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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

ALEJANDRO MALDONADO, individually, and  
on behalf of all others similarly situated,

*Plaintiff,*

vs.

TECHMER PM, INC. a California corporation;  
and DOES 1 through 10, inclusive,

*Defendants.*

Case No.: 20STCV21918

Hon. Amy D. Hogue – Dept. 7

CLASS ACTION

**PLAINTIFF’S NOTICE OF MOTION AND  
MOTION FOR PRELIMINARY APPROVAL  
OF CLASS AND REPRESENTATIVE  
ACTION SETTLEMENT; MEMORANDUM  
OF POINTS AND AUTHORITIES**

Date: June 20, 2022  
Time: 11:00 a.m.  
Courtroom: Dept. SSC-7  
Judge: Hon. Amy D. Hogue

Action Filed: June 08, 2020  
Trial Date: Not Set

1 TO THE COURT, ALL PARTIES, AND THEIR COUNSEL OF RECORD:

2 PLEASE TAKE NOTICE that on June 20, 2022, at 11:00 a.m., or as soon thereafter as the  
3 matter may be heard, in Department SSC-07 of the above-captioned Court, located at 312 North Spring  
4 Street, Los Angeles, CA 90012, Plaintiff Alejandro Maldonado (“Plaintiff”) will and hereby does move  
5 this Court for an order:

6 1. Granting class certification of the Class, solely for settlement purposes pursuant to  
7 Code of Civil Procedure § 382;

8 2. Preliminarily approving the JOINT STIPULATION OF CLASS AND  
9 REPRESENTATIVE ACTION SETTLEMENT (“Settlement” or “Agreement”);

10 3. Appointing counsel for Plaintiff, Moon & Yang, APC, as Class Counsel;

11 4. Appointing Alejandro Maldonado as the Class Representative;

12 5. Approving the use of the proposed notice procedure and related notice form;

13 6. Approving ILYM Group, Inc. as the third-party administrator;

14 7. Directing that notice be mailed to the Class; and,

15 8. Scheduling a hearing date for motions for final approval of class action settlement  
16 and awards of attorneys’ fees and costs.

17 Good cause exists to grant this Motion because:

18 1. The Class meets all of the requirements for class certification for settlement  
19 purposes under Code of Civil Procedure § 382;

20 2. The Settlement Agreement is a fair, adequate, and reasonable compromise of the  
21 disputed wage and hour claims asserted by Plaintiff;

22 3. Plaintiff and Class Counsel are adequate to represent the Class;

23 4. The proposed notice procedures and related forms comply with California Rules of  
24 Court 3.766(d) and (e), adequately apprise Class Members of their rights, and fully comport  
25 with due process; and

26 5. Based on the foregoing, notice should be directed to the Class Members and a final  
27 fairness hearing should be scheduled (Plaintiff proposes 150 days after preliminary approval is  
28 granted).

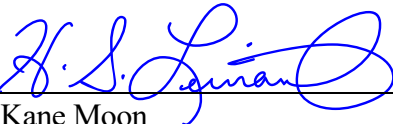
1 This Motion is made pursuant to Rule 3.769 and Rule 3.1113(e) of the California Rules of Court,  
2 which require approval by the Court of a class action settlement and permit the Court to extend the page  
3 limit for memoranda.

4 This Motion is based on this Notice of Motion and Motion, the attached Memorandum of Points  
5 and Authorities, the Declarations of H. Scott Leviant, Plaintiff, and the Settlement Administrator in  
6 support thereof, all papers and pleadings on file with the Court in this action, all matters judicially  
7 noticeable, and on such oral and documentary evidence as may be presented in connection with the  
8 hearing on the Motion.

9 Respectfully submitted,

10 Dated: March 18, 2022

**MOON & YANG, APC**

11 By:   
12 Kane Moon  
13 H. Scott Leviant  
14 Lilit Tunyan  
15 Mariam Ghazaryan

Attorneys for Plaintiff Alejandro Maldonado

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MEMORANDUM OF POINTS AND AUTHORITIES

**I. INTRODUCTION**

Pursuant to California Rules of Court, Rules 3.769(d) and (e), Plaintiff respectfully requests that this Court preliminarily approve the proposed class action settlement set forth in the JOINT STIPULATION OF CLASS AND REPRESENTATIVE ACTION SETTLEMENT (“Settlement” or “Agreement”) with Defendants TECHMER PM, INC. and TECHMER PM, LLC (“TECHMER” or “Defendants”).

After the exchange of voluminous documents and data, and an arm’s-length mediation session with experienced third-party mediator Steven Rottman, Plaintiff and Defendants (collectively referred to herein as the “Parties”) reached a proposed class action settlement with a gross settlement amount (“GSA”) of **\$285,000.00** in compromise of disputed claims asserted on behalf of the below-defined Class consisting of approximately **113** members. Plaintiff believes that this settlement is a fair, adequate, and reasonable compromise of the disputed claims for alleged unpaid wage and hour violations and penalties asserted in this case.

Plaintiff now submits this Motion for Preliminary Approval of Class Action Settlement, along with the Settlement (attached to the Declaration of H. Scott Leviant [“Leviant Decl.”], at Exhibit 1 thereto). For the Court’s convenience, below is a summary of the key provisions of the Settlement.

**II. THE MAJOR TERMS OF SETTLEMENT**

The provisions of the proposed Settlement include the following:

- Defendants stipulate to certification of a Settlement Class for purposes of Settlement only (Settlement, ¶ 19);
- Settlement Amount: Defendants will pay a maximum of **\$285,000.00**, referred to as the Gross Settlement Amount, resulting in an average **gross** payment per Class Member of approximately **\$2,522.12** (Settlement, ¶ 26(c));
- Data Reviewed and Data Accuracy: Informal discovery provided to Plaintiff included employee handbooks, data for the entire putative class, Plaintiff’s records, sub-counts of current and former employees, time sheets sampled for a majority of the class period, and other policy documents relevant to the claims in this matter. The largest margin of error

calculated for any of the data sets provided was **5.5%**. (Leviant Decl., ¶ 6.)

