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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF DEL NORTE

REINALD PILLSBURY, an individual, on
behalf of himself and on behalf of all persons
similarly situated,,

Plaintiff,

vs.

T & T RESTAURANTS CA, INC., a
Corporation; and DOES 1 through 50,
inclusive,,

Defendant.

Case No. CVUJ-20-1214

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

Date: July 23, 2021
Time: 10:00 a.m.
Dept.: 1

*[Assigned for All Purposes to Judge Darren
McElfresh]*

Action Filed: September 8, 2020

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I. INTRODUCTION

Plaintiff REINALD PILLSBURY (“Plaintiff”) seeks preliminary approval of the Stipulation of Settlement of Class Action Claims and Release of Claims (“Agreement”)¹, which if approved, would provide valuable monetary relief for approximately 345 members of the Settlement Class. The basic terms of the Agreement provide for the following:

1. The “**Settlement Class**” and “**Settlement Class Period**” shall mean with respect to the class, all of defendant T & T RESTAURANTS CA, INC.’s (“Defendant”) current and former non-exempt employees employed in California September 8, 2016 and March 16, 2021 (“Class Period”). The Settlement Class excludes any person who submits a timely and valid request for exclusion. Agreement at §§ I (EE).

2. The “**Aggrieved Employees**” and “**PAGA Period**” means all of Defendant’s current and former non-exempt employees employed in California between June 26, 2019 and March 16, 2021 (“PAGA Period”). Agreement at §I(B).

3. The “**Total Settlement Amount**” is Two Hundred Eighty Thousand Dollars (\$280,000). Agreement at §§I (FF). The releases granted to Defendant only become effective upon the funding of the Total Settlement Amount. §III(B). The Total Settlement Amount is non-reversionary and includes the following:

a. A “**Class Representative Service Award**” in the amount of \$7,500 to Plaintiff for his services on behalf of the Settlement Class, and for agreeing to a broad general release of California Civil Code section 1542. Agreement at § III(M)(2).

b. A “**Class Counsel Award**” in the amount not to exceed one-third of the Total Settlement Amount for attorney’s fees, currently estimated to be \$93,333 **and** litigation costs and expenses not to exceed \$15,000, to be paid to Class Counsel. Agreement at §III(M)(3).

c. A “**PAGA Settlement**” of \$10,000 shall be allocated from the Total Settlement Amount for settlement of claims for civil penalties under the Private Attorneys General

¹ The Agreement is attached as Ex “A” to the Declaration of Jean-Claude Lapuyade (“JCL Dec.”) at ¶ 3. All citations to the Agreement incorporate by this reference a citation to the JCL Dec., ¶ 3. Further, unless indicated otherwise, capitalized terms used herein have the same meaning as those defined by the Agreement.

1 Act of 2004 (“PAGA Amount”). The Settlement Administrator shall pay 75% of the PAGA
2 Settlement (“LWDA Payment”) the California Labor and Workforce Development Agency. The
3 Settlement Administrator shall distribute 25% of the PAGA Amount (“Aggrieved Employee
4 Payment”) to members of the Aggrieved Employees. Agreement at §III(M)(4).

5 d. And “**Settlement Administration Costs**” not to exceed \$9,631.93 payable to
6 the proposed Settlement Administrator, ILYM Group, Inc., for, *inter alia*, the administration of the
7 Notice Packet and Individual Settlement Payments. Agreement at §III(M)(5).

8 4. The “**Net Settlement Fund**” of approximately \$144,536.07 (Total Settlement Amount
9 minus the requested Class Representative Service Award, Class Counsel Award, PAGA Settlement
10 and Settlement Administration Costs) which will be allocated to all participating members of the
11 Settlement Class on a pro-rata basis according to the number of Workweeks each Settlement Class
12 member performed during the Class Period. The entire Net Settlement Amount will be paid to all
13 Settlement Class Members who do not opt out of the Settlement Class resulting in an average
14 Individual Settlement Share of **\$418.94**. Agreement at §III(M)(1); JCL Dec., ¶ 5.

15 An objective evaluation of the Settlement confirms that the relief negotiated on behalf of the
16 Settlement Class is fair, reasonable, and valuable. The Settlement was negotiated by the Parties at
17 arm’s length. The Settlement confers substantial benefits to the Settlement Class. The relief offered
18 by the Settlement is particularly impressive when viewed against the difficulties encountered by
19 plaintiffs pursuing wage and hour cases (*see infra*). Indeed, by settling now rather than proceeding
20 to trial, Class Members will not have to wait (possibly years) for relief, nor will they have to bear
21 the risk of class certification being denied or of Defendant prevailing at trial. JCL Dec., ¶ 5.

22 As discussed below, the proposed Settlement satisfies all criteria for preliminary settlement
23 approval under California law and falls within the range of reasonableness. The average Individual
24 Settlement Share to the Settlement Class meet or exceeds awards in similar wage and hour class
25 actions. Moreover, the proposed Settlement Class is appropriate for provisional certification.
26 Accordingly, Plaintiff respectfully requests that this Court grant preliminary approval of the
27 Settlement. JCL Dec., ¶ 6.

28 ///

II. FACTS AND PROCEDURE

A. Overview of the Litigation

Defendant operates a franchised McDonald's restaurant in Crescent City, California. JCL Dec., ¶ 7.

Plaintiff worked for Defendant as an hourly, non-exempt employee and shift manager between 2009 and his termination in December of 2019. As a non-exempt employee, Plaintiff was subject to Defendant's written policies and procedures and general employment practices. JCL Dec., ¶ 8. According to Defendant, as a shift manager, Plaintiff had a leadership role at the restaurant.

Generally, Plaintiff claims that Defendant failed to pay him for all hours worked, failed to provide complaint meal and rest periods, failed to reimburse mandatory business expenses, failed to provide accurate itemized wage statements, and failed to pay all wages due at the time of his separation. Defendant denies liability for each of Plaintiff's claims. Further, Defendant asserts that it fully complied with all applicable employment laws. Defendant asserts that it had clear compliant policies and procedures such as for taking rest and meal periods as outlined in the Handbook and additional technical assistance for accurate time keeping that included meal and rest break reminders. Defendant raised several other significant defenses to Plaintiff's claims, including but not limited to, lack of any evidence of overtime and minimum wage violations, and the opportunity and encouragement to take all meal and rest-breaks compliant with its policies and the law. Additionally, Defendant maintains that any claims that Plaintiff required use of his personal cell phone or car are unsupported by the facts. JCL Dec., ¶ 9.

On June 26, 2020, Plaintiff served Defendant and the Labor and Workforce Development Agency ("LWDA") with a Notice of Violations ("PAGA Notice"). Plaintiff's PAGA Notice set forth the facts and theories supporting Defendant's alleged violations of various provisions of the California Labor Code and applicable Industrial Welfare Commissions ("IWC") Wage Order and of his intent to pursue claims under California Labor Code Private Attorneys General Act, Cal. Lab. Code Sections 2698 et seq ("PAGA"). JCL Dec., ¶ 10.

On September 8, 2020, Plaintiff filed a class action complaint in the Del Norte Superior Court for: (1) Unfair Competition in Violation of Bus. and Prof. Code §§ 17200; (2) failure to pay

1 minimum wages in violation of California Labor Code sections 1194, 1197 and 1197.1; (3) failure
2 to pay overtime wages in violation of California Labor Code sections 510 *et seq.*; (4) failure to
3 provide required meal periods in violation of California Labor Code sections 226.7 and 512; (5)
4 failure to provide required rest periods in violation of California Labor Code sections 226.7 and 512;
5 (6) failure to reimburse employees for required business expenses in violation of California Labor
6 Code sections 2802; (7) failure to provide accurate itemized wage statements in violation of
7 California Labor Code section 226; (8) failure to provide wages when due in violation of California
8 Labor Code sections 201, 202 and 203; and (9) violations of the California Labor Code Private
9 Attorney General Act (“PAGA”). JCL Dec., ¶ 11.

