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SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF RIVERSIDE

MICHAEL NASH, an individual, on behalf of
himself, and on behalf of all persons similarly
situated,

Plaintiff,

v.

K. HOVNANIAN COMPANIES, LLC, a
California limited liability company, and DOES 1-
50, Inclusive,

Defendants.

Case No. RIC2003319

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

Date: June 27, 2024

Time: 8:30 a.m.

Judge: Hon. Harold W. Hopp

Dept.: 1

Reservation ID: 205551208606

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I. INTRODUCTION

Plaintiff Michael Nash (“Plaintiff”) seeks preliminary approval of the Stipulation of Settlement of Class and PAGA Action Claims and Release of Claims (“Agreement”)¹, which if approved, would provide valuable monetary relief for approximately 136 members of the Class who collectively worked approximately 17,400 Workweeks. The basic terms of the Agreement provide for the following:

1. The **“Class Members,” “Settlement Class Members” and “Class Period”** shall mean all non-exempt employees who are or previously were employed by K. Hovnanian Companies, LLC (“Defendant”) and performed work in California (“Class” or “Class Members”) between August 18, 2016 to the End Date (“Class Period”). The End Date is defined as the earlier of either February 9, 2024 or the date on which the Class Members worked a collective 17,400 workweeks. Agreement at §§ I(H), (I) and (O). The “Settlement Class Members” exclude any Class Member that submitted a valid and timely request for exclusion. Agreement at §I(JJ).

2. The **“Aggrieved Employees” and “PAGA Period”** means all non-exempt employees who are or previously were employed by Defendant and performed work in California (“Aggrieved Employees”) between June 4, 2019 until the End Date (“PAGA Period”). Agreement at §§ I(B) and (X). Aggrieved Employees do not have the ability to opt-out of the PAGA portion of the settlement.

3. The **“Gross Settlement Amount”** is Two Hundred Sixty-Five Thousand Dollars (\$265,000). Agreement at § I(Q). The Gross Settlement Amount is non-reversionary and includes the following:

a. A **“Class Representative Service Award”** in the amount of \$10,000 to Plaintiff for his services on behalf of the Class Members, and for agreeing to a broad release. Agreement at §III(M)(9);

b. A **“Class Counsel Award”** in the amount not to exceed one-third of the Gross Settlement Amount for attorney’s fees, currently estimated to be \$88,333.33 *and* litigation

¹ The Agreement is attached as Ex “1” 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.

costs and expenses not to exceed \$25,000, to be paid to Class Counsel. Agreement at §III(M)(10);

c. A **“PAGA Settlement”** of \$15,000 shall be allocated from the Gross Settlement Amount for settlement of claims for civil penalties under the Private Attorneys General Act of 2004 (**“PAGA Settlement”**). The Settlement Administrator shall pay 75% of the PAGA Settlement to the Labor and Workforce Development Agency (**“LWDA Payment”**). The Settlement Administrator shall distribute 25% of the PAGA Amount to the Aggrieved Employees (**“Aggrieved Employee Payment”**). Agreement at §III(M)(11); and

d. **“Settlement Administration Costs”** not to exceed \$7,000 payable to the Settlement Administrator, Apex Class Action LLC, for, *inter alia*, the administration of the Notice Packet and Individual Settlement Payments. Agreement at §III(M)(12).

3. The **“Net Settlement Fund”** of approximately \$119,666.67 (Gross Settlement Amount minus the requested Class Representative Service Award, Class Counsel Award, PAGA Settlement and Settlement Administration Costs) will be allocated to all Settlement Class Members on a pro-rata basis according to the number of Workweeks each Settlement Class Member worked during the Class Period. The entire Net Settlement Amount will be paid to all Settlement Class Members. Assuming a 100% participation rate, the average Individual Settlement Payment to each Settlement Class Member is estimated to be \$879.90. Agreement at §III(M)(1); JCL Dec., ¶ 7.

An objective evaluation of the Settlement confirms that the relief negotiated on behalf of the Class Members is fair, reasonable, and adequate. The Settlement was negotiated by the Parties at arm’s length. The Settlement confers substantial benefits to the Class Members. The relief offered by the Settlement is particularly impressive when viewed against the difficulties encountered by plaintiffs pursuing wage and hour cases (*see infra*). Indeed, by settling now rather than proceeding to trial, Class Members will not have to wait (possibly years) for relief, nor will they have to bear the risk of class certification being denied or of Defendant prevailing at trial. JCL Dec., ¶ 8.

As discussed below, the proposed Settlement satisfies all criteria for preliminary settlement approval and falls within the range of reasonableness. The average Individual Settlement Payment

1 to the Settlement Class meets or exceeds awards in similar wage and hour class actions. Moreover,
2 the proposed Settlement Class is appropriate for provisional certification. Accordingly, Plaintiff
3 respectfully requests the Court grant preliminary approval of the Settlement. JCL Dec., ¶ 9.

4 **II. FACTS AND PROCEDURE**

5 **A. Overview of the Litigation**

6 Defendant designs, constructs and sells residential homes. This action asserts claims on
7 behalf of Defendant’s non-exempt employees. Plaintiff worked for Defendant as a non-exempt
8 employee in California from September 2018 to January 2020. At all times during his
9 employment, Plaintiff earned an hourly wage and was entitled to legally compliant meal and/or
10 rest periods, and minimum, regular and overtime wages for all hours worked. Throughout his
11 employment, Plaintiff was subject to Defendant’s written policies and procedures. JCL Dec., ¶
12 10; Declaration of Michael Nash (“Nash Dec.”) at ¶¶ 4-5.

13 Generally, Plaintiff claims that Defendant failed to pay for all time worked, failed to
14 provide compliant meal and rest periods, failed to reimburse employees for required expenses,
15 failed to furnish accurate itemized wage statements, and failed to pay all wages when due.
16 Defendant forcefully denies liability for each of Plaintiff’s claims. Further, Defendant asserts that
17 it fully complied with all applicable employment laws and raised several other significant
18 defenses to Plaintiff’s claims, including but not limited to, compliant meal and rest period
19 practices, compliant wage statements, and timely payment of all wages. JCL Dec., ¶ 11.

20 On June 4, 2020, Plaintiff served Defendant and the Labor and Workforce Development
21 Agency (“LWDA”) with a Notice of Violations (“PAGA Notice”). Plaintiff’s PAGA Notice set
22 forth the facts and theories supporting Defendant’s alleged violations of various provisions of the
23 California Labor Code and applicable Industrial Welfare Commissions (“IWC”) Wage Order and
24 of his intent to pursue claims under California Labor Code Private Attorneys General Act, Cal.
25 Lab. Code Sections 2698 et seq (“PAGA”). JCL Dec., ¶ 12.