- **Class Size**: The Class contained an estimated 113 individuals on January 21, 2022, who worked an estimated 18,763 workweeks through mediation (Settlement, ¶¶ 4, 26(d));
- **PAGA Group Size**: There are an estimated 88 PAGA Employees, who worked an estimated 9,091 pay periods through mediation (Leviant Decl., ¶ 11);
- **Escalator Clause**: If, on the date of preliminary approval or June 30, 2022, whichever is sooner, the number of actual Covered Workweeks during the Class Period exceeds 15% of the estimated Covered Workweeks (i.e., exceeds 21,577 workweeks), the Gross Settlement Amount will be increased by 1% for every percentage point that the Covered Workweeks exceed the 15% threshold (Settlement, ¶ 26(d).)
- **Kullar/Munoz Analysis**: Plaintiff addresses the claims analysis herein, at Part V.B.3, and in more detail the Declaration of Leviant, at Paragraph 18;
- **Certification**: Plaintiff addresses certification requisites herein, at Part V.A., and in the Declaration of H. Scott Leviant in Support of Plaintiff's Motion for Preliminary Approval, at Paragraphs 34-40.
- **No Claim Form**: No claim form is required (Settlement, ¶ 26(f));
- **No Reversion**: The Settlement is a ***non-reversionary*** settlement (Settlement, ¶ 26(e));
- **Class Release**: The Settlement will release wage-and-hour claims either pled or that could have been pled based upon the allegations for those Settlement Class Members who do not opt out of the Settlement (Settlement, ¶ 37);
- **PAGA Release**: The Class Members employed during the PAGA Period will release the PAGA Claims contained in the LWDA Notice Letter, regardless of whether they opt out of the class portion of the Settlement (Settlement, ¶¶ 14, 37(c)(2));
- **Release Effective Date**: The Release becomes effective on the later of the Effective Date of the Settlement or the payment by Defendants of all money owed under the Settlement (Settlement, ¶ 37(b));
- **Net Settlement Amount Available to the Class**: After deducting Class Counsel's attorneys' fees and costs, enhancement payment to Plaintiff, Administration costs, and the payment to

the LWDA, the remainder will be available for distribution to Class Members who do not opt out, with each Participating Class Member receiving a share based on the number of workweeks each Participating Class Member worked for Defendants within the Settlement Class Period. The Net Settlement Amount is estimated to be at least \$118,510.00, resulting in an average **net** payment per Class Member of at least **\$1,048.76**, before any tax withholdings (Settlement, ¶ 26(g));

- Tax Allocation: The amounts distributed to Class Members will be characterized as 25% alleged unpaid wages and 75% as alleged unpaid penalties and interest, with the PAGA payment allocated as 100% penalties (Settlement, ¶ 26(k));
- Employer's Portion of Payroll Taxes Paid Separately: Defendants' portion of payroll taxes (e.g., FICA, FUTA, etc.) owed on any settlement payments to Settlement Class Members that constitute wages will be paid separate and apart from the GSM (Settlement, ¶ 26(h));
- Settlement Administrator: The notice portion of the Settlement is administered by a third-party Administrator, ILYM Group, Inc., and the bid cost of administration, **\$8,990.00**, does not exceed the \$15,000 estimate. (Settlement, ¶ 26(p).)
- Class Data for Administration: The Settlement Administrator will receive the Class List within 14 days of Preliminary Approval, use the NCOA database to update the Class List, and then use skip tracing on returned Notices (Settlement, ¶ 32(a));
- Notice Language: Notice issued in English and Spanish. (Settlement, ¶ 26(t).)
- Notice Issuance: The Notice will issue within 30 days of receipt of the Class List (Settlement, ¶ 32(b)). The Notice describes how to dispute workweeks, submit and objection in writing, in person, or through an attorney, or request exclusion (Settlement, Exhibit A).
- PAGA Allocation: From the GSA, \$40,000 is allocated to settle claims brought pursuant to the California Private Attorneys General Act, Labor Code § 2699 *et seq.* ("PAGA"), and seventy-five percent (75%), or **\$30,000.00**, will be paid to the California Labor & Workforce Development Agency. (Settlement, ¶ 9.)
- Notice to LWDA: Notice was provided prior to the filing of this Motion. Evidence is

1 attached to the Leviant Declaration.

- 2 • Enhancement/Service Awards to Plaintiff: Defendants will not oppose the application for a  
3 Class Representative Enhancement of up to **\$7,500** for Plaintiff, to be paid from the GSA  
4 (Settlement, ¶ 26(n));
- 5 • Fees and Costs: Defendants will not oppose Class Counsel's application for fees not to  
6 exceed 33 1/3% of the GSA (**\$95,000.00**), and actual costs, in an amount not to exceed  
7 \$15,000, to be paid out of the GSA; (Settlement, ¶ 26(m)).
- 8 • Objections: Objections can be submitted in person, through an attorney, or in writing to the  
9 Settlement Administrator, with no pre-requisite to being heard (Settlement, ¶ 26(x));
- 10 • Exclusion Requests: The procure for exclusion requests, mailing a request to the  
11 Settlement Administrator, is the same as the procedure for submitting a writing objection  
12 (Settlement, ¶¶ 26(w) and 26(x));
- 13 • Check Void Period: Settlement checks will be valid for 180 days (Settlement, ¶ 34);
- 14 • Uncashed Checks: Any settlement checks mailed to the Settlement Class Members that  
15 remain uncashed after 180 days of the date of issuance will be cancelled, and the moneys  
16 will be directed to the State Controller's Office-Uncollected Funds (Settlement, ¶ 35);
- 17 • Judgment Notice: Judgment will be posted on the Settlement Administrator's website after  
18 entry (Settlement, ¶ 30).