10 Plaintiff commenced written discovery in November 2020. Defendant responded to
11 Plaintiff’s discovery in December 2020. The Parties began meeting and conferring regarding
12 Defendant’s discovery responses, but prior to resolving disagreements over discovery, the Parties
13 agreed to mediate this action as deemed in the best interest of the parties in particular in light of the
14 many anticipated factual disputes. In anticipation of mediation, the Parties stipulated to stay formal
15 discovery. To prepare for mediation, the Parties agreed to informally produce certain documents
16 and data points subject to the mediation privilege, including but not limited to, a sample of the Class
17 Members’ time and payroll data. As discussed *infra*, Plaintiff’s counsel retained the Berger
18 Consulting Group, to analyze Defendant’s time and payroll data. JCL Dec., ¶ 12.

19 On March 16, 2021, the Parties participated in a full day mediation with (Ret.) Hon. William
20 Pate. After arms-length negotiations and bargaining, the parties reached an agreement to settle and
21 signed a Memorandum of Understanding. After reaching an agreement in principle, the parties
22 drafted and negotiated a long-form settlement agreement, which is the subject of the instant motion.
23 JCL Dec., ¶ 13.

24 **B. Class Counsel Thoroughly Investigated the Factual and Legal Issues**

25 Months before filing the Action, Class Counsel began its pre-filing investigation into
26 Plaintiff’s complaints. Class Counsel’s investigation started with several lengthy interviews with
27 Plaintiff. As part of the interview process, Plaintiff produced documents related to his employment
28 for Defendant, including portions of Defendant’s handbooks, compensation policies and time and

1 payroll records. At the conclusion of the interviews, Class Counsel determined that Plaintiff's
2 complaints justified further inquiry. JCL Dec., ¶ 14.

3 Class Counsel subsequently requested Plaintiff's employee file from Defendant. In response,
4 Defendant produced hundreds of pages of documents, including but not limited, a copies of
5 Plaintiff's hiring documents, payroll and time records, performance reviews and separation
6 documents. Class Counsel reviewed and analyzed the documents and determined the documents
7 appeared to substantiate Plaintiff's claim that Defendant's failed to, among other things, provide
8 compliant meal and rest periods. Shortly thereafter, Class Counsel summarized the known factual
9 and legal issues in the PAGA Notice addressed to the LWDA. Approximately 65 days later, Class
10 Counsel filed this class action. JCL Dec., ¶ 15.

11 After serving Defendant with the complaint, Plaintiff propounded written discovery.
12 Defendant responded to Plaintiff's discovery. In light of the many anticipated factual disputes, the
13 parties agreed it would be in the best interest of both parties to mediate the matter. To prepare for
14 mediation, Class Counsel requested several documents and data points to further evaluate Plaintiff's
15 claims and Defendant's liability exposure to the Settlement Class members. In response to Class
16 Counsel's request, Defendant produced the time and payroll records for the Settlement Class
17 members, aggregate workweek and pay period data for the Settlement Class, and copies of applicable
18 handbooks, policies, and agreements containing, *inter alia*, compensation, timekeeping and, meal
19 and rest period policies. In total, Defendant produced approximately 2,500 pages containing nearly
20 hundreds of thousands of unique cells of time and payroll data for Class Counsel to analyze. JCL
21 Dec., ¶ 16.

22 Class Counsel then retained the statisticians and economists at Berger Consulting Group
23 ("BCG"), to evaluate the Settlement Class Members' payroll and time data. BCG provides data
24 analysis and damage modeling consulting services specializing in wage and hour class
25 actions. BCG's team of financial and data analysts are credentialed and experienced experts in their
26 fields and have provided their expertise on thousands of cases. Stated differently, the BCG is
27 uniquely qualified to analyze Defendant's time and payroll data. JCL Dec., ¶ 17.

28 BCG analyzed Defendant's time and payroll data to assist in the development of various

1 damage models. Among other things, BCG determined the approximate number of work shift, work
2 weeks, pay periods, average rate of pay, average length of shift and average number of hours worked
3 per week and pay period during the Class Period. BCG also estimated the number of missed or late
4 meal and rest periods, the amount of paid missed meal period premiums paid during the Class Period.
5 . JCL Dec., ¶ 18.

6 In advance of mediation, Class Counsel created a damage model predicated on BCG analysis.
7 Class Counsel's model calculated Defendant's potential liability exposure while accounting for the
8 uncertainties of continued litigation. This damage model informed and guided Class Counsel during
9 the mediated settlement discussions. JCL Dec., ¶ 19.

10 Overall, Class Counsel thoroughly investigated the claims at issue, including: (1) determining
11 Plaintiff's suitability as a putative class representative through interviews, background
12 investigations, and analysis of his employment files; (2) evaluating all of Plaintiff's potential claims;
13 (3) researching similar wage and hour class actions as to the claims brought, the nature of the
14 positions, and the type of employer; (4) analyzing the Settlement Class' time and payroll records;
15 (5) analyzing Defendant's labor policies and practices; (6) researching settlements in similar cases
16 as well as outstanding issues which could affect settlement approval; (7) evaluating Plaintiff's
17 claims and estimating Defendant's liability for purposes of settlement; (8) drafting the mediation
18 brief and (9) participating in the mediation. This investigation allowed Class Counsel to fully assess
19 the nature and magnitude of the claims being settled, as well as the impediments to recovery, such
20 as to make an independent assessment of the reasonableness of the terms to which the parties have
21 agreed. JCL Dec., ¶ 20.

22 **C. The Parties Settled at Mediation**

23 On March 16, 2021, the Parties conducted a full day of mediation with (Ret.) William Pate, a
24 highly regarded mediator, and former San Diego County Superior Court Judge. Hon. Pate helped to
25 manage the Parties' expectations and provided a useful, neutral analysis of the issues and risks to
26 both sides. The Parties made substantial progress with Judge Pate's assistance. Namely, the parties
27 exchanged information regarding their respective claims and defense, including their respective
28 evaluation of the damages. After nearly eight hours arm's length and adversarial negotiations, the

1 mediation nearly concluded without a settlement. However, at the conclusion of the mediation,
2 Judge Pate issued a proposal for settlement that the Parties accepted. The complete and final terms
3 of the Parties' settlement are now set forth in the Agreement. Class Counsel submits that the
4 Settlement constitutes a fair, adequate, and reasonable compromise of the claims at issue. JCL Dec.,
5 ¶ 21.

6 **D. The Proposed Settlement Fully Resolves Plaintiff's Claims**

7 1. The Composition of the Settlement Class Members

8 The proposed Settlement Class consists of all Defendant's current and former non-exempt
9 employees employed in California between September 8, 2016 and March 16, 2021. The Settlement
10 Class excludes any person who submits a timely and valid request for exclusion. Agreement at §§ I
11 (EE). There are approximately 345 members of the Settlement Class that worked an estimated
12 11,600 workweeks during the Class Period. Agreement at §III(A)(2).

13 2. The Settlement Consideration

14 The Parties agreed to settle the underlying class claims in exchange for the Total Settlement
15 Amount of \$280,000. The Total Settlement Amount Fund: (1) Individual Settlement Payments to
16 the Settlement Class; (2) a Class Representative Service Award of \$7,500 to Plaintiff for his services
17 on behalf of the Settlement Class and, equally important, for a general release of claims; (3) a PAGA
18 Settlement in the amount of \$10,000; (4) Settlement Administration costs estimated at \$9,631.93,
19 (5) Class Counsel Award in the amount of \$108,333, comprised of attorneys' fees equal to one-third
20 of the Total Settlement Amount estimated to be at least \$93,333 and an estimated \$15,000 for
21 actually incurred litigation expenses. Agreement at §III(M).

22 Subject to the Court approving the Class Representative Service Award, Class Counsel
23 Award, PAGA Settlement, and Settlement Administration Costs, the Net Settlement Amount will
24 be distributed to each participating member of the Settlement Class Member. Agreement at
25 §III(M)(1). There is no reversion to Defendant and Defendant must separately pay for its share of
26 the employer payroll taxes. Agreement at §III(A)(1).