26 On August 18, 2020, Plaintiff filed a class action lawsuit in the Riverside Superior Court,
27 Case Number RIC2003319 (“Action”). The Action alleged eight causes of action against
28 Defendant for: (1) Unfair Competition in Violation of California Business and Professions Code

1 §§ 17200 *et seq.*; (2) Failure to Pay Minimum Wages in Violation of California Labor Code §§
2 1194, 1197 and 1197.1; (3) Failure to Pay Overtime Wages in Violation of California Labor Code
3 §§ 510 *et seq.*; (4) Failure to Provide Required Meal Periods in Violation of Cal. Lab. Code §§
4 226.7 and 512; (5) Failure to Provide Required Rest Periods in Violation of Cal. Lab. Code §§
5 226.7 and 512; (6) Failure to Reimburse Employees for Required Expenses in Violation of Cal.
6 Lab. Code § 2802; (7) Failure to Provide Accurate Itemized Wage Statements in Violation of Cal.
7 Lab. Code §§ 226; (8) Failure to Provide Wages When Due in Violation of Cal. Lab. Code §§
8 201, 202 and 203. JCL Dec., ¶ 13.

9 On November 6, 2020, Plaintiff filed a separate action with a single cause of action for
10 Violation of the Private Attorneys General Act [Labor Code sections 2698 *et seq.*]. On May 17,
11 2021, this Court consolidated Plaintiff’s class action and PAGA action for all purposes, with the
12 class action being the lead case. The consolidated cases now comprise this Action. JCL Dec., ¶
13 14.

14 The Parties agreed to mediate the Action with Steven Mehta, an experienced mediator of
15 wage and hour class actions. To prepare for mediation, the Parties agreed to informally exchange
16 documents and data points subject to the mediation privilege, including but not limited to, the
17 Class Members’ time data and certain payroll data points. As discussed *infra*, Plaintiff’s counsel
18 retained the forensic consultants at Berger Consulting Group (“BCG”) to analyze Defendant’s
19 time and payroll data. JCL Dec., ¶ 15.

20 On March 24, 2022, the Parties participated in a full day mediation with Steven Mehta. The
21 Parties were unable to reach a settlement at mediation, however, the Parties subsequently
22 continued settlement negotiations until a settlement was ultimately reached. The Parties drafted
23 and negotiated a long-form settlement agreement, which is the subject of the instant motion. JCL
24 Dec., ¶ 16.

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

26 Months before filing the Action, Class Counsel began its pre-filing investigation into the
27 Plaintiff’s complaints. Class Counsel’s investigation started with several lengthy interviews with
28

1 Plaintiff. At the conclusion of the interviews, Class Counsel determined that Plaintiff's complaints
2 justified further inquiry. JCL Dec., ¶ 17.

3 Considering the many anticipated factual disputes, the Parties agreed that it would be in the
4 best interest of both Parties to mediate the matter. To prepare for mediation, Class Counsel
5 requested documents and data points to further evaluate Plaintiff's claims and Defendant's
6 liability exposure to the Class Members. In response to Class Counsel's request, Defendant
7 produced time records and pay data for the Class Members, which allowed Plaintiff's expert to
8 determine the average shift length, average hourly rate for the Class Members, and total number
9 of workweeks and pay periods in the Class Period and PAGA Period, respectively, before
10 beginning its analysis related to Plaintiff's allegations. Defendant also produced copies of
11 applicable handbooks, policies, and agreements containing, *inter alia*, compensation, timekeeping
12 and meal and rest period policies. JCL Dec., ¶ 18.

13 Class Counsel then retained the statisticians and economists at BCG to evaluate the Class
14 Members' payroll and time data. BCG provides data analysis and damage modeling consulting
15 services specializing in wage and hour class actions. BCG's team of financial and data analysts
16 are credentialed and experienced experts in their fields and have provided their expertise on
17 thousands of cases. Stated differently, the BCG is uniquely qualified to analyze Defendant's time
18 and payroll data. JCL Dec., ¶ 19.

19 BCG analyzed Defendant's time and payroll data to assist in the development of various
20 damage models. Among other things, BCG determined the approximate number of work shifts,
21 pay periods, and average number of hours worked per shift during the Class Period. BCG also
22 estimated the number of unpaid overtime hours, the number of meal and rest break violations, as
23 well as the total damages due to Defendant's alleged miscalculation of employee's regular rates
24 of pay during the Class Period. JCL Dec., ¶ 20.

25 In advance of mediation, Class Counsel created several damage models predicated on the
26 BCG analysis. Class Counsel's models calculated Defendant's potential liability exposure while
27 accounting for the uncertainties of continued litigation. These damage models informed and
28 guided Class Counsel during the mediated settlement discussions. JCL Dec., ¶ 21.

1 Following the Parties' mediation, the Parties engaged in formal discovery, including
2 Interrogatories, Requests for Admission, and document requests concerning Defendant's wage
3 and hour policies and practices concerning both Plaintiff and the Class. BCG updated the
4 damages model in November 2023, as the Parties continued to negotiate a settlement. JCL Dec.,
5 ¶ 22.

6 Overall, Class Counsel thoroughly investigated the claims at issue, including: (1)
7 determining Plaintiff's suitability as a putative class representative through interviews,
8 background investigations, and analysis of his employment files; (2) evaluating all of Plaintiff's
9 potential claims; (3) researching similar wage and hour class actions as to the claims brought, the
10 nature of the positions, and the type of employer; (4) analyzing the Settlement Class' time and
11 payroll records; (5) analyzing Defendant's labor policies and practices; (6) researching
12 settlements in similar cases as well as outstanding issues which could affect settlement approval;
13 (7) evaluating Plaintiff's claims and estimating Defendant's liability for purposes of settlement;
14 (8) drafting the mediation brief; and (9) participating in the mediation. This investigation allowed
15 Class Counsel to fully assess the nature and magnitude of the claims being settled, as well as the
16 impediments to recovery, such as to make an independent assessment of the reasonableness of the
17 terms to which the Parties have agreed. JCL Dec., ¶ 23.