19 (Leviant Decl., ¶¶ 11-12 and Exhibit 1 thereto.)

### 20 **III. FACTUAL AND PROCEDURAL BACKGROUND**

#### 21 **A. Plaintiff's Claims**

22 On June 8, 2020, Plaintiff filed a putative Class Action against Defendant TECHMER PM, INC.  
23 alleging the following labelled causes of action: (1) Failure to Pay Minimum Wage and Regular Rate  
24 Wages [Cal. Lab. Code §§ 204, 1194, 1194.2, and 1197]; (2) Failure to Pay Overtime Compensation  
25 [Cal. Lab. Code §§ 1194 and 1198]; (3) Failure to Provide Meal Periods [Cal. Lab. Code §§ 226.7, 512];  
26 (4) Failure to Authorize and Permit Rest Breaks [Cal. Lab. Code §§ 226.7]; 5) Failure to Indemnify  
27 Necessary Business Expenses [Cal. Lab. Code § 2802]; (6) Failure to Timely Pay Final Wages at  
28 Termination [Cal. Lab. Code §§ 201-203]; (7) Failure to Provide Accurate Itemized Wage Statements

[Cal. Lab. Code § 226]; and (8) Unfair Business Practices [Cal. Bus. & Prof. Code §§ 17200, *et seq.*] (The “Action.”). (Leviant Decl., ¶ 4.)

Plaintiff satisfied the administrative exhaustion requirement that is a prerequisite to filing a claim for Civil Penalties under the Labor Code Private Attorneys General Act of 2004 [Lab. Code § 2699, *et seq.*] (“PAGA”). (Leviant Decl., ¶ 5.) On August 10, 2020, Plaintiff filed a First Amended Complaint adding a cause of action for Civil Penalties Under PAGA [Cal. Lab. Code § 2699, *et seq.*]. Thereafter, the Parties agreed to mediate the matter. (*Id.*)

**B. Pre-Mediation Data Production and Analysis**

The Parties have conducted a thorough investigation of the facts and law. Such discovery and investigation have included, *inter alia*, the exchange of informal data and discoverable information in preparation for the mediation session. (Leviant Decl., ¶ 6.) The Parties have analyzed payroll and other data pertaining to Plaintiff and the Class during the relevant Settlement Period, including but not limited to the numbers of former and current members of each purported subclass within the Class, average workweeks, and average rate of hourly pay. (*Id.*) In addition, Defendants also provided documents reflecting its wage and hour policies and practices during the Settlement Period and information regarding the total number of current and former employees in the Class. (*Id.*)

After reviewing documents regarding Defendants’ wage and hour policies and practices and other information obtained during the informal exchange of discovery, Class Counsel were able to evaluate the probability of class certification, success on the merits, and the reasonably obtainable maximum monetary exposure for all claims. Class Counsel reviewed these records and prepared a damage analysis prior to mediation. Class Counsel also investigated the applicable law regarding the claims and defenses asserted in the litigation. (Leviant Decl., at ¶ 7.)

**C. Settlement**

On January 21, 2022, the Parties mediated before Steven Rottman, Esq., who is a highly experienced and well-regarded mediator for wage and hour class action litigation.<sup>1</sup> (Leviant Decl., ¶ 8.)

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<sup>1</sup> The mediation in this matter was cancelled and rescheduled on two occasions. Because of Mr. Rottman’s congested mediation calendar, it took a significant amount of time to complete the mediation after initially agreeing to do so.

At the mediation, the Parties discussed at length the burdens and risks of continuing with the litigation as well as the merits of the claims and defenses. (*Id.*) The Parties agreed to the basic terms of a proposed settlement and ultimately signed a long form settlement agreement (the Agreement). (*Id.*)

Plaintiff and Class Counsel are aware of the burdens of proof necessary to establish liability for the claims asserted in the Action, both generally and in response to Defendants’ defenses thereto. (Leviant Decl., ¶ 9.) Plaintiff and Class Counsel have also taken into account Defendants’ agreement to enter into a Settlement that confers substantial relief upon the Class.

Based on the foregoing, Plaintiff and Class Counsel have determined that the Settlement set forth in this Agreement is a fair, adequate, and reasonable Settlement and is in the best interests of the Class. (Leviant Decl., ¶ 10.) Solely for the purpose of settling this case, the Parties stipulate to class certification. (*Id.*) If this Settlement is not approved by the Court for any reason, Defendants reserve their rights to contest class certification. (*Id.*) This Settlement, if approved by the Court, will result in the termination with prejudice of the litigation through the entry of the Judgment and the release of all Released Claims for all Class Members, including all within the class definition who have not elected to exclude themselves from the Class. (*Id.*)

#### IV. **CLASS DEFINITION**

The Class is defined as follows:

All non-exempt employees of Defendants who worked in California during the Class Period (the “Class Period” is June 8, 2016 through the date the court issues an order granting preliminary approval or June 30, 2022, whichever is sooner). “Settlement Class Members” are those Class Members who do not submit timely exclusion requests to the Settlement Administrator. (Settlement, ¶¶ 3-4.)

(Leviant Decl., ¶ 34 and Exhibit 1.)

#### V. **DISCUSSION**

##### A. **The Court Should Conditionally Certify the Class Because It Meets All the Requirements for Certification for Settlement Purposes Under CCP § 382**

Under Code of Civil Procedure § 382,<sup>2</sup> class certification is warranted so long as there is a

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<sup>2</sup> Code Civ. Proc. § 382, which is the statutory basis for the maintenance of class actions under California law, states in relevant part, “[W]hen the question is one of a common or general interest, of

1 numerous and ascertainable class with a well-defined community of interest among its members and that  
2 a “class action proceeding is superior to other means for a fair and efficient adjudication of the  
3 litigation.” *See, e.g., Sav-on Drug Stores, Inc. v. Superior Court*, 34 Cal.4th 319, 326, 332 (2004). Any  
4 doubts as to the appropriateness of class treatment must be resolved in favor of certification, subject to  
5 later modification. *Richmond v. Dart Indus. Inc.*, 29 Cal. 3d 462, 473-475 (1981). For purposes of this  
6 Settlement only, Defendants stipulated to conditional certification of the proposed class. (Settlement ¶  
7 19.)