27 3. Formula for Calculating Individual Settlement Payments

28 Each participating member of the Settlement Class will receive an Individual Settlement

1 Payment. The Individual Settlement Payment will be proportional to the number of Workweeks each
2 member of the Settlement Class worked for Defendant during the Class Period. Using the Class
3 Data, the Settlement Administrator shall add up the total number of Workweeks for the entire
4 Settlement Class. Each Settlement Class Member's final Individual Settlement Payment for
5 purposes of payment will be calculated by multiplying the NSF by a fraction, the numerator of which
6 is the Settlement Class Member's total number of Workweeks, and the denominator of which is the
7 total number of Workweeks of all Settlement Class Members. Agreement at §III(M)(1)(a).

8 Each Individual Settlement Payment will be reduced by any legally mandated employee tax
9 withholdings (e.g., employee payroll taxes, etc.). Agreement at §III(M)(1)(b). Individual
10 Settlement Payments for members of the Settlement Class who submit valid and timely requests for
11 exclusion will be redistributed to Settlement Class member who do not submit valid and timely
12 requests for exclusion on a pro rata basis. Agreement at §III(M)(1)(a).

13 Given that there are approximately 345 Settlement Class Members, **the average gross**
14 **recovery is approximately \$418.94** (Net Settlement Amount divided by Settlement Class Members).
15 This average net recovery exceeds many wage and hour class action settlements approved by
16 California state and federal courts. (See, e.g., *Shachno et al. v. KT Hotels, LLC, et al.*, San Diego
17 Superior Court Case No. 37-2018-00043601 (average net recovery of \$283.35); and *Crawford et al.*
18 *v. Outlook Amusements, Inc.*, Los Angeles Superior Court Case No. BC617160 (average net
19 recovery \$333.98).

20 4. Release by Participating Settlement Class Members

21 Generally, as of the Funding Date, Plaintiff and the Settlement Class Members will agree to
22 release the Released Parties from the Released Claims (all class claims alleged in the operative
23 complaint in *Pillsbury v. T&T Restaurants CA, Inc.* Case No. CVW-20-1214, including all claims,
24 requests for damages and penalties alleged therein, which occurred during the Class Period, and
25 expressly excluding all other claims, including claims for vested benefits, wrongful termination,
26 unemployment insurance, disability, social security, workers' compensation, and class claims
27 outside of the Class Period). Agreement at §§I(Y) and III(B).

28 ///

5. Release by the LWDA and the Aggrieved Employees

Generally, upon the Funding Date the LWDA and the Aggrieved Employees will release any and all PAGA Claims alleged in the operative complaint and Plaintiff's notice to the LWDA which occurred during the PAGA Period, and expressly excluding all other claims, including claims for vested benefits, wrongful termination, unemployment insurance, disability, social security, workers' compensation, and PAGA claims outside the PAGA Period. Agreement at §§I(Z) and III(C).

III. ARGUMENT

A. The Court Should Preliminarily Approve the Proposed Class Action Settlement

The proposed Settlement, including a Total Settlement Amount of \$280,000 meets the standards for preliminary approval. Pre-trial settlement of complex class actions is a judicially favored remedy. (*Officers for Justice v. Civil Serv. Comm’n* (9th Cir. 1982) 688 F.2d 615, 625 (“Voluntary conciliation and settlement are the preferred means of dispute resolution.”).) In California, class action settlement approval requires an early “preliminary” review by the trial court and a subsequent “final” review after notice of the settlement has been distributed to class members for their comments and objections. (C.R.C. 3.769(c)-(g); *Cellphone Termination Fee Cases*, 180 Cal. App. 4th 1110, 1118 (2010) (the court first “preliminarily approves the settlement” and later “conducts a final approval hearing to inquire into the fairness of the proposed settlement”).)

Although California Rule of Court Rule 3.769 does not provide detail as to the scope of review of the proposed settlement, preliminary approval is warranted if the settlement falls within a “reasonable range.” (*See North County Contractor’s Assn., Inc. v. Touchstone Ins. Services* (1994) 27 Cal.App.4th 1085, 1089-90; Conte & Newberg, *Newberg on Class Actions*, §§ 11.26 (4th ed. 2002) (“Newberg”).) Reasonableness and fairness are presumed where: (1) the settlement is reached through “arms-length bargaining;” (2) investigation and discovery are “sufficient to allow counsel and the court to act intelligently;” (3) counsel is “experienced in similar litigation. . . .” (*Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1802.) The presumption of fairness is consistent with California’s public policy goal of favoring settlements. (*Stambaugh v. Super. Ct* (1976) 62 Cal.App.3d 231, 236 (“the law wisely favors settlements”); *Cellphone Termination Fee Cases* (2009) 180 Cal.App.4th 1110, 1118 (“public policy generally favors the compromise of complex

1 class action litigation”); *7-Eleven Owners for Fair Franchising v. Southland Corp.* (2000) 85
2 Cal.App.4th 1135, 1151 (“voluntary conciliation and settlement are the preferred means of dispute
3 resolution ... [t]his is especially true in complex class action litigation”).)

4 Additionally, in reviewing the fairness of a class action settlement, due regard should be given
5 to what is “otherwise a private consensual agreement between the parties.” (*Cellphone Termination*
6 *Fee Cases* (2010) 186 Cal.App.4th 1380, 1389.) The inquiry “must be limited to the extent necessary
7 to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or
8 collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair,
9 reasonable and adequate to all concerned.” (*Id.*)

10 1. The Parties Reached the Settlement Through Arm’s-Length Bargaining Led by
11 Experienced Counsel.

12 “[W]hat transpires in settlement negotiations is highly relevant to the assessment of a
13 proposed settlement’s fairness.” (*State v. Levi Strauss & Co.* (1986) 41 Cal.3d 460, 482.) Courts
14 presume the absence of fraud or collusion in the negotiation of a settlement, unless evidence to the
15 contrary is offered; thus, there is a presumption that settlement negotiations are conducted in good
16 faith. (Newberg, § 11.51.)

17 The Parties participated in mediation the highly respected mediator and former San Diego
18 Superior Court judge (Ret.) Hon. William Pate. Judge Pate managed the Parties’ expectations and
19 provided a useful, neutral analysis of the issues and risks to both sides. (*In re Apple Computer, Inc.*
20 *Derivative Litig*, No. C 06-4128 JF (HRL), 2008 U.S. Dist. LEXIS 108195 (N.D. Cal. Nov. 5, 2008)
21 (mediator’s participation weighs considerably against any inference of a collusive settlement);
22 *D’Amato v. Deutsche Bank* (2d. Cir. 2001) 236 F.3d 78, 85 (a “mediator’s involvement in pre-
23 certification settlement negotiations helps to ensure that the proceedings were free of collusion and
24 undue pressure.”).) At all times, the Parties’ negotiations were at an arm’s length, adversarial and
25 non-collusive. In fact, despite a full day of mediated negotiations, the Parties reached an impasse
26 and the mediation session nearly concluded without a settlement. The matter resolved only when
27 Judge Pate issued a mediator’s proposal that the Parties accepted. Judge Pate only arrived at his
28 proposal after hearing arguments, reviewing evidence and evaluating the Parties’ respective claims

1 and defenses.

2 Once the Parties agreed to the Mediator's proposal, the Parties engaged in protracted
3 negotiations regarding the written terms of the class action settlement. The Parties maintained the
4 arm's length, non-collusive and adversarial negotiations while arriving at the final terms of the
5 Settlement. The Agreement is the final product of these mediated negotiations. Objectively, the
6 Settlement terms are fair, adequate and represent a reasonable compromise of the claims at issue.
7 JCL Dec., ¶ 23.

8 2. Class Counsel's Thorough Investigation Provided an Objective Measurement of the
9 Settlement's Reasonableness.

10 As set forth in greater detail above, Class Counsel conducted a very thorough investigation
11 into the factual and legal issues in dispute. In addition to formal and informal discovery, document
12 review, data analysis and legal research, Class Counsel also researched similar wage and hour
13 actions. Although no two cases are identical, this research provided Class Counsel with a marker to
14 inform settlement discussions and, ultimately, to measure this settlement against. The investigation
15 allowed to Class Counsel to realistically assess the value of Plaintiff's claims and intelligently
16 engage defense counsel in settlement discussions that culminated in the proposed settlement now
17 before the Court.