18 **C. Facts Surrounding the Settlement**

19 On March 24, 2022, the Parties conducted a full day of mediation with Steven Mehta, an
20 experienced wage and hour mediator. Steven Mehta helped manage the Parties' expectations and
21 provided a useful, neutral analysis of the issues and risks to both sides. The Parties made
22 substantial progress with the mediator's assistance, though were unable to reach a settlement. The
23 Parties remained in contact on the topic of settlement as they continued to litigate the matter via
24 formal discovery. The Parties reached a settlement on February 9, 2024, after months of arm's
25 length and adversarial negotiations. The complete and final terms of the Parties' settlement are
26 now set forth in the Agreement. Class Counsel submits that the Settlement constitutes a fair,
27 adequate, and reasonable compromise of the claims at issue. JCL Dec., ¶ 24.

28 ///

D. The Proposed Settlement Fully Resolves Plaintiff's Claims

1. The Composition of the Class

The proposed Class consists of all non-exempt employees who are or previously were employed by Defendant and performed work in California between August 18, 2016 to the End Date. The Settlement Class excludes any person who submits a timely and valid request for exclusion. Through the conclusion of the Class Period, there are approximately 136 Class Members that worked an estimated 17,400 Workweeks during the Class Period. Agreement at §III(A)(2).

2. The Settlement Consideration

The Parties agreed to settle the underlying class claims in exchange for the Gross Settlement Amount of \$265,000. The Gross Settlement Amount includes: (1) Individual Settlement Payments to the Settlement Class; (2) a Class Representative Service Award of \$10,000 to Plaintiff for his services on behalf of the Settlement Class and, equally important, for a general release of claims; (3) a PAGA Settlement in the amount of \$15,000; (4) Settlement Administration Costs estimated at \$7,500; (5) Class Counsel Award in the amount of \$113,333.33, comprised of attorneys' fees equal to one-third of the Gross Settlement Amount estimated to be \$88,333.33 and an estimated \$25,000 for actually incurred litigation expenses. See generally Agreement at §III(M).

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

3. The Funding Date

Assuming there are no objectors, and no appeal is filed, Defendant will fund the \$265,000 Gross Settlement Amount, plus any employer's share of payroll taxes, within sixty (60) calendar days of the Court's entry of the order granting final approval of this Settlement. Agreement at §I(N;P).

4. Formula for Calculating Individual Settlement Payments

Each Settlement Class Member will receive an Individual Settlement Payment. The Individual Settlement Payment will be proportional to the number of Workweeks each Settlement Class Member worked for Defendant in California during the Class Period. The Class Data provided by Defendant to the Settlement Administrator will include the information required to calculate the number of Workweeks for each Class Member and the number of PAGA Pay Periods worked during the PAGA Period. Agreement at §I(G). Each Settlement Class Member's final Individual Settlement Payment will be calculated by using a fraction, the numerator of which is the Settlement Class Member's total number of Workweeks, and the denominator of which is the total number of Workweeks of all Settlement Class Members. Each Individual Settlement Payment will be reduced by any legally mandated employee tax withholdings (e.g., employee payroll taxes, etc.). Individual Settlement Payments for members of the Settlement Class who submit valid and timely requests for exclusion will be redistributed to Settlement Class Members who do not submit valid and timely requests for exclusion on a pro rata basis. Agreement at §III(M)(1).

Given that there are approximately 136 Settlement Class Members, *the average gross recovery is approximately \$879.90* (Net Settlement Amount divided by Settlement Class Members). The range of settlement awards will be provided when Plaintiff moves for final approval of the Settlement. JCL Dec., ¶ 7.

For tax purposes, Individual Settlement Payments shall be allocated and treated as follows: 20% as wages ("Wage Portion"); 80% as penalties and interest ("Non-Wage Portion"). The Wage Portion is subject to wage withholdings and shall be reported on IRS Form W-2. The Non-Wage Portion shall not be subject to wage withholdings and shall be reported on IRS Form 1099. Agreement at §III(M)(3). In calculating Defendant's total damages exposure, BCG determined that the vast majority of damages are for meal and rest premiums, which can be classified as penalties and not wages. Therefore, with the uncertainty regarding how meal and rest premiums would be classified, the Parties agreed that an allocation of 20% as wages and 80% as penalties and interest is far and reasonable.

1 5. Formula for Calculating Individual Payments to the Aggrieved Employees

2 Each Aggrieved Employee will receive an Aggrieved Employee Settlement Payment.
3 Using the Class Data, each Aggrieved Employee's final Aggrieved Employee Settlement Payment
4 will be calculated by using a fraction, the numerator of which is the Aggrieved Employee's total
5 number of PAGA Pay Periods, and the denominator of which is the total number of PAGA Pay
6 Periods of all Aggrieved Employees. Agreement at §III(M)(2). For tax purposes, Aggrieved
7 Employee Settlement Payments shall be allocated and treated as 100% penalties and shall be
8 reported on IRS Form 1099. Agreement at §III(M)(4).

9 6. Mailing of Individual Settlement Payments and Aggrieved Employee Payments

10 The Settlement Administrator will mail the Individual Settlement Payments and Aggrieved
11 Employee Payments by regular First-Class U.S. Mail to Settlement Class Members' and/or
12 Aggrieved Employees' last known mailing address no later than fifteen (15) calendar days after
13 the Funding Date. Agreement at § III(M)(7). Any checks issued to Settlement Class Members and
14 Aggrieved Employees shall remain valid and negotiable for one hundred and eighty (180) days
15 from the date of their issuance. If a Settlement Class Member and/or Aggrieved Employee does
16 not cash his or her settlement check within 90 days, the Settlement Administrator will send a letter
17 to such persons, advising that the check will expire after the 180th day, and invite that Settlement
18 Class Member and/or Aggrieved Employee to request reissuance in the event the check was
19 destroyed, lost or misplaced. Agreement at § III(M)(8). In the event an Individual Settlement
20 Payment and/or Aggrieved Employee's individual share of the PAGA Settlement check has not
21 been cashed within one hundred and eighty (180) days, the check will be voided and the
22 Settlement Class Member and/or Aggrieved Employee will remain bound by the Settlement. The
23 funds from any such uncashed checks will be directed to the State Controller's Office Unclaimed
24 Property Division in the name of the Class Member or Aggrieved Employee. Agreement at §
25 III(M)(8).

26 7. Release by Participating Settlement Class Members

27 Generally, as of the Funding Date, Plaintiff and the Settlement Class Members will agree
28 to release Defendant and the Released Parties from the Released Claims (those that were alleged

1 in the operative complaint, or could have been alleged based upon the facts in the operative
2 complaint) that accrued during the Class Period. Agreement at §§I(DD) and III(B).