8 “The certification question is ‘essentially a procedural one that does not ask whether an action is  
9 legally or factually meritorious.’” *Id.*, at 326, quoting *Linder v. Thrifty Oil Co.*, 23 Cal. 4th 429, 439-440  
10 (2000). Indeed, the certification question simply asks whether the theory of recovery advanced by the  
11 plaintiff is likely to prove amenable to class treatment. *See, e.g., Jaimez v. Daiohs USA, Inc.*, 181 Cal.  
12 App. 4th 1286, 1298 (2010). In ruling on certification, a trial court’s task is to determine “whether ... the  
13 issues which may be jointly tried, when compared with those requiring separate adjudication, are so  
14 numerous or substantial that the maintenance of a class action would be advantageous to the judicial  
15 process and to the litigants.” *Id.* Thus, “[t]he relevant comparison lies between the costs and benefits of  
16 adjudicating plaintiffs’ claims in a class action and the costs and benefits of proceeding by numerous  
17 separate actions . . . .” *See, e.g., id.*

18 “[I]t is also well established that trial courts should use different standards to determine the  
19 propriety of a settlement class, as opposed to a litigation class certification. Specifically, a lesser standard  
20 of scrutiny is used for settlement cases.” *Global Minerals & Metals Corp. v. Superior Court*, 113 Cal.  
21 App. 4th 836, 859 (2003), citing *Dunk v. Ford Motor Co.* 48 Cal. App. 4th 1794, 1807 n. 19 (1996). As  
22 the court noted in *Dunk*, although certification requirements are intended “to protect the interests of the  
23 non-representative class members,” that concern is “protected by the trial court’s fairness review of the  
24 settlement.” *Dunk*, 48 Cal. App. 4th at 1807 n.19.

25 Indeed, numerous courts have certified settlement classes. For example, the court in *In re Drexel*  
26 *Burnham Lambert Group, Inc.*, 960 F.2d 285 (2d Cir. 1992), cert. dismissed, 506 U.S. 1088, 122 L. Ed.

27 \_\_\_\_\_  
28 many persons, or when the parties are numerous, and it is impracticable to bring them all before the  
court, one or more may sue or defend for the benefit of all.”

1 497, 113 S. Ct 1070 (1993), addressed settlement before a class was certified. After a hearing, the  
2 “district court issued an order certifying the class and approving the settlement agreement.” *Id.* at 289;  
3 *see also Alaniz v. California Processors, Inc.*, 73 F.R.D. 269, 278 (N.D. Cal. 1976) (“the use of the  
4 tentative settlement class procedure was appropriate in this case”), *aff’d*, 572 F.2d 657 (9th Cir.), cert.  
5 denied, 439 U.S. 837 (1978). Certification of a settlement class is a regular feature of class action  
6 litigation and an approved procedure which ought to be followed in this case. *See Newberg on Class*  
7 *Actions* (3d ed. 1991) § 11.27, pp. 11-40 to 11-56; *Manual for Complex Litigation*, 2d (1993) § 30.45.

8 In view of these standards, and as shown below, the Class should be certified for purposes of  
9 settlement. Code Civ. Proc. § 382; Rules of Court, Rule 3.769(c).

10 **1. The Members of the Class Are Both Objectively Ascertainable and**  
11 **Sufficiently Numerous.**

12 Whether an ascertainable class exists turns on three factors: (1) the class definition, (2) the size of  
13 the class, and (3) the means of identifying the class members. *See Miller v. Woods*, 148 Cal. App. 3d  
14 862, 873 (1983). In this case, Plaintiff contends that all three considerations strongly favor class  
15 certification.

16 A class is ascertainable when “it is defined ‘in terms of objective characteristics and common  
17 transactional facts’ that make ‘the ultimate identification of class members possible when that  
18 identification becomes necessary.’” *Noel v. Thrifty Payless, Inc.*, 7 Cal. 5th 955, 980 (2019). No set  
19 number of class members is required to maintain a class action. *Hebbard v. Colgrove*, 28 Cal. App. 3d  
20 1017, 1030 (1972). In fact, the California Supreme Court has upheld a class of as few as ten members.  
21 *Bowles v. Superior Court*, 44 Cal. 2d 574 (1955).

22 The class definition is sufficiently specific to enable the Parties, Class Members, and the Court to  
23 readily determine the parameters of the class. *See Clothesrigger, Inc. v. GTE Corp.*, 191 Cal. App. 3d  
24 605, 617 (1987) (proposed class defined as all persons nationwide subscribing to telephone service since  
25 January 1, 1981, who were charged for one or more unanswered long distance calls, deemed “plainly”  
26 ascertainable).

27 The question of whether class members are easily identifiable turns on whether a plaintiff can  
28 establish “the existence of an ascertainable class,” not whether the plaintiff can “identify the individual

members of such class as prerequisite to the class suit.” *Daar*, 67 Cal.2d at 706; *see also*, *Reyes v. San Diego County Bd. of Supervisors*, 196 Cal. App. 3d 1263, 1275 (1987).

In this case, there are approximately 113 Class Members, all of whom may be identified by reference to Defendants’ records. In addition, to facilitate the administration of the Settlement, Defendants have agreed to share the information from its records and has already demonstrated that it can do so when providing class-wide informal discovery to Plaintiff to facilitate settlement discussions. Accordingly, the Class is not only ascertainable, but also sufficiently numerous. (Leviant Decl., ¶ 35.)