18 Class Counsel only agreed to enter the Settlement following their thorough investigation and
19 evaluation of Plaintiff's claims. Based on his investigation of the facts, applicable law, and
20 marketplace for similar settlements, and in light of the risk of significant delay, uncertainty
21 associated with litigation, and the various defenses asserted by Defendant, Class Counsel firmly
22 believes this Agreement to be in the best interests of Settlement Class. Because the Settlement's
23 terms are fair, reasonable, and adequate, the Court should preliminarily approve the Settlement. JCL
24 Dec., ¶ 24.

25 3. The Settlement Falls Within the Recognized Range of Reasonableness.

26 The Total Settlement Amount of \$280,000 is well within the range of reasonable for
27 preliminary approval. To determine whether a settlement is fair and reasonable, the court should
28 "consider enough information about the nature and magnitude of the claims being settled, as well as

1 the impediments to recovery, to make an independent assessment of the reasonableness of the terms
2 to which the parties have agreed.” (*Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116,
3 133.) In making this determination, the court is “not to try the case” but rather “satisfy itself that the
4 class action settlement is within the ‘ballpark of reasonableness.’ ” (*Id.* (emphasis added).) For this
5 analysis, courts do “not require any such explicit statement of value; [they] require[] a record which
6 allows an understanding of the amount that is in controversy and the realistic range of outcomes of
7 the litigation. ” (*Munoz v. BCI Coca-Cola Bottling Co.* (2010) 186 Cal.App.4th 399, 409 (internal
8 citation omitted).) The reasonableness of a settlement is not dependent upon its actual value
9 approaching the potential recovery plaintiffs might have received if they had succeeded at trial.²
10 Indeed, “[t]he determination whether a settlement is reasonable does not involve the use of a
11 ‘mathematical equation yielding a particularized sum.’ ” (*Frank v. Eastman Kodak Co.* (W.D.N.Y.
12 2005) 228 FRD. 174, 186 (*quoting In re Michael Milken and Assoc. Sec. Litig.* (S.D.N.Y. 1993) 150
13 F.R.D. 57, 66).)

14 **a. The Total Settlement Amount Meets the Recognized Range of**
15 **Reasonableness.**

16 The Total Settlement Amount of \$280,000 is fair and reasonable considering the nature and
17 magnitude of the claims being settled and the various factual and legal issues in disputes and
18 potential impediments to recovery. Prior to mediation, Class Counsel retained BCG to develop
19 varied economic damages models measuring Defendant’s liability exposure while accounting for
20 the uncertainties of continued litigation. The various models were informed by Class Counsel’s
21 investigation, including the analysis of time and payroll data. Class Counsel projected Defendant’s

22 _____
23 ² Federal district courts recognize that there is an inherent “range of reasonableness” in determining whether to approve
24 a settlement “which recognizes the uncertainties of law and fact in any particular case and the concomitant risks and
25 costs necessarily inherent in taking any litigation to completion.” *Newman v. Stein* (2d. Cir. 2002) 464 F.2d 689, 693;
26 *see In re Omnivision Tech, Inc.* (N.D. Cal. 2008) 559 F.Supp.2d 1036; *see also Nat’l Rural Telecomm. Coop. v. Directv.*
27 *Inc.* (C.D. Cal. 2004) 221 F.R.D. 523, 527 (“well settled law that a proposed settlement may be acceptable even though
28 it amounts to only a fraction of the potential recovery”); *In re Global Crossing Sec. and ERISA Litig.* (S.D.N.Y 2004)
225 F.R.D. 436, 460 (“settlement amount’s ratio to the maximum potential recovery need not be the sole, or even
dominant, consideration when assessing settlements fairness”); *In re IKON Office Solutions, Inc Sec Litig.* (E.D. Pa.
2000) 194 F.R.D. 166, 184 (“the fact that a proposed settlement constitutes a relatively small percentage of the most
optimistic estimate does not, in itself, weigh against the settlement; rather the percentage should be considered in light
of strength of the claims”); *Officers for Justice v. Civil Serv. Comm.* (9th Cir. 1982) 688 F.2d 615, 628 (it is “the complete
package, taken as a whole rather than the individual component parts, that must be examined for overall fairness”).

1 liability exposure for the Settlement Class ranged between approximately \$425,733 for damages and
2 \$1,251,090 for damages, civil penalties and interest, if successful at trial. This range reflects the
3 uncertainty regarding several of Plaintiff's claims, together with the uncertainty surrounding
4 derivative liability for inaccurate wage statements and waiting time penalties resulting from meal
5 and rest period violations. Thus, the Total Settlement Amount of \$280,000 represents approximately
6 between 22% and 66% of Defendant's liability exposure as estimated by Class Counsel at the time
7 of mediation. The following summarizes Defendant's estimated exposure if Plaintiffs were to
8 prevail. JCL Dec., ¶ 14.

9 (1) Estimated Damages for Meal Period

10 Plaintiff alleges that Defendant failed to provide compliant meal periods. Specifically,
11 Plaintiff alleges that because of their rigorous work schedules, Plaintiff and the Settlement Class
12 Members regularly worked through what should have been off-the-clock and duty-free meal periods
13 without compensation. Consequently, Plaintiff alleges that he is owed meal period premiums and
14 compensation for the off-the-clock work performed during what should have been his duty-free meal
15 periods. JCL Dec., ¶ 25.

16 Labor Code 512 requires employers to provide employees with thirty (30) minute
17 uninterrupted and duty-free meal period within the first five hours of work. Moreover, an employee
18 who works more than ten (10) hours per day is entitled to receive a second thirty (30) minute
19 uninterrupted and duty-free meal period. Pursuant to Labor Code § 512, an employer may not employ
20 an employee for a work period of more than ten (10) hours, without providing the employee with a
21 second meal period of not less than thirty (30) minutes. Moreover, the second meal period may not
22 be waived if the total hours worked is more than twelve (12) hours. California Lab. Code § 226.7(c)
23 provides that "if an employer fails to provide an employee a meal or rest or recovery period in
24 accordance with a state law, including ... an ... order of the Industrial Welfare Commission, the
25 employer shall pay the employee one additional hour of pay at the employee's regular rate of
26 compensation for each workday that the meal or rest or recovery period is not provided."

27 Defendant has denied these claims. Defendant maintains that it paid Plaintiffs for every
28 minute that they claimed they worked. Defendant argued that it fully complied with California meal

1 period laws and maintained legally compliant policies and practices as outlined in its Handbook and
2 other policies. Courts have found that where an employer's meal period policies are compliant,
3 individualized issues exist as to the reasons for missed, late or truncated meal periods. *See e.g. Lampe*
4 *v. Queen of the Valley Medical Center*, 19 Cal.App.5th 832, 851 (2018) (holding that although only
5 11.1% of the employees' time punches for meal periods were within the first 5 hours, the claim was
6 not certifiable because individualized issues existed as to the reasons for the late meal periods).
7 Defendant argued that it not only provided meal and rest breaks but also installed technical
8 enhancements that reminded employees to timely take their meal-and rest breaks. If successful,
9 Defendant availed itself to a complete defense of Plaintiff's meal period claim. Plaintiff estimated
10 the exposure for this claim was approximately \$247,043³, which includes \$39,024 in interest, if
11 substantiated. JCL Dec., ¶ 26.

12 (2) Estimated Damages for Rest Period Violations

13 Plaintiff also alleged that Defendant failed to provide compliant rest periods. Specifically,
14 Plaintiff alleged that as a result of their rigorous work schedule class members were not able to take
15 timely and duty-free rest periods. WC Wage Orders 5-2001 and 7-20017 provide that "[a]uthorized
16 rest period times shall be counted as hours worked for which there shall be no deduction from
17 wages." Lab. Code § 226.7(c) provides that "if an employer fails to provide an employee a meal or
18 rest or recovery period in 13 accordance with a state law, including ... an ... order of the Industrial
19 Welfare Commission, the employer shall pay the employee one additional hour of pay at the
20 employee's regular rate of compensation for each workday that the meal or rest or recovery period
21 is not provided."