3 8. PAGA Release by Plaintiff and the State of California

4 Generally, upon the Funding Date, Plaintiff, acting as the representative of the State of
5 California, will release the Released Parties from all claims for statutory penalties that could have
6 been sought by the Labor Commissioner for the violations identified in Plaintiff's pre-filing letter
7 to the LWDA; Plaintiff does not release any aggrieved employee's claim for wages or damages.
8 Agreement at §§I(DD) and III(C).

9 **III. ARGUMENT**

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

11 The proposed Settlement, including a Gross Settlement Amount of \$265,000 meets the
12 standards for preliminary approval. Pre-trial settlement of complex class actions is a judicially
13 favored remedy. (*Officers for Justice v. Civil Serv. Comm'n* (9th Cir. 1982) 688 F.2d 615, 625
14 ("Voluntary conciliation and settlement are the preferred means of dispute resolution.")) Class
15 action settlement approval requires an early "preliminary" review by the trial court and a
16 subsequent "final" review after notice of the settlement has been distributed to class members for
17 their comments and objections. (C.R.C. 3.769(c)-(g); *Cellphone Termination Fee Cases*, 180 Cal.
18 App. 4th 1110, 1118 (2010) (the court first "preliminarily approves the settlement" and later
19 "conducts a final approval hearing to inquire into the fairness of the proposed settlement").)

20 Although Rule of Court Rule 3.769 does not provide detail as to the scope of review of the
21 proposed settlement, preliminary approval is warranted if the settlement falls within a "reasonable
22 range." (*See North County Contractor's Assn., Inc. v. Touchstone Ins. Services* (1994) 27
23 Cal.App.4th 1085, 1089-90; Conte & Newberg, *Newberg on Class Actions*, §§ 11.26 (4th ed.
24 2002).) Reasonableness and fairness are presumed where: (1) the settlement is reached through
25 "arms-length bargaining;" (2) investigation and discovery are "sufficient to allow counsel and the
26 court to act intelligently;" (3) counsel is "experienced in similar litigation. . . ." (*Dunk v. Ford*
27 *Motor Co.* (1996) 48 Cal.App.4th 1794, 1802.) The presumption of fairness is consistent with
28 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 class action litigation”); *7-Eleven Owners for Fair Franchising v. Southland Corp.* (2000) 85 Cal.App.4th 1135, 1151 (“voluntary conciliation and settlement are the preferred means of dispute resolution ... [t]his is especially true in complex class action litigation”).)

Additionally, in reviewing the fairness of a class action settlement, due regard should be given to what is “otherwise a private consensual agreement between the parties.” (*Cellphone Termination Fee Cases* (2010) 186 Cal.App.4th 1380, 1389.) 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, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned.” (*Id.*)

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

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

The Parties participated in mediation with Steven Mehta, who managed the Parties’ expectations and provided a useful, neutral analysis of the issues and risks to both sides. (*In re Apple Computer, Inc. Derivative Litig.* No. C 06-4128 JF (HRL), 2008 U.S. Dist. LEXIS 108195 (N.D. Cal. Nov. 5, 2008) (mediator’s participation weighs considerably against any inference of a collusive settlement); *D’Amato v. Deutsche Bank* (2d. Cir. 2001) 236 F.3d 78, 85 (a “mediator’s involvement in pre-certification settlement negotiations helps to ensure that the proceedings were free of collusion and undue pressure.”).) The matter resolved after months of arm’s length, adversarial and non-collusive negotiations, some of which were facilitated with the assistance of a mediator. JCL Dec., ¶¶ 15-16; 25.

1 Once the Parties reached a settlement, they engaged in protracted negotiations regarding
2 the written terms of the class action settlement. The Parties maintained the arm's length, non-
3 collusive and adversarial negotiations while arriving at the final terms of the Settlement. The
4 Agreement is the final product of these mediated negotiations. Objectively, the Settlement terms
5 are fair, adequate and represent a reasonable compromise of the claims at issue. JCL Dec., ¶ 26.

6 2. The Settlement Falls Within the Recognized Range of Reasonableness.

7 The Gross Settlement Amount of \$265,000 is within the range of reasonableness. To
8 determine whether a settlement is fair and reasonable, the court should “consider enough
9 information about the nature and magnitude of the claims being settled, as well as the impediments
10 to recovery, to make an independent assessment of the reasonableness of the terms to which the
11 parties have agreed.” (*Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 133.) In
12 making this determination, the court is “not to try the case” but rather “satisfy itself that the class
13 action settlement is within the ‘ballpark of reasonableness.’” (*Id.* (emphasis added).) For this
14 analysis, courts do “not require any such explicit statement of value; [they] require[] a record
15 which allows an understanding of the amount that is in controversy and the realistic range of
16 outcomes of the litigation.” (*Munoz v. BCI Coca-Cola Bottling Co.* (2010) 186 Cal.App.4th 399,
17 409 (internal citation omitted).) The reasonableness of a settlement is not dependent upon its
18 actual value approaching the potential recovery plaintiffs might have received if they had
19 succeeded at trial.² Indeed, “[t]he determination whether a settlement is reasonable does not
20 involve the use of a ‘mathematical equation yielding a particularized sum.’” (*Frank v. Eastman*

21
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.*
27 *Directv. Inc.* (C.D. Cal. 2004) 221 F.R.D. 523, 527 (“well settled law that a proposed settlement may be acceptable
28 even though 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”).

Kodak Co. (W.D.N.Y. 2005) 228 FRD. 174, 186 (quoting *In re Michael Milken and Assoc. Sec. Litig.* (S.D.N.Y. 1993) 150 F.R.D. 57, 66).)

a. The Gross Settlement Amount Meets the Recognized Range of Reasonableness.

The Gross Settlement Amount of \$265,000 is fair and reasonable considering the nature and magnitude of the claims being settled and the various potential impediments to recovery. Prior to reaching this settlement, Class Counsel retained BCG to develop economic damage models measuring Defendant's liability exposure while accounting for the uncertainties of continued litigation. The various models were informed by Class Counsel's investigation, including the analysis of a significant sample of time and payroll data. Class Counsel projected Defendant's liability exposure for *class claims* (excluding PAGA Penalties) at \$644,588 if successful at trial. Thus, the Gross Settlement Amount of \$265,000 represents approximately 40% of Defendant's *class-wide* liability exposure as estimated by Class Counsel at the time of mediation. The following summarizes Defendant's estimated exposure. JCL Dec., ¶ 27.