## **2. There Are Common Questions That Predominate Over Any Questions That May Be Unique to Individual Class Members.**

The community of interest requirement embodies three factors: (1) predominant questions of law and fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class. *Dunk*, 48 Cal. App. 4th at 1806; *Richmond*, 29 Cal. 3d at 473-75. In this case, Plaintiff’s claims satisfy all three factors.

A question of law or fact is common to the members of a class if it may be resolved through common proof. *See, Jaimez*, 181 Cal.App.4th at 1305. As for predominance, it “is a comparative concept, and ‘the necessity for class members to individually establish eligibility and damages does not mean individual fact questions predominate.’” *Sav-on*, 34 Cal. 4th at 334, quoting *Reyes v. Los Angeles County Bd. of Supervisors*, 196 Cal. App. 3d 1263, 1278 (1979). Thus, “[i]ndividual issues do not render class certification inappropriate so long as such issues may effectively be managed.” *Id.* This is especially so where the key difference between class members solely concerns their damages. *See id.*

In this case, common questions include, but are not limited to: (i.) Whether or not Defendants paid proper wages to the Class; (ii.) Whether or not Defendants provided meal periods to the Class; (iii.) Whether or not Defendants provided rest periods to the Class; (iv.) Whether or not Defendants paid compensation timely upon separation of employment to former Class Members; (v.) Whether or not Defendants reimbursed the Class for necessary business expenses; (vi.) Whether or not waiting-time penalties are available to the Class for violation of California Labor Code § 203; (vii.) Whether or not Defendants engaged in unlawful or unfair business practices affecting the Class in violation of California Business and Professions Code §§ 17200-17208; and (viii.) Whether or not Plaintiff and the Class are

entitled to penalties pursuant to PAGA. (Leviant Decl., ¶¶ 37-38.)

In the Action, Plaintiff's claims present sufficient common issues of law and fact that predominate over individual issues and warrant class certification. From their review of the documentation provided, Class Counsel determined that for purposes of these claims, Defendants' policies and practices are either identical, or sufficiently similar, to raise the same questions of liability, and applied to all Class Members. Because Class Members would have to prove the same issues of law and fact to prevail, and because their potential legal remedies are identical, it would be preferable to resolve all Class Members' claims by means of the Settlement than to require each Class Member to litigate his or her individual claims. Therefore, common questions predominate over any questions that may be unique to individual Class Members, and class-wide settlement is superior to any other method of resolution.

### **3. Plaintiff's Claims Are Typical of Those of the Class.**

Typicality "requires a showing that the class representative has claims or defenses typical of the class." *See, e.g., Ghazaryan v. Diva Limousine, Ltd.*, 169 Cal. App. 4th 1524, 1534 (2008), citing *Fireside Bank v. Superior Court*, 40 Cal. 4th 1069, 1089 (2007), and *Sav-On*, 34 Cal. 4th at 326, approved by *Jaimez*, 181 Cal. App. 4th at 1298 and *Brinker Rest. Corp. v. Super. Ct.*, 53 Cal. 4th 1004 (2012). To satisfy the typicality requirement, California law does not require that plaintiffs have claims identical to the other class members. Rather, the test of typicality for a class representative is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct. *Seastrom v. Neways, Inc.*, 149 Cal. App. 4th 1496, 1502 (2007). The typicality requirement for a class representative refers to the nature of the claim or defense of the representative, and not to the specific facts from which it arose or the relief sought. *Id.*; *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992).

The purpose of this requirement is to ensure that the representative plaintiff has interests that are reasonably co-extensive with those of absent class members. *See id.* "The test of typicality 'is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of

conduct.” *Id.*, quoting *Schwartz v. Harp* 108 F.R.D. 279, 282 (C.D. Cal. 1985). Notably, “it has never been the law in California that the class representative must have *identical* interest with the class members.” *Classen v. Weller*, 145 Cal. App. 3d 27, 46 (1983). In light of these standards, Plaintiff is typical of class members.

Here, like other Class Members, Defendants employed Plaintiff in a non-exempt position during the Class Period, and Plaintiff was subject to the same policies alleged to have impacted the entire class. (Leviant Decl., ¶ 36.) Plaintiff and other Class Members share the same claims stemming from Defendants’ alleged violations of the Labor Code and relevant wage order. In addition, Defendants’ main defense, namely that its policies and practices fully comply with California law, apply equally to the claims of all Class Members. Thus, Plaintiff is typical of the Class.

#### **4. Plaintiff and Plaintiff’s Counsel Will Adequately Represent the Class.**

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

In the Action, Plaintiff has no conflicts of interest with other Class Members and has agreed to place Class interests above Plaintiff’s own. (Leviant Decl., ¶ 39; Huerta Decl., ¶¶ 5-11.) Moreover, Plaintiff’s counsel are experienced in wage and hour class action litigation and have no conflicts of interest with absent Class Members. (Leviant Decl., ¶¶ 21-26, 39.) As such, this Court should appoint Plaintiff as Class Representative for the Class and appoint Plaintiff’s Counsel as Class Counsel.

#### **5. Proceeding as a Class Action is Superior to Individual Actions**

Under the circumstances, proceeding as a class action is a superior means of resolving this dispute, as the Class Members and the Court will derive substantial benefits. Class certification would serve as the only means to deter and redress the alleged Labor Code violations. *See Linder v. Thrifty Oil Co.* 23 Cal. 4th at 434 (relevant considerations include the probability that each class member will come forward ultimately to prove his or her separate claim to a portion of the total recovery and whether the class approach would actually serve to deter and redress the alleged wrongdoing). Furthermore,

individual actions arising out of the same operative facts would unduly burden the courts and could result in inconsistent results, which may be avoided by class certification.

**6. The Proposed Class Notice Is Constitutionally Sound and Complies with Rule 3.766(d) and (e)**

Notice requirements are set forth in Rules of Court, Rule 3.766. In determining the manner of the notice, the court must consider the interests of the class, the type of relief requested, the stake of the individual class members, the cost of notifying class members, the resources of the parties, the possible prejudice to class members who do not receive notice, and the *res judicata* effect on class members. Rules of Court, Rule 3.766(e).