22 Again, Defendant denied liability and asserted that they maintained legally compliant rest
23 period policies and practices throughout the Class Period. Moreover, Defendant argued that it not
24 only provided all rest breaks but reminded Plaintiff and employees to take them. Plaintiff recognizes
25 the evidentiary burdens establishing this claim. Establishing Plaintiff's rest period claim would rely,

26
27 ³ Plaintiff's damages for unpaid wages, including minimum wages and overtime wages, were predicated on Plaintiff's
28 argument that Plaintiff and other employees were required to work while clocked out during what was supposed to be
their duty-free meal periods. Therefore, the damages for unpaid wages are encompassed in this figure.

1 almost entirely, on Class Member testimony, making it a riskier claim at class certification and
2 liability stages. Defendant likely would have argued that only a small number of Class Members
3 missed their rest breaks. Certification likely would have required depositions of Class Members who
4 provided declarations, and Defendant surely would have obtained opposing declarations stating
5 either rest breaks were taken, or rest breaks were voluntarily waived. *See, e.g., Ordonez v. Radio*
6 *Shack, Inc.* (C.D. Cal. Jan. 17, 2013) 2013 WL 210223, at *11 (“Because of the competing testimony
7 before the Court, plaintiff’s evidence that defendant may have an illegal, written rest break policy is
8 insufficient for this Court to find that common issues predominate.”); *Villa v. United Site Servs. of*
9 *California, Inc.* (N.D. Cal. Nov. 13, 2012) 2012 WL 5503550, at *8 (“Indeed, Plaintiff’s own
10 evidence confirms that the written policy does not generate uniform practices.”). Accordingly, the
11 rest break claim was subject to significant defenses. If successful, Defendant availed itself to a
12 complete defense of Plaintiff’s rest period claim. Plaintiff estimated the exposure for this claim was
13 approximately \$154,298, which includes \$25,583 in interest, if substantiated. JCL Dec., ¶ 27.

14 (3) Defendant’s Estimated Exposure for Unreimbursed Business Expenses

15 Plaintiff alleged that Defendant required the Settlement Class Members to use their personal
16 cell phone to obtain and view work schedules and remain in communication with dispatch during
17 their work shifts. California employers who require employees to use a personal cellular device for
18 work purposes must reimburse the employee for the cost incurred in furnishing the device, including
19 voice and data service. (See Cal. Labor Code § 2802(a), providing that “An employer shall indemnify
20 his or her employee for all necessary expenditures or losses incurred by the employee in direct
21 consequence of the discharge of his or her duties, or of his or her obedience to the directions of the
22 employer...”)

23 Under Section 2802, when use of a personal electronic device is “mandatory,” reimbursement
24 is “always required.” (*Cochran v. Schwan’s Home Serv.*, 228 Cal. App. 4th 1137, 1144 (2014)).
25 Absent adequate reimbursement, “the employer would receive a windfall because it would be
26 passing its operating expenses onto the employee.” (*Id.*). To comply with the statute, “the employer
27 must pay some reasonable percentage of the employee’s cell phone bill.” (*Id.*). “Because of the
28 difference in cell phone plans and work-related scenarios, the calculation for reimbursement must

1 be left to the trial court and parties in each particular case.” (*Id.*)

2 Again, Defendant vigorously denied any liability for this claim. Defendant maintains that
3 employees were never required to use their personal cell phone for work at the restaurant, which
4 offered telephone service for any employees work related use, if any. Instead, Defendant argued that
5 any cell phone use was completely voluntary and for their own personal not work related use.
6 Plaintiff estimated the exposure for this claim was approximately \$87,000, if factually substantiated.
7 JCL Dec., ¶ 28.

8 (4) Exposure for Wage Statement Violations and Waiting Time Penalties

9 Generally, Plaintiff alleges that Defendant’s aforementioned violations resulted in derivative
10 violations of Labor Code sections 203 and 226(a). Class Counsel considered the arguable presence
11 of various penalties and weighed the potential recoveries against probable defenses. Specifically,
12 Defendant could argue that Plaintiff could not prove the “willful” prong needed to obtain waiting
13 time penalties under Cal. Lab. Code § 203. Additionally, Defendant could argue that Plaintiff could
14 not show that Class Members suffered an “injury” because of wage statement violations, as required
15 by Cal. Lab. Code § 226. Defendant could also argue that that meal and rest period violations do
16 not entitle employees like Plaintiff and the Settlement Class Members to pursue the derivative
17 waiting time and itemized wage statement penalties. (*See Naranjo v. Spectrum Security Services,*
18 *Inc.*, (2019) 40 Cal. App. 5th 444; *Maldonado v. Epsilon Plastics, Inc.* (2018) 22 Cal. App. 5th
19 1308.) Although the Settlement Class arguably could have seen a significant payout for these
20 penalties if Plaintiff prevailed on every penalty claim, Plaintiff would not recover any derivative
21 penalties if they failed to prove the underlying claims. Moreover, Plaintiff would have to overcome
22 damaging precedent to prove the Class deserved the penalties. *See, e.g., Howard v. CVS Caremark*
23 *Corp.*, 2014 U.S. Dist. LEXIS 172406 (C.D. Cal. Dec. 9, 2014) (denying class certification for the
24 same penalty claims); *Alonzo v. Maximus, Inc.*, 832 F. Supp. 2d 1122, 1134-1137 (C.D. Cal. 2011)
25 (finding insufficient evidence of bad faith or actual injury). Plaintiff could not give the penalty
26 claims great weight given that they depended on proving the underlying claims, which according to
27 Defendant were not supported by the facts. Nevertheless, Plaintiff estimated the potential exposure
28

1 for these claim, if substantiated, was approximately \$762,749 (\$547,449 for waiting time penalties
2 and \$215,300 for wage statement penalties). JCL Dec., ¶ 30.

3 (5) Conclusion

4 In conclusion, the settlement of \$280,000.00 represents approximately **66%** of the value of
5 the maximum potential *damages* at issue. Even when including the penalties for Plaintiffs' claim
6 for wage statement violations and waiting time penalties under Labor Code Sections 203 and 226,
7 the settlement represents 22% of the maximum potential liability, assuming all of these amounts
8 could be proved at trial. This is well within the bounds of reasonableness. (*See Vicerel v. Mistras*
9 *Grp., Inc.* (N.D. Cal. 2016) 2016 WL 5907869, at *3, 7 (approving a California wage and hour
10 settlement where the class received 11.6% of the estimated total liability); *Leverage v. Traeger Pellet*
11 *Grills, LLC* (N.D. Cal. 2017) 2017 WL 2797811, at *7 (Approving a California wage and hour
12 settlement where the class received 18% of the estimated total liability); *Stovall-Gusman v. W.W.*
13 *Granger, Inc.*, (N.D. Cal. 2015) 2015 WL 3776765 at * 4 (Approving California wage and hour
14 misclassification settlement where the class received approximately 7.3% of the estimated trial
15 award was within the "range of reasonableness.".)

16 (6) Defendant's PAGA Exposure

17 Class Counsel's damage models also estimated Defendant's exposure for PAGA penalties
18 arising from the aforementioned violations. At the time of mediation, Plaintiff estimated
19 Defendant's PAGA exposure at approximately \$2,836,000. JCL Dec., ¶ 31.

20 Under PAGA, Courts have considerable discretion to reduce the penalty award. In *Fleming v.*
21 *Covidien*, 2011 U.S. Dist. LEXIS 154590 (C.D. Cal. 2011), a federal court reduced PAGA penalties
22 from \$2,800,000 to \$500,000, a reduction of 82.2%, because the court found maximum penalties
23 "unjust" because the employees had suffered no injuries. Some trial courts have actually awarded no
24 civil penalties, even when Labor Code violations are established. *See also In re Nordstrom Com.*
25 *Cases*, 186 Cal.App.4th 576, 589 (2010) (affirming an award of \$0 in PAGA penalties in a wage
26 and hour class action); *In re Taco Bell Wage & Hour Actions*, 2016 U.S. Dist. LEXIS 48557, *40-
27 43 (E.D. Cal. Apr. 6, 2016) (PAGA penalties denied after trial).