(1) Estimated Damages for Unpaid Wages

Plaintiff alleges Defendant failed to include certain non-discretionary bonuses and awards when calculating the regular rate of pay for Class Members for purposes of overtime and sick pay. Specifically, Plaintiff alleges that Class Members earned non-discretionary incentive compensation tied to sales made by the agents they supported. When this additional, non-discretionary compensation was earned during the same pay periods during which overtime or sick pay was also paid, Defendant failed to include the non-discretionary bonus into the calculation for the Class Member's regular rate of pay. JCL Dec., ¶ 28.

Plaintiff further alleges that Defendant rounded Class Members' time which resulted in the systematic under-compensation to Class Members. The data provided by Defendant shows clock in and clock out times all in exact, quarter-hour increments. Plaintiff also alleges that he and the Class Members were trained to submit timecards on the Monday of the coming week, before the workweek began, entering the same clock-in and clock-out times. Plaintiff alleges that he and other Class Members would arrive early and/or leave late when necessary, and that this time would

not be reflected on their timecards, as they had been filled out prior to the workweek elapsing. As a result of Defendant's unlawful rounding and timekeeping practices, Plaintiff and Class Members were not paid for all hours worked, including overtime hours. JCL Dec., ¶ 29.

Plaintiff's expert estimated the damages for this claim at approximately \$111,473. JCL Dec., ¶ 29.

(2) Estimated Damages for Defendant's Meal Period Violations

Plaintiff alleges Defendant regularly: (a) failed to provide meal periods; (b) provided late meal periods; (c) provided short meal periods; and/or (d) required employees to work through their meal periods. Plaintiff's expert made the following notable findings with respect to Defendant's meal break violations: 24.7% of shifts between 5 and 6 hours were without a recorded first meal break; 96.3% of shifts between 10 and 12 hours without a recorded second meal break; and 96.8% of shifts greater than 12 hours without a recorded second meal break. With respect to second meal breaks, Defendant's time records indicate that Class Members worked an estimated 1,135 shifts that qualified for a second meal break during the Class Period. Yet, the same records, indicate only 41 (3.6%) shifts where a second meal break was recorded. Plaintiff further alleges that Defendant failed to pay any meal period premiums. Defendant raised a number of defenses, including that in shifts exceeding 5 hours but less than 6 hours, employees voluntarily waived their meal periods, and that in shifts exceeding 10 hours but less than 12 hours, employees voluntarily waived their second meal periods. Defendants also argued, among other things, that they provided all Class Members with the opportunity to take compliant meal periods. Thus, Defendant argued that any missed meal periods were voluntarily and did not trigger liability for premium payments. JCL Dec., ¶ 30.

Plaintiff also alleges that Defendant unlawfully rounded meal breaks, as Defendant's time records show that 22.4% of first meal breaks were exactly 30 minutes in length and 77.2% of meal breaks were exactly 60 minutes in length. This data indicates that Defendant employed a rounding policy in direct violation of the California Supreme Court's ruling in *Donohue v. AMN Services, LLC*, 11 Cal.5th 58 (2021) and raises a rebuttable presumption of meal break violations. JCL Dec., ¶ 31.

1 Plaintiff expert estimated the damages for this claim at approximately \$87,342 in damages
2 for unpaid meal period premiums. JCL Dec., ¶ 31.

3 (3) Estimated Damages for Rest Period Violations

4 Plaintiff also alleged that Defendants failed to provide compliant rest periods. Specifically,
5 Plaintiff alleged that Class Members were often not afforded the opportunity to take a compliant
6 rest period due to their rigorous workload requirements and understaffing. Defendants denied
7 liability and asserted that it maintained legally compliant rest period practices throughout the
8 Class Period. Moreover, Plaintiff recognized the evidentiary burdens establishing this claim.
9 Establishing Plaintiff's rest period claim would rely, almost entirely, on Class Member testimony,
10 making it a riskier claim at class certification and liability stages. Certification likely would have
11 required depositions of Class Members who provided declarations, and Defendant surely would
12 have obtained opposing declarations stating either rest breaks were taken, or rest breaks were
13 voluntarily waived. *See, e.g., Ordonez v. Radio Shack, Inc.* (C.D. Cal. Jan. 17, 2013) 2013 WL
14 210223, at *11 ("Because of the competing testimony before the Court, plaintiff's evidence that
15 defendant may have an illegal, written rest break policy is insufficient for this Court to find that
16 common issues predominate."); *Villa v. United Site Servs. of California, Inc.* (N.D. Cal. Nov. 13,
17 2012) 2012 WL 5503550, at *8 ("Indeed, Plaintiff's own evidence confirms that the written policy
18 does not generate uniform practices."). Accordingly, Plaintiff's Damages model included a 15%
19 discount as applied to Class Members' meal periods. Plaintiff's expert estimated Defendants'
20 exposure for this claim to be \$69,874. JCL Dec., ¶ 32

21 (4) Estimated Damages for Defendant's Inaccurate Wage Statements

22 Plaintiff alleges Defendant failed to furnish Class Members with complete and accurate
23 wage statements. Specifically, Plaintiff alleges that Defendant furnished wage statements that
24 included "vacation" hours in the calculation of total hours worked, in violation of Cal. Lab. Code
25 § 226(a)(2). However, hours for "Vacation" are not considered "hours worked" for purposes of
26 Cal. Lab. Code § 226(a)(2). *Cicairos v. Summit Logistics, Inc.*, 133 Cal. App. 4th 949 (2005).
27 Plaintiff also alleges that Class Members who were not paid the correct wages resulting from
28 Defendants' miscalculation of the regular rate of pay for purposes of overtime redeemed sick

1 leave are entitled to derivative penalties for Defendants’ failure to pay those wages when due and
2 for failure to include those wages on Class Member’s wage statements, thus making those wage
3 statements inaccurate. Plaintiff’s expert estimates Defendant’s damages for this claim at
4 approximately \$190,200. JCL Dec., ¶ 33