*a) The Notice Procedure Satisfies Due Process*

Plaintiff requests that the Court approve the proposed plan for giving notice to the Class and administering the Settlement. The notice process is set forth in the Settlement. The standard for determining the adequacy of notice is whether the notice has “a reasonable chance of reaching a substantial percentage of the class members.” *Cartt v. Sup. Ct.*, 50 Cal.App.3d 960, 974 (1975). California law vests the Court with broad discretion in fashioning an appropriate notice program. *Cartt*, 50 Cal. App. 3d at 973-74. There is no statutory or due process requirement that all class members receive actual notice, but in this matter, the Class Members will receive direct mailed notice. Direct mail notice to Class Members’ last known address is the best possible notice under the circumstances. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

As the Court of Appeal has explained, “[t]he notice given should have a reasonable chance of reaching a substantial percentage of the Class Members . . . .” *Cartt*, 50 Cal. App. 3d at 974. For class claims “for money damages or similar relief at law, notice sent by first class mail to the last known address of each member of the plaintiff class is sufficient.” *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811 (1985). Here, the proposed procedure includes safeguards, including, but not limited to, searches for address changes and the re-mailing of returned notices after skiptraces. As such, the proposed procedure provides a reasonable chance that Class members will receive notice.

*b) The Notice is Accurate and Informative*

The proposed Notice of Class Action Settlement should be approved for dissemination to the

1 Class Members. It will be disseminated through direct mail to the last known address for each Class  
2 Member. It informs the Class Members of the terms of the settlement and their right to be excluded from  
3 the Settlement. If there are Class Members who wish to object to this proposed class action settlement,  
4 they will have the opportunity to file their objections and be heard at the Final Approval Hearing.

5 Rule 3.769(f) of the Rules of Court provides as follows:

6 If the court has certified the action as a class action, notice of the final approval hearing  
7 must be given to the class members in the manner specified by the court. The notice  
8 must contain an explanation of the proposed settlement and procedures for class  
members to follow in filing written objections to it and in arranging to appear at the  
settlement hearing and state any objections to the proposed settlement.

9 Rules of Court, rule 3.769(f).

10 The Notice also fulfills the requirement of neutrality in class notices. 3 NEWBERG § 8.39. It  
11 summarizes the proceedings and the terms and conditions of the proposed Settlement, in an informative  
12 and coherent manner, in compliance with the Manual for Complex Litigation (“MANUAL”), (2d Ed.  
13 1993), which states that “the notice should be accurate, objective, and understandable to Class Members .  
14 ..” MANUAL, § 30.211. It makes clear that the Settlement does not constitute an admission of liability  
15 by Defendants and recognizes that this Court has not ruled on the merits. It also states that the final  
16 settlement approval decision has yet to be made. Accordingly, the Notice complies with the standards of  
17 fairness, completeness, and neutrality required of a combined settlement-certification class notice.

18 Upon the Court’s approval, the Notice of Class Action Settlement will be mailed by the  
19 Administrator to each Class Member.

20 **B. The Court Should Preliminarily Approve the Settlement Because It Is a Fair,**  
21 **Adequate, and Reasonable Compromise of Disputed Wage Claims in View of**  
22 **Defendants’ Potential Liability Exposure and the Risks of Continued Litigation**

23 California courts favor settlement. *See, e.g., Stambaugh v. Superior Court*, 62 Cal. App. 3d 231,  
24 236 (1976). Unlike most settlements, class action settlements involve a court approval process that exists  
25 to prevent fraud, collusion, and unfairness to class members. *Malibu Outrigger Bd. of Governors v.*  
26 *Superior Court*, 103 Cal.App.3d 573, 578-579 (1980). This approval process consists of preliminary  
27 settlement approval, notice being given to class members, and a final fairness and approval hearing being  
28 held at which class members may be heard with respect to the settlement. *Id.* For the reasons discussed

below, this Court should preliminarily approve the Settlement, allow the Parties to give notice to the Class as proposed, and schedule a final fairness and final approval hearing.

**1. Class Action Settlements Are Subject to Review and Approval.**

Any settlement of class litigation must be reviewed and approved by the presiding court. Rules of Court, Rule 3.769(a). Approval occurs in two steps: (1) an early (preliminary) review by the trial court and (2) a subsequent (final) review after notice has been distributed to the class members. The Preliminary Approval Hearing and Final Approval Hearing coincide with these two steps. The present motion seeks *preliminary approval* and the setting of a Final Approval Hearing.

To evaluate a settlement, the trial court must receive “basic information about the nature and magnitude of the claims in question and the basis for concluding that the consideration being paid for the release of those claims represents a reasonable compromise.” *Kullar v. Foot Locker Retail, Inc.*, 168 Cal. App. 4th 116, 133 (2008). However, the record need *not* contain an explicit statement of the maximum theoretical amount that the class could recover:

Greenwell misunderstands *Kullar*, apparently interpreting it to require the record in all cases to contain evidence in the form of an explicit statement of the maximum amount the plaintiff class could recover if it prevailed on all its claims—a number which appears nowhere in the record of this case. But *Kullar* does not, as Greenwell claims, require any such explicit statement of value; it requires a record which allows “an understanding of the amount that is in controversy and the realistic range of outcomes of the litigation.”

*Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles*, 186 Cal. App. 4th 399, 409 (2010).

**2. The Parties Reached the Settlement Through Arms’ Length Negotiations Between Experienced Counsel with the Assistance of a Highly-Qualified Mediator After Sufficient Data Was Exchanged to Evaluate Settlement.**

A settlement is presumptively fair where it is reached through arms’ length bargaining, based on sufficient discovery and investigation to allow counsel and the court to act intelligently, counsel is experienced in similar litigation, and the percentage of objectors is small.<sup>3</sup> *Dunk*, 48 Cal.App.4th at 1802; *In re Microsoft I-V Cases*, 135 Cal. App. 4th 706, 723 (2006); *7-Eleven Owners for Fair Franchising v.*

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<sup>3</sup> Because the fourth prerequisite for the presumption to arise cannot be addressed until the final approval hearing, only the first three prerequisites are relevant at this preliminary stage of the settlement approval process.