1 In order to recover any PAGA penalties, Plaintiff would be required at trial to prove each of
2 the underlying Labor Code violations. See *Cardenas v. McLane Foodservice, Inc.*, 2011 U.S. Dist.
3 LEXIS 13126, *10 (C.D. Cal. 2011) ("Given the statutory language [of PAGA], a plaintiff cannot
4 recover on behalf of individuals whom the plaintiff has not proven suffered a violation of the Labor
5 Code by the defendant."). Here, Plaintiff would need to prove that each Aggrieved Employee
6 suffered a violation for each pay period the employee worked. Again, Defendant raised several
7 defenses that presented serious threats to the claims of the Plaintiff and the Aggrieved Employees.
8 Defendant asserted that the employment practices complied with all applicable Labor Laws. In
9 addition to those arguments discussed *supra*, Defendant also argued that the Court of Appeals
10 decision in *Cacho v. Eurostar, Inc.* (2019) 43 Cal.App.5th 885, weakened Plaintiff's claims, on
11 liability, value, and manageability as to the rest period claims. In all, Plaintiff's PAGA liability
12 exposure is hotly contested. JCL Dec., ¶ 32.

13 *Carrington v. Starbucks Corp.*, 30 Cal. App. 5th 504 (2018), illustrates the risk of PAGA
14 claims. In *Carrington*, while the plaintiff prevailed on his PAGA claim upon trial, the trial court
15 reduced the maximum PAGA penalty amount by 90%, citing the employer's good faith attempt at
16 complying with the law. *Id.* at 517. Upon review, the Court of Appeal found such reduction to be
17 proper. *Id.* at 539. Again, the *Carrington* decision was after Plaintiff actually prevailed at trial, and
18 even then, the PAGA penalties were reduced by 90%

19 **b. Inherent Risks of Continued Litigation Support Preliminary Approval.**

20 "It can be difficult to ascertain with precision the likelihood of success at trial. The Court
21 cannot and need not determine the merits of the contested facts and legal issues at this stage,
22 [Citation], and to the extent courts assess this factor, it is to 'determine whether the decision to settle
23 is a good value for a relatively weak case or a sell-out of an extraordinary strong case.'" (*Misra v.*
24 *Decision One Mortg. Co.* (C.D. Cal. 2009) 2009 WL 4581276, at *7.)

25 With respect to the most immediate challenge, i.e., class certification, the risks attendant to
26 the certification of similar wage and hour claims are demonstrated by *Donohue v. AMN Services,*
27 *LLC* (2018) 29 Cal.App.5th 1068 (cert granted.) In *Donohue*, Fourth District Court of Appeal
28 affirmed Hon. Joel Pressman's denial of class certification for missed meal and rest periods by call

center employees. (*See also O’Conner v. Uber Technologies, Inc.* (9th Cir. 2018) 904 F.3d 1087 (decertification of wage and hour misclassification action); *see also Duran v. U.S. Bank National Association* (2014) 59 Cal.4th 1, 31 (reversing a trial verdict in favor plaintiffs in a wage and hour class action)); *Tien v. Tenet Healthcare Corp.* (2012) 209 Cal.App.4th 1077, 1088 (“[T]he reason, if any, that employees might not take their breaks were predominantly individualized questions of fact not susceptible to class treatment.”); *Ali v. U.S.A. Cab Ltd.* (2009) 176 Cal.App.4th 1333, 1341 (affirming denial of certification because employees’ declarations attesting to having taken meal and rest breaks demonstrated that individualized inquiries were required to show harm); *Campbell v. Best Buy Stores, L.P.*, (C.D. Cal. 2013) 2013 WL 5302217 at *11-13 (following *Brinker* and denying certification of proposed off-the-clock and rest and meal break classes due to lack of uniform policy); *Brown v. Fed Express Corp.* (C.D. Cal. 2008) 249 F.R.D. 580, 587-88 (denying certification of driver meal and rest period claims based on the predominance of individual issues).) Plaintiff is confident about the strength of his claims. Nonetheless, Plaintiff recognizes that Defendant has factual and legal defenses that, if successful, would potentially defeat or substantially impair the value of Plaintiff’s lawsuit. Collectively, the examples cited above illustrate the uncertain nature of class litigation. Consequently, the uncertainty of obtaining certification through a contested motion is a significant risk factor favoring settlement. JCL Dec., ¶ 33.

“The Settlement eliminates these and other risks of continued litigation, including the very real risk of no recovery after several years of litigation.” (*In re Nvidia Derivs. Litig.* (N.D. Cal. 2008) 2008 WL 5382544, at *3.) Indeed, potential appeals aside, litigating a complex case through trial is inherently perilous regardless of the strengths of merits of the claims:

[N]othing is assured when litigating against commercial giants with vast litigative resources, particular in such complex litigation as this, which would strain the cognitive capacities of any jury. Defense judgments were hardly beyond the realm of possibility. Accordingly, this factor weighs in favor of preliminary approval.

(*Rebney v. Wells Fargo Bank* (1990) 220 Cal.App.3d 1117, 1140, *opinion modified* (June 18, 1990).)

Finally, continuing to litigate this action would require continued and extensive resources coupled with significant Court time to proceed through trial and post-trial motions; which can often

1 take years. Furthermore, wage and hour litigation are complex and expensive, as it often necessitates
2 extensive expert testimony, particularly with regards to damages. But even if Plaintiff is successful
3 at trial, Plaintiff is acutely aware that a judgment does not end the litigation. Plaintiff fully expects
4 that Defendant would appeal any favorable judgment. JCL Dec., ¶ 34. “Avoiding such a trial and
5 the subsequent appeals in this complex case strongly militates in favor of settlement rather than
6 further protracted and uncertain litigation.” (*Nat’l Rural Telecomms. Coop v. DirecTV* (C.D. Cal.
7 2004) 221 F.R.D. 523, 527.) Thus, “unless the settlement is clearly inadequate, its acceptance and
8 approval are preferable to lengthy and expensive litigation with uncertain results.” (*Id.* at 526.)

9 In this matter, Class Counsel negotiated a Total Settlement Amount of \$280,000 that is
10 roughly between 22% and 65% Defendant’s maximum liability exposure. Given the amount of the
11 settlement here, as compared to potential value of the claims, offset by the various inherent risks to
12 continued litigation, the settlement is fair and reasonable. JCL Dec., ¶ 35.

13 **B. The Proposed Notice Informs the Class about the Case and Settlement**

14 The Settlement Class is entitled to the best practical notice under the circumstances. (*Kass v.*
15 *Young* (1977) 67 Cal.App.3d 100, 106.) The purpose of the notice is to give class members sufficient
16 information to decide whether they should accept the benefits offered, opt out and pursue their own
17 remedies, or object to the settlement. (*Trotsky v. Los Angeles Fed Savings & Loan Assn.* (1975) 48
18 Cal. App. 3d 143, 151-52.) The notice must advise class members “that they may be excluded from
19 the class if they so request and that they will be bound by the judgment, whether favorable or not, if
20 they do not request exclusion.” (*Kass*, 67 Cal.App.3d at 106.) In a case such as this involving a
21 significant number of class members, California authorities generally require service of the class
22 notice by mail or similar reliable means. (*Chance v. Super. Ct.* (1962) 58 Cal.2d 275, 290; *Cart v.*
23 *Super. Ct.* (1975) 50 Cal.App.3d 960, 972.)⁴

24
25 _____
26 ⁴ Due process does not require that each class member actually receive a notice, but rather a procedure reasonably certain
27 to reach class members. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 1789, at 253 (2d ed. 1986). If
28 appropriate notice is given, class members will be bound by the judgment even if they never actually receive the notice.
Fontana v. Elrod (7th Cir. 1987) 826 F.2d 729, 732.