5 (5) Exposure for Failure to Reimburse for Mandatory Business Expenses

6 Plaintiff alleged that Defendant required that Plaintiff and other Class Members use their
7 personal cell phones and personal vehicles in furtherance of their job duties. Specifically, Plaintiff
8 alleges that he and the Class Members were required to use personal cell phones to take photos of
9 model homes and communicate with sales agents. Additionally, Plaintiff alleges that he and the
10 Class Members were required to use their own personal vehicles to drive to and from the K.
11 Hovnanian communities. Defendant owned golf carts, but failed to regularly maintain them,
12 requiring Plaintiff and the Class Members to use their personal vehicles. California employers who
13 require employees to use a personal cellular device for work purposes must reimburse the
14 employee for the cost incurred in furnishing the device, including voice and data service. *See* Cal.
15 Labor Code § 2802(a), providing that “[a]n employer shall indemnify his or her employee for all
16 necessary expenditures or losses incurred by the employee in direct consequence of the discharge
17 of his or her duties, or of his or her obedience to the directions of the employer...” Plaintiff
18 estimated Defendants’ exposure for this claim to be \$113,430. JCL Dec., ¶ 34

19 (6) Exposure for Waiting Time Penalties

20 Plaintiff alleges that Defendant’s alleged violations resulted in derivative violations of
21 Labor Code section 203. Class Counsel considered these penalties and weighed the potential
22 recoveries against probable defenses. Specifically, Defendant contends that Plaintiff could not
23 prove the “willful” prong needed to obtain waiting time penalties under Labor Code section 203.
24 Plaintiff would have to overcome precedent to prove the Class deserved the penalties. *See, e.g.,*
25 *Howard v. CVS Caremark Corp.*, 2014 U.S. Dist. LEXIS 172406 (C.D. Cal. Dec. 9, 2014)
26 (denying class certification for the same penalty claims); *Alonzo v. Maximus, Inc.*, 832 F. Supp.
27 2d 1122, 1134-1137 (C.D. Cal. 2011) (finding insufficient evidence of bad faith or actual injury).

Due to the uncertainty here, Plaintiff applied a 20% discount to these claims and estimated Defendant's exposure for these claims to be approximately \$72,269. JCL Dec., ¶ 35.

(7) Defendant's PAGA Exposure

"Under PAGA, a plaintiff may bring a representative action as an aggrieved employee on behalf of herself and other current or former employees and may seek civil penalties for Labor Code violations." *Wilner v. Manpower, Inc.*, 35 F.Supp.3d 1116 (N.D. Cal. 2014). Thus, Plaintiff sought penalties for unpaid wages (including unpaid overtime), non-compliant or no meal periods, noncompliant or no rest periods, and unreimbursed business expenses. The PAGA Period is the period between June 4, 2019 until the End Date and there are approximately 128 Aggrieved Employees who worked a total of 3,728 pay periods. JCL Dec., ¶ 36.

Plaintiff's claims and corresponding PAGA penalties can be broken down as follows:

Labor Code Section	Number of employees	Statutory penalty	Number of pay periods / violations	Violation rate	Total Penalties
351, 510, 558, 1194, 1197 and 510 (unpaid wages)	128	\$100	3,728	100% of total pay periods	\$186,400
510 (unpaid overtime)	128	\$100	172	4.6% of total pay periods	\$17,200
512 and 226.7 (meal period violations)	128	\$50	3,724	99% of total pay periods	\$186,200
512 and 226.7 (rest period violations)	128	\$50	3,728	100% of total pay periods	\$186,400
2802 (unreimbursed business expenses)	128	\$50	3,728	100% of total pay periods	\$186,400
TOTAL					\$762,600

JCL Dec., ¶ 37.

California Labor Code section 2699(e)(1) permits a court to award a lesser amount than the maximum civil penalty if, based on the facts and circumstances, to do otherwise would result in an award that is "unjust, arbitrary and oppressive or confiscatory." Before and after the mediation,

1 Defendant argued, among other things, that it was unlikely that any judge would award more than
2 the actual amounts owed on the claims, let alone the full \$50, \$100 or \$200 per violation authorized
3 under PAGA. In *Carrington v. Starbucks Corp.*, 30 Cal.App.5th 204 (2018), the Court of Appeal
4 affirmed a judgement after trial which only provided for a PAGA penalty of \$5 per pay period.
5 Therefore, at trial, any PAGA penalties awarded in this case could be significantly less than
6 Plaintiff's calculation even had Plaintiff prevailed on the PAGA claim. Here, multiplying the
7 number of pay periods (3,728) by \$5 results in a total potential liability of \$18,640. JCL Dec., ¶
8 38.

9 As discussed above, Defendant asserted a number of defenses to both the PAGA claim and
10 the underlying Labor Code violations, not only as to liability but also as to the amount of penalties.
11 Defendant could argue that no penalties prior to the PAGA notification should be awarded because
12 the violations were not intentional, and at least one court has ruled. These defenses present a risk to
13 the PAGA claim and a serious risk that some or all of the PAGA penalties Plaintiff sought would
14 not be awarded. JCL Dec., ¶ 39.

15 Based on the defenses outlined above, Defendant has argued, and continues to argue, that
16 any violation was not knowing or intentional, and that any penalty awarded beyond the benchmark
17 set in *Carrington* would be unjust, arbitrary and oppressive or confiscatory. Plaintiff concedes that
18 at least some of the alleged violations, were arguably not intentional. JCL Dec., ¶ 40.

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
23 settle is a good value for a relatively weak case or a sell-out of an extraordinary strong case.’”
24 (*Misra v. 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 *Magadia v. Wal-Mart*
27 *Associates, Inc.* (9th Cir. 2021) 999 F.3d 668. There, the Ninth Circuit, vacated, reversed and
28 remanded a \$110 million judgement against an employer for, *inter alia*, inaccurately paying

overtime, and directed the trial court to enter judgement in favor of the employer. *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). 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.

“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).)

1 Finally, continuing to litigate this action would require continued and extensive resources
2 coupled with significant Court time to proceed through trial and post-trial motions; which can
3 often take years. Furthermore, wage and hour litigation is complex and expensive, as it often
4 necessitates extensive expert testimony, particularly with regards to damages. But even if
5 Plaintiff is successful at trial, Plaintiff is acutely aware that a judgment does not end the litigation.
6 Plaintiff fully expects that Defendant would appeal any favorable judgment. As demonstrated by
7 *Magadia, supra*, 999 F.3d 668, the risk of an appeal and subsequent reversal is real. JCL Dec., ¶
8 41. “Avoiding such a trial and the subsequent appeals in this complex case strongly militates in
9 favor of settlement rather than further protracted and uncertain litigation.” (*Nat’l Rural*
10 *Telecomms. Coop v. DirecTV* (C.D. Cal. 2004) 221 F.R.D. 523, 527.) Thus, “unless the settlement
11 is clearly inadequate, its acceptance and approval are preferable to lengthy and expensive
12 litigation with uncertain results.” (*Id.* at 526.)