1 *Southland Corp.*, 85 Cal. App. 4th 1135, 1146 (2000). In deciding whether to approve a settlement, a  
2 trial court has broad powers to determine whether it is fair under the circumstances of the case. *See, e.g.*,  
3 *Mallick v. Superior Court*, 89 Cal. App. 3d 434, 438 (1979). In exercising these powers, the overriding  
4 concern is to ensure that a proposed settlement is “fair, adequate, and reasonable.” *Dunk*, at 1801,  
5 quoting *Officers for Justice v. Civil Serv. Comm’n of San Francisco*, 688 F.2d 615, 625 (9th Cir. 1982).

6 Relevant factors in making this determination, include, but are not limited to:

7 [T]he complexity and likely duration of further litigation, the risk of maintaining class  
8 action status through trial, the amount offered in settlement, the extent of discovery  
9 completed and the state of the proceedings, the experience and views of counsel, the  
presence of a governmental participant, and the reaction of the class members to the  
proposed settlement.

10 *Id.* These factors require balancing, are non-exhaustive, and, as such, trial courts should tailor the factors  
11 considered to each case and give due regard to “what is otherwise a private consensual agreement  
12 between the parties.” *Id.*

13 Here, the Settlement resulted from thorough, arms’ length negotiations between experienced  
14 counsel with the assistance of highly-regarded mediator. (Leviant Decl., ¶¶ 8-10.) With respect to the  
15 claims at issue in this case, Plaintiff obtained data from Defendants and then carefully reviewed that  
16 information. Counsel for Plaintiff also examined relevant policies and interviewed witnesses in detail  
17 about their work experiences and Defendants’ practices.

18 Based on the totality of that review, Plaintiff estimated the potential exposure and then estimated  
19 risk factors to adjust the reasonable expected outcome. The investigation and discovery that Plaintiff’s  
20 counsel conducted were sufficient to provide them with enough information to intelligently evaluate the  
21 estimated exposure in this action for purposes of negotiating the Settlement in view of the risks discussed  
22 below and are also sufficient to allow this Court to do the same. *See, e.g., Wershba v. Apple Computer,*  
23 *Inc.*, 91 Cal. App. 4th 224, 245 (2001).

24 **3. The Settlement Represents a Fair, Adequate, and Reasonable Compromise**  
25 **of Class Members’ Claims Based on Defendants’ Estimated Liability**  
26 **Exposure Given the Risks Continued Litigation Would Entail.**

27 A settlement is not judged against what might have been recovered had a plaintiff prevailed at  
28 trial and does not have to provide 100% of damages sought to be fair and reasonable. “In the context of a

1 settlement agreement, the test is not the maximum amount plaintiffs might have obtained at trial on the  
2 complaint, but rather whether the settlement is reasonable under all of the circumstances.” *Wershba*, 91  
3 Cal.App.4th at 250. Accordingly, because settlements involve compromise, even one that provides for  
4 substantially narrower relief than would likely be obtained if the suit were successfully litigated can be  
5 reasonable given that “the public interest may indeed be served by a voluntary settlement in which each  
6 side gives ground in the interest of avoiding litigation.” *Id.*, quoting *Air Line Stewards & Stewardesses*  
7 *Ass’n, Local 550 v. American Airlines, Inc.*, 455 F.2d 101, 109 (7th Cir. 1972).

8 With respect to the claims asserted on behalf of the Class in this case, there are serious risks that  
9 support the reduced compromise amount. These risks include, but are not limited to: (i) the risk that  
10 Plaintiff would be unable to establish liability for unpaid straight time or overtime wages, *see Duran v.*  
11 *US Bank Nat’l Ass’n*, 59 Cal. 4th 1, 39 & n. 33 (2014) (“*Duran*”), citing *Dilts v. Penske Logistics, LLC*  
12 2014 WL 205039 (S.D. Cal. 2014) (dismissing certified off-the-clock claims based on proof at trial); (ii)  
13 the risk that Defendants’ meal and rest period policies might not ultimately support class certification or  
14 a class-wide liability finding, *see Duran*, 59 Cal. 4th at 14, n. 28 (citing Court of Appeal decisions  
15 favorable on class certification issue without expressing opinion as to ultimate viability of proposition);  
16 (iii) the risk that uncertainties pertaining to the ultimate legality of Defendants’ policies and practices  
17 could preclude class-wide awards of statutory penalties under Labor Code §§ 203 and 226(e); (iv) the  
18 risk that individual differences between Class Members could be construed as pertaining to liability and  
19 not solely to damages, *see Duran*, 59 Cal. 4th at 19; (v) the risk that any civil penalties award under the  
20 PAGA could be reduced by the Court in its discretion, *see Labor Code § 2699(e)(1)*; (vi) the risk that  
21 class treatment could be deemed improper as to one or more claims, except for settlement purposes; (vii)  
22 the risk that lengthy appellate litigation could ensue; and (viii) the risk that violation rate estimates would  
23 prove much lower than expected. (Leviant Decl., ¶ 16.) These risks are non-exhaustive.

