JAMES HAWKINS APLC**

17 Dated: November 9, 2023

18 By:

19   
James R. Hawkins, Esq.  
Christina Lucio, Esq.

20 *Attorneys for Plaintiff and the Putative Class*  
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