1 The Parties jointly drafted the Class Notice which fairly and neutrally informs the Settlement
2 Class of their rights and remedies in this action. The Settlement Administrator will first verify
3 addresses, then mail the proposed Class Notice to entire Settlement Class. The Notice will include
4 information regarding the nature of the lawsuit, a summary of the substance of the Settlement's
5 terms, the class definition, the procedure and time period within which to requests for exclusions or
6 objections to the Settlement, the date for the final approval hearing, the formula used to calculate
7 settlement payments, and the terms and scope of the Released Claims. Agreement at §III(L). This
8 method was negotiated by the Parties to ensure delivering the most reasonable method of notice to
9 the Settlement Class while ensuring cost effective administration of the Settlement. JCL Dec., ¶36.

10 Accordingly, both the method of disseminating the Class Notice and content of the Class
11 Notice satisfy due process and the requirements of California law. (See C.R.C. 3.776(e)-(f); *State of*
12 *Cal. v. Levi Strauss* (1986) 41 Cal.3d 460,485 (the class notice must "fairly apprise the class
13 members of the terms of the proposed compromise and of the options open to dissenting class
14 members.").)

15 **C. The Court Should Preliminarily Approve the Class Representative Enhancement**
16 **Award**

17 Enhancement payments "are fairly typical in class action cases." (*Cellphone Termination Fee*
18 *Cases* (2010) 186 Cal.App.4th 1380, 1393 (affirming incentive awards of \$10,000); *Rodriguez v.*
19 *West Publishing Corp.* (9th Cir. 2009) 563 F.3d 948, 958, *citing* 4 Newberg on Class Actions (4th
20 ed. 2002) § 1 1:38, and Eisenberg & Miller, *Incentive Awards to Class Action Plaintiffs: An*
21 *Empirical Study*, 53 UCLA L. Rev. 1303 (2006).) Enhancement payments "are intended to
22 compensate class representatives for work done on behalf of the class, to make up for financial or
23 reputational risk undertaken in bringing the action, and, sometimes, to recognize their willingness to
24 act as a private attorney general." (*Rodriguez*, 563 F.3d at 958-59.) "[T]he rationale for making
25 enhancement or incentive awards to named plaintiffs is that they should be compensated for the
26 expense or risk they have incurred in conferring a benefit on other members of the class." (*Clark v.*
27 *American Residential Services LLC* (2009) 175 Cal.App.4th 785.)

28 Approximately 345 members of the Settlement Class will share in the estimated \$144,536.07

1 Net Settlement Amount due entirely to the effort and commitment of Plaintiff. Subject to Court
2 approval, therefore, the Settlement provides for a Class Representative Service Award of \$7,500⁵
3 for Plaintiff. The service award is fair and reasonable compensation for Plaintiff's efforts bringing
4 the action, assisting Class Counsel with the litigation and settlement, regularly conferring with Class
5 Counsel on the status of his case and the strategies for prosecuting the claims, reviewing the proposed
6 Settlement to ensure that its terms are fair and provide adequate relief for the Settlement Class, and
7 agreeing to provide Defendant a general release of all claims arising out of his employment. JCL
8 Dec., ¶ 38.

9 Class Counsel on behalf of Plaintiff will file a formal motion for the negotiated Class
10 Representative Service Award once preliminary approval of the Settlement is granted. Plaintiff
11

12 ⁵ The amount of the requested enhancement payment-\$10,000-is reasonable by reference to the amounts that California courts (both
13 federal and state) have repeatedly found to be reasonable for wage and hour class action settlements: *See Baker v. L.A. Fitness Int'l*,
14 *LLC*, No. BC438654 (L.A. County Super. Ct. Dec. 12, 2012) (awarding \$10,000 enhancement payments to three of the named
15 plaintiffs); *Blue v. Codwell Banker Residential Brokerage Co.*, No. BC417335 (L.A. County Super. Ct. Mar. 21, 2011) (awarding
16 \$10,000 enhancement payment); *Buckmire v. Jo-Ann Stores, Inc.*, No. BC394795 (L.A. County Super. Ct. June 11, 2010) (awarding
17 \$10,000 enhancement payments to the named plaintiff); *Coleman v. Estes Express Lines, Inc.*, No. BC429042 (L.A. County Super.
18 Ct. Oct. 3, 2013) (awarding \$10,000 enhancement payment); *Ethridge v. Universal Health Services, Inc.*, No. BC391958 (L.A.
19 County Super. Ct. May 27, 2011) (awarding \$10,000 enhancement payment); *Hickson v. South Coast Auto Insurance Marketing*,
20 *Inc.*, No. BC390395 (L.A. County Super. Ct. Mar. 27, 2012) (awarding \$10,000 enhancement payment); *Hill v. Sunglass Hut Int'l*,
21 *Inc.*, No. BC422934 (L.A. County Super. Ct. July 2, 2012) (awarding \$10,000 enhancement payments to the named plaintiffs);
22 *Kabamba v. Victoria's Secret Stores. LLC*, No. BC368528 (L.A. County Super. Ct. Aug. 19, 2011) (awarding enhancement
23 payments of \$ 10,000 to the named plaintiffs along with additional compensation for their general release of claims); *Magee v.*
24 *American Residential Services, LLC*, No. BC423798 (L.A. County Super. Ct. Apr. 21, 2011) (awarding \$15,000 enhancement
25 payment); *Mares v. BFS Retail & Commercial Operations, LLC*, No. BC375967 (L.A. County Super. Ct. June 24, 2010) (awarding
26 \$15,000 enhancement payments to the named plaintiffs); *Nevarez v. Trader Joe's Co.*, No. BC373910 (L.A. County Super. Ct. Jan.
27 29, 2010) (awarding \$10,000 enhancement payment); *Ordaz v. Rose Hills Mortuary, LP.*, No. BC386500 (L.A. County Super. Ct.
28 Mar. 19, 2010) (awarding 10,000 enhancement payments to the named plaintiffs); *Sheldon v. AHMC Monterey Park Hospital LP*,
No. BC440282 (L.A. County Super. Ct. Feb. 22, 2013) (awarding \$10,000 enhancement payment); *Silva v. Catholic Moray Services*,
No. BC408054 (L.A. County Super. Ct. Feb. 8, 2011) (awarding \$10,000 enhancement payments to the named plaintiffs);
Weisbarth v. Banc West Investment Services, Inc., No. BC422202 (L.A. County Super. Ct. May 24, 2013) (awarding \$10,000
enhancement payment); *Zamora v. Balboa Life & Casualty LLC*, No. BC360026 (L.A. County Super. Ct. Mar. 7, 2013) (awarding
\$25,000 enhancement payments to the named plaintiffs); *Acheson v. Express, LLC*, No. 109CV135335 (Santa Clara County Super.
Ct. Sep. 13, 2011) (awarding \$10,000 enhancement payment); *Aguilar v. Cingular Wireless. LLC*, No. CV 06-8197 DDP (AJWx)
(C.D. Cal. Mar. 17, 2011) (awarding \$14,767 enhancement payment); *Bejarano v. Amerisave Mortgage Corp.*, No. EDCV 08-
00599 SGL (Opx) (C.D. Cal. June 22, 2010) (awarding \$10,000 enhancement payment); *Carbajal v. Sally Beauty Supply LLC*, No.
CIVVS 1004307 (San Bernardino Super. Ct. Aug. 6, 2012) (awarding \$10,000 enhancement payments to the named Plaintiffs);
Contreras v. Serco Inc., No. 10-cv-04526-CAS-JEMx (CD. Cal. Sep. 10, 2012) (awarding \$10,000 enhancement payment);
Guerrero v. R.R. Donnelley & Sons Co., No. RIC 10005196 (Riverside Super. Ct. July 16, 2013) (awarding \$10,000 enhancement
payment); *Kisliuk v. ADT Security Services, Inc.*, No. CV08-0324 DSF (RZx) (C.D. Cal. Jan. 10, 2011) (awarding \$10,000
enhancement payment); *Morales v. BCBG Maxaria Int'l Holdings, Inc.*, No. JCCP 4582 (Orange County Super. Ct. Jan. 24, 2013)
(awarding \$10,000 enhancement payment); and *Barrett v. Doyon Security Services, LLC*, Nos. BS900199, BS900517 (San
Bernardino County Super. Ct. Apr. 23, 2010) (awarding \$10,000 enhancement payment).