13 In this matter, Class Counsel negotiated a Gross Settlement Amount of \$265,000 that is
14 roughly 40% Defendant’s estimated class wide liability exposure. Given the amount of the
15 settlement here, as compared to potential value of the claims, offset by the various inherent risks
16 to continued litigation, the settlement is fair and reasonable. JCL Dec., ¶ 42.

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

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

27 ³ Due process does not require that each class member actually receive a notice, but rather a procedure reasonably
28 certain to reach class members. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 1789, at 253 (2d ed.
1986). If 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 Class
2 Members of their rights and remedies. The Settlement Administrator will first verify addresses,
3 then mail the proposed Class Notice to all Class Members. The Class 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 the form Request for
6 Exclusion or form Objection must be submitted, the date for the final approval hearing, the
7 formula used to calculate settlement payments, and the terms and scope of the Released Claims.
8 Agreement at §III(L). This method was negotiated by the Parties to ensure delivering the most
9 reasonable method of notice to the Class Members while ensuring cost effective administration
10 of the Settlement. JCL Dec., ¶ 43.

11 The Class Notice includes an exclusion form that Class Members can fill out in order to
12 exclude themselves from the Settlement, and an Objection Form that Class Members can fill out
13 in order to object to the terms of the Settlement. The Class Notice informs Class Members of
14 where they can find the full text of the settlement agreement, the court address, and court website
15 address. See Ex. A to the Agreement.

16 Accordingly, both the method of disseminating the Class Notice and content of the Class
17 Notice satisfy due process. (*See* C.R.C. 3.776(e)-(f); *State of Cal. v. Levi Strauss* (1986) 41 Cal.3d
18 460,485 (the class notice must “fairly apprise the class members of the terms of the proposed
19 compromise and of the options open to dissenting class members.”).)

20 **C. The Court Should Preliminarily Approve the Class Representative Enhancement**
21 **Award**

22 Enhancement payments “are fairly typical in class action cases.” (*Cellphone Termination*
23 *Fee Cases* (2010) 186 Cal.App.4th 1380, 1393 (affirming incentive awards of \$10,000);
24 *Rodriguez v. West Publishing Corp.* (9th Cir. 2009) 563 F.3d 948, 958, *citing* 4 Newberg on Class
25 Actions (4th ed. 2002) § 1 1:38, and Eisenberg & Miller, *Incentive Awards to Class Action*
26 *Plaintiffs: An Empirical Study*, 53 UCLA L. Rev. 1303 (2006).) Enhancement payments “are
27 intended to compensate class representatives for work done on behalf of the class, to make up for
28 _____

1 financial or reputational risk undertaken in bringing the action, and, sometimes, to recognize their
2 willingness to act as a private attorney general.” (*Rodriguez*, 563 F.3d at 958-59.) “[T]he rationale
3 for making enhancement or incentive awards to named plaintiffs is that they should be
4 compensated for the expense or risk they have incurred in conferring a benefit on other members
5 of the class.” (*Clark v. American Residential Services LLC* (2009) 175 Cal.App.4th 785.)

6 The Settlement provides for a Class Representative Service Award of \$10,000⁴ for
7 Plaintiff. The service award is fair and reasonable compensation for the Plaintiff’s efforts bringing

8
9 ⁴ The amount of the requested enhancement payment-\$10,000-is reasonable by reference to the amounts that California
10 courts (both federal and state) have repeatedly found to be reasonable for wage and hour class action settlements: *See*
11 *Baker v. LA. Fitness Int’l, LLC*, No. BC438654 (L.A. County Super. Ct. Dec. 12, 2012) (awarding \$10,000
12 enhancement payments to three of the named plaintiffs); *Blue v. Codwell Banker Residential Brokerage Co.*, No.
13 BC417335 (L.A. County Super. Ct. Mar. 21, 2011) (awarding \$10,000 enhancement payment); *Buckmire v. Jo-Ann*
14 *Stores, Inc.*, No. BC394795 (L.A. County Super. Ct. June 11, 2010) (awarding \$10,000 enhancement payments to the
15 named plaintiff); *Coleman v. Estes Express Lines, Inc.*, No. BC429042 (L.A. County Super. Ct. Oct. 3, 2013) (awarding
16 \$10,000 enhancement payment); *Ethridge v. Universal Health Services, Inc.*, No. BC391958 (L.A. County Super. Ct.
17 May 27, 2011) (awarding \$10,000 enhancement payment); *Hickson v. South Coast Auto Insurance Marketing, Inc.*,
18 No. BC390395 (L.A. County Super. Ct. Mar. 27, 2012) (awarding \$10,000 enhancement payment); *Hill v. Sunglass*
19 *Hut Int’l, Inc.*, No. BC422934 (L.A. County Super. Ct. July 2, 2012) (awarding \$10,000 enhancement payments to the
20 named plaintiffs); *Kabamba v. Victoria’s Secret Stores. LLC*, No. BC368528 (L.A. County Super. Ct. Aug. 19, 2011)
21 (awarding enhancement payments of \$ 10,000 to the named plaintiffs along with additional compensation for their
22 general release of claims); *Magee v. American Residential Services, LLC*, No. BC423798 (L.A. County Super. Ct. Apr.
23 21, 2011) (awarding \$15,000 enhancement payment); *Mares v. BFS Retail & Commercial Operations, LLC*, No.
24 BC375967 (L.A. County Super. Ct. June 24, 2010) (awarding \$15,000 enhancement payments to the named plaintiffs);
25 *Nevarez v. Trader Joe’s Co.*, No. BC373910 (L.A. County Super. Ct. Jan. 29, 2010) (awarding \$10,000 enhancement
26 payment); *Ordaz v. Rose Hills Mortuary, LP.*, No. BC386500 (L.A. County Super. Ct. Mar. 19, 2010) (awarding 10,000
27 enhancement payments to the named plaintiffs); *Sheldon v. AHMC Monterey Park Hospital LP*, No. BC440282 (L.A.
28 County Super. Ct. Feb. 22, 2013) (awarding \$10,000 enhancement payment); *Silva v. Catholic Moray Services, Inc.*,
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 the action, assisting Class Counsel with the litigation and settlement, regularly conferring with
2 Class Counsel on the status of his case and the strategies for prosecuting the claims, reviewing
3 the proposed Settlement to ensure that its terms are fair and provide adequate relief for the
4 Settlement Class, and agreeing to provide Defendant a general release of all claims arising out of
5 his employment. JCL Dec., ¶ 44.