1 respectfully submits that the above showing is sufficient for preliminary approval of the negotiated
2 Class Representative Service Award. JCL Dec., ¶ 39.

3 **D. The Court Should Preliminarily Approve the Negotiated Class Counsel Award**

4 The purpose of a Class Counsel Award in class action litigation is to reward counsel who took
5 the risk of non-payment and invested in a case that achieved a substantial positive result for the class.
6 California courts routinely award attorneys' fees equaling one-third or more of the potential value
7 of the common fund, the amount requested under this settlement. (*See Chavez v. Netflix, Inc.* (2008)
8 162 Cal.App.4th 43, 66 n.11 ("Empirical studies show that regardless whether the percentage
9 method or the lodestar method is used, fee awards in class actions average around one-third of the
10 recovery."); Theodore Eisenberg & Geoffrey P. Miller, *Attorney Fees in Class Action Settlements:*
11 *An Empirical Study*, *J. of Empirical Legal Studies*, Vol. 1, Issue 1, 27-78, March 2004, at 35
12 (independent studies of class action litigation nationwide have come to a similar conclusion that a
13 one-third fee is consistent with market rates).)

14 Class Counsel took this matter on a contingency fee basis and invested significant time and
15 expense successfully prosecuting Plaintiff's claims. As discussed *supra*, the estimated average
16 Individual Settlement Share illustrates the demonstrably positive outcome for the Settlement Class
17 Members. The Agreement provides for a Class Counsel Award in the amount of one-third of the
18 Total Settlement Amount and litigation costs and expenses not to exceed \$15,000. Agreement at
19 §III(M)(3). In light of the positive outcome for the Settlement Class, and in light of the supporting
20 authority, the proposed Class Counsel award is fair and reasonable. JCL Dec., ¶ 40.

21 Plaintiff will file a formal motion for the negotiated Class Counsel Award once preliminary
22 approval of the Settlement is granted. Plaintiff respectfully submits that the above showing is
23 sufficient for preliminary approval of the negotiated attorneys' fees. JCL Dec., ¶ 41.

24 **E. California Law Authorizes Provisional Certification for Settlement Purposes**

25 For the purpose of Settlement only, Plaintiff contends, and Defendant does not dispute, that
26 provisional certification of the Settlement Class is appropriate. JCL Dec., ¶ 42.

27 1. The California Standard for Class Certification

28 Cal. Rules of Court, 3.769(d) provides that the Court may make an order approving

1 certification of a provisional settlement class at the preliminary approval stage. It is well-established
2 that trial courts should use a “lesser standard of scrutiny” for determining the propriety of certifying
3 a settlement class, as opposed to a litigation class. *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th
4 1794, 1807 at n. 19. Class actions are statutorily authorized “when the question is one of common
5 or general interest, of many persons, or when the parties are numerous, and it is impracticable to
6 bring them all before the court” (*Cal.Civ.Proc. Code* § 382; *Lee v. Dynamex, Inc.* (2008) 166
7 Cal.App.4th 1325, 1332.) Class certification is appropriate when there is an “ascertainable class and
8 a well-defined community of interest among class members.” (*Sav-On Drug Stores, Inc.* (2014) 34
9 Cal.4th 319, 326.) Class treatment is appropriate even if class members at some point may be
10 required to make an individual showing as to eligibility for recovery. (*Bufile v. Dollar Financial*
11 *Group, Inc.* (2008) 162 Cal.App.4th 1193, 1207; *Sav-On*, 34 Cal.4th at 333.)

12 2. The Proposed Settlement Class is Ascertainable and there is a Well-Defined
13 Community of Interest Among the Settlement Class Members.

14 Whether a class is “ascertainable” within the meaning of Code of Civil Procedure Section 382
15 is “determined by examining (1) the class definition, (2) the size of the class, and (3) the means
16 available for identifying class members.” (*Lee*, 166 Cal.App.4th at 1334.) Class members are
17 ascertainable where they may be readily identified without unreasonable expense or time by
18 reference to official records. (*Id.*)

19 The community of interest requirement embodies three factors: (1) predominant common
20 questions of law or fact; (2) a class representative with claims or defenses typical of the class; and
21 (3) a class representative and counsel who can adequately represent the class. (*Cal. Civ. Proc. Code*
22 § 382.)

23 In April of 2012, the California Supreme Court expounded on the element of predominance:
24 The “ultimate question” the element of predominance presents is whether “the issues which may be
25 jointly tried, when compared with those requiring separate adjudication, are so numerous or
26 substantial that the maintenance of a class action would be advantageous to the judicial process and
27 to the litigants.” (*Brinker*, 53 Cal. 4th at 1021-1022 (citations omitted).)

28 Generally, the proposed Settlement Class consists of all of Defendant’s current and former

1 California employees during the Class Period. Defendant's records show that the Settlement Class
2 Members consists of approximately 345 individuals, making joinder of all Settlement Class
3 Members impracticable. Further, because all Settlement Class Members are Defendant's current and
4 former employees, the class is readily ascertainable from Defendant's regular business records, i.e.,
5 payroll records. JCL Dec., ¶ 43.

6 The California statutes relating to each of Plaintiff's claims apply with equal force and effect
7 to the entire Settlement Class. Factually, Defendant's policies and practices apply class-wide and
8 Defendant's liability can be determined by facts common to all members of the class. While
9 Defendant disputes whether the class would be appropriate if the litigation were to continue, it agrees
10 to class certification for purposes of this settlement only. The wage and hour issues are both
11 numerous and substantial, and a class action is the most advantageous method of dealing with the
12 claims of the Settlement Class. JCL Dec., ¶ 44.

13 Plaintiff's wage and hour claims are typical of the proposed Settlement Class because they
14 arise from the same factual basis and are based on the same legal theories applicable to the other
15 Class Members. Likewise, Plaintiff's interests are entirely coextensive with the interests of the
16 Settlement Class. Plaintiff alleges that they were injured by the same company-wide practices to
17 which the proposed Settlement Class was subject and seeks the same relief. Plaintiff has already
18 demonstrated his ability to advocate for the interests of the Settlement Class by initiating this
19 litigation, undertaking class discovery, and evaluating the proposed settlement to assure that it is
20 fair. Again, the Defendant disputes whether Plaintiff's claims are typical of the Class for purposes
21 of any continued litigation of the Action, but agrees for the purposes of this settlement only that
22 Plaintiffs assert claims that are typical of the Settlement Class, including claims for meal and rest
23 break practices and reimbursement. JCL Dec., ¶ 45.

24 Additionally, Plaintiff is represented by competent Class Counsel who has extensive
25 experience in litigating wage and hour class action cases. Class Counsel successfully briefed, argued,
26 certified, and gained state court settlement approval of the same class-wide causes of action that are
27 at issue in this case. Class Counsel's wage and hour class action experience establishes that they are
28 well qualified to represent the interests of this Class. JCL Dec., ¶¶ F.

1 A class action is superior to a multitude of individual lawsuits. Given the size and amount of
2 each individual Settlement Class Member's claim, Class Settlement Members likely have little
3 incentive to litigate their claims on an individual basis because the out-of-pocket expense and
4 personal commitment necessary to litigate each claim outweighs any potential recovery. In sum,
5 class treatment is superior to individual, case-by-case adjudication. JCL Dec., ¶ 46.

6 **IV. CONCLUSION**

7 The Parties have negotiated a fair and reasonable settlement of claims. Having appropriately
8 presented the materials and information necessary for preliminary approval, the Parties request that
9 the Court preliminarily approve the settlement.

10
11 Dated: June 24, 2021

JCL LAW FIRM, APC

12
13 By: 
14 Jean-Claude Lapuyade, Esq.