6 Class Counsel on behalf of Plaintiff will file a formal motion for the negotiated Class
7 Representative Service Award once preliminary approval of the Settlement is granted. Such
8 motion will be accompanied by a declaration from Plaintiff that describes the services he
9 performed to prosecute this action, includes an estimate of time incurred by Plaintiff in performing
10 these services, the risks he assumed or benefits he received in prosecuting this action, and identify
11 any adverse consequences he suffered in prosecuting this action. Nash Decl., ¶ 1-9; JCL Dec. ¶
12 45.

13 Plaintiff has **not** negotiated any settlement of individual claims with Defendant separate
14 from the settlement at bar. Nash Decl., ¶ 10; JCL Dec. ¶ 46.

15 Plaintiff respectfully submits that the above showing is sufficient for preliminary approval
16 of the negotiated Class Representative Service Award. JCL Dec., ¶ 46.

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

18 The purpose of a Class Counsel Award in class action litigation is to reward counsel who
19 took the risk of non-payment and invested in a case that achieved a substantial positive result for
20 the class. California courts routinely award attorneys' fees equaling one-third or more of the
21 potential value of the common fund, the amount requested under this settlement. (*See Chavez v.*
22 *Netflix, Inc.* (2008) 162 Cal.App.4th 43, 66 n.11 ("Empirical studies show that regardless whether
23 the percentage method or the lodestar method is used, fee awards in class actions average around
24 one-third of the recovery."); Theodore Eisenberg & Geoffrey P. Miller, *Attorney Fees in Class*
25 *Action Settlements: An Empirical Study*, *J. of Empirical Legal Studies*, Vol. 1, Issue 1, 27-78,
26 March 2004, at 35 (independent studies of class action litigation nationwide have come to a
27 similar conclusion that a one-third fee is consistent with market rates).)
28

1 Class Counsel took this matter on a contingency fee basis and invested significant time and
2 expense successfully prosecuting Plaintiff's claims. As discussed *supra*, the estimated average
3 Individual Settlement Payment illustrates the demonstrably positive outcome for the Settlement
4 Class Members. Considering the positive outcome for the Settlement Class Members, and in light
5 of the supporting authority, the proposed Class Counsel award is fair and reasonable. JCL Dec.,
6 ¶ 47.

7 Plaintiff will file a formal motion for the negotiated Class Counsel Award once preliminary
8 approval of the Settlement is granted. Such motion will be accompanied by a declaration that
9 provides evidence of the total amount of time spent by Class Counsel, a description of the work
10 performed, and the reasonableness of the fees charged. Such declaration will also include a
11 detailed description of the costs actually incurred. Such declaration will include details related to
12 fee splitting between Class Counsel, and Plaintiff's written notice of such. Plaintiff respectfully
13 submits that the above showing is sufficient for preliminary approval of the negotiated attorneys'
14 fees. JCL Dec., ¶ 48.

15 **E. Provisional Certification for Settlement Purposes Is Appropriate**

16 For Settlement, Plaintiff contends, and Defendant does not dispute, that provisional
17 certification of the Class is appropriate. JCL Dec., ¶ 49.

18 1. The Standard for Class Certification

19 Class actions are statutorily authorized "when the question is one of common or general
20 interest, of many persons, or when the parties are numerous, and it is impracticable to bring them
21 all before the court." (*Cal.Civ.Proc. Code* § 382; *Lee v. Dynamex, Inc.* (2008) 166 Cal.App.4th
22 1325, 1332.) Class certification is appropriate when there is an "ascertainable class and a well-
23 defined community of interest among class members." (*Sav-On Drug Stores, Inc.* (2014) 34
24 Cal.4th 319, 326.) Class treatment is appropriate even if class members at some point may be
25 required to make an individual showing as to eligibility for recovery. (*Bufile v. Dollar Financial*
26 *Group, Inc.* (2008) 162 Cal.App.4th 1193, 1207; *Sav-On*, 34 Cal.4th at 333.)

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

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

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

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

Because all Class Members are Defendant’s current and former employees, the class is readily ascertainable from Defendant’s regular business records, i.e., payroll records. JCL Dec., ¶ 50.

The statutes relating to each of Plaintiff’s claims apply with equal force and effect to the entire Settlement Class. Factually, Defendant’s policies and practices apply class-wide and Defendant’s liability can be determined by facts common to all members of the class. The wage and hour issues are both numerous and substantial, and a class action is the most advantageous method of dealing with the claims of the Settlement Class. JCL Dec., ¶ 51.

Plaintiff’s wage and hour claims are typical of the proposed Settlement Class because they arise from the same factual basis and are based on the same legal theories applicable to the other Class Members. Likewise, Plaintiff’s interests are entirely coextensive with the interests of the Settlement Class. Plaintiff alleges that he was injured by the same company-wide practices to which the proposed Class Members were subject to and seeks the same relief. Plaintiff has already demonstrated his ability to advocate for the interests of the Class Member by initiating this

1 litigation, undertaking discovery in order to meaningfully mediate, and evaluating the proposed
2 settlement to assure that it is fair. JCL Dec., ¶ 52.

3 Additionally, Plaintiff is represented by competent Class Counsel who have extensive
4 experience in litigating wage and hour class action cases. Class Counsel successfully briefed,
5 argued, certified, and gained state court settlement approval of the same class-wide causes of
6 action that are at issue in this case. Class Counsel's wage and hour class action experience
7 establishes that they are well qualified to represent the interests of this Class. JCL Dec., ¶¶ 54-60,
8 Declaration of Shani Zakay, ¶ 3; Declaration of Nicholas De Blouw, ¶ 2.

9 A class action is superior to a multitude of individual lawsuits. Given the size and amount
10 of each individual claim, the Class Members likely have little incentive to litigate their claims on
11 an individual basis because the out-of-pocket expense and personal commitment necessary to
12 litigate each claim outweighs any potential recovery. In sum, class treatment is superior to
13 individual, case-by-case adjudication. JCL Dec., ¶ 53.

14 IV. CONCLUSION

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

18
19 Dated: June 4, 2024

JCL LAW FIRM, APC

20 By: 

21 Jean-Claude Lapuyade, Esq.
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