24 In light of the uncertainties of protracted litigation, the settlement amount reflects a fair and  
25 reasonable recovery for the Class Members. (Leviant Decl. ¶¶ 13-20.) The settlement amount is, of  
26 course, a compromise figure. (Leviant Decl. ¶ 17.) By necessity it took into account risks related to  
27 liability, damages, and the defenses asserted by Defendants. (*Id.*) Moreover, each Class Member will be  
28 given the opportunity to opt-out of the Settlement, allowing those who feel they have claims that are

greater than the benefits they can receive under this Settlement to pursue their own claims. (*Id.*) For the approximately 113 members of the Class, the average **gross** recovery is approximately **\$2,522.12** per class member, and the estimated average **net** recovery for each Class Member is approximately **\$1,048.76**. (*Id.*) Given that Defendants could challenge certification and liability, this is a significant sum to have achieved in settlement. Moreover, a Class Member who worked a greater number of weeks for Defendants will receive a larger share of the Settlement than a Class Member who worked for a shorter amount of time during the class period. (*Id.*)

After analyzing the claims in this matter, Plaintiff has concluded that the value of this Settlement is fair, adequate, and reasonable. (Leviant Decl., ¶ 18.) The Class Settlement Amount of **\$285,000** is 88% of the **\$323,936.82** estimate of *risk-adjusted* recovery (excluding interest) at this stage in the litigation. On that basis, it would be unwise to pass up this settlement opportunity. This assessment is based on a carefully constructed model of the current fair value of the case, using estimated risks, average wage rates, numbers of employees, and the amount of time covered by the class period. (*Id.*)

The maximum calculated plausible exposure is **\$2,021,966.67**, *including* PAGA penalties and **no discount applied to any class claim**. (*Id.*)

- The reasonably estimated exposure for unpaid off-the-clock work (donning and doffing and waiting in line to clock in to work) over the class period was estimated to be **\$429,512.00**, but with chances of certification and proof of liability (50% and 25% respectively) for a risk-adjusted exposure of **\$53,689.00**.
- The reasonably estimated exposure for unpaid wages due to miscalculation of the overtime and premium rate of pay over the class period was calculated to be **\$31,830.00**, with chances of certification and proof of liability (75% and 40% respectively) for a risk-adjusted exposure of **\$9,549.00**.
- The reasonably estimated exposure for rest break violations over the class period was calculated at **\$200,771.00**, but with low chances of certification and proof of liability (25% and 20% respectively) for a risk-adjusted exposure of **\$10,038.55**.
- The reasonably estimated exposure for meal break violations over the class period was calculated at **\$32,700.00**, with chances of certification and liability risks (50% and 40%

respectively) resulting in a risk-adjusted exposure of **\$6,540.00**.

- Risk-adjusted penalty recoveries for wage statement and Labor Code § 203 penalties were estimated to be approximately **\$11,060.00** and **\$10,250.47**, respectively, on maximum exposures of **\$110,600.00** and **\$102,504.67**, respectively. The certification and liability risk factors are contingent upon the underlying unpaid wage claims and are assumed to be the same as those for the overtime and premium rate error claim for that reason.
- The reasonably estimated exposure for unreimbursed expenses (purchasing safety boots) over the class period was calculated at **\$23,289.00**, with chances of certification and liability risks (50% and 40% respectively) resulting in a risk-adjusted exposure of **\$4,657.00**.
- Performing risk-adjusted valuations for all claims yields a total value in the range of **\$90,876.55**, excluding PAGA. (*Id.*)
- PAGA penalties were calculated as having a maximum realistic exposure of **\$1,090,760.00**, but a risk adjusted value of **\$218,152.00**, after factoring in risks of reduction in penalties pursuant to Court discretion and the high risk of the inability to prove violations for all aggrieved employees.

The concurrently-filed Declaration of H. Scott Leviant sets forth claim valuation in additional detail. (*See*, Leviant Decl., ¶ 18.)

This result here is fully supportable as reasonable. First, it is important to recognize the wilfulness finding required for Labor Code §§ 203 and 226 is challenging to establish. (Leviant Decl., ¶ 19.) Second, rest break and meal period claims have been challenging to certify for many years, even after *Brinker*. (Leviant Decl., ¶ 19.) Third, the certification rates in California are lower than conventional wisdom holds. *See*, H. Scott Leviant, *Second Interim Report on class actions in California sheds new light on certification* (February 19, 2010), [www.thecomplexlitigator.com](http://www.thecomplexlitigator.com), available at <http://www.thecomplexlitigator.com/post-data/2010/2/19/second-interim-report-on-class-actions-in-california-sheds-n.html>; *see also*, *Findings of the Study of California Class Action Litigation, 2000-2006*, available at <http://www.courtinfo.ca.gov/reference/documents/class-action-lit-study.pdf> (finding, at page

5, and in Table 9, at page 15, that only 21.4% of all class actions were certified either as part of a settlement *or* as part of a contested certification motion).

Here, the estimated certification probabilities are *above* the average rate at which cases were certified in California over the study years, based upon data available through the California Courts websites. (Leviant Decl., ¶ 19.) In sum, well *under* 20% of all cases filed as proposed class actions are ultimately certified by way of a *contested* motion. (*Id.*) The recovery is **14%** of the maximum plausible recovery (estimated to be approximately **\$2,021,966.67**, including PAGA), which falls within the expected outcome under the likelihood of success metric. (*Id.*) It would also be appropriate to evaluate the result by examining only the premium wages at issue (approximately \$694,813.00, with no risk reduction), excluding penalties and interest; the settlement is about 41% of the premium wages (unpaid wages, meal period premiums, and rest break premiums) at maximum realistic exposure values.<sup>4</sup> This Settlement achieves the goals of the litigation.

#### **4. The Proposed Method for Allocating Settlement Funds Is Fair, Adequate, and Reasonable.**

The proposed method of allocating the Settlement Fund to Class Members also is fair and reasonable. As noted, the parties agreed to allocate the Settlement Fund between all Class Members based on time worked by the Class Member during the Class Period, in relation to the total amount of time worked by all participating Class Members collectively during the class period. This proposed method is fair and reasonable because each Class Member's actual potential damages vary based on the number of workweeks he or she actually worked (e.g., Lab. Code § 226.7 provides for an extra hour of pay at the employee's regular rate of pay for each violation, resulting in a higher potential damage when a higher number of incidents occur). A Class Member who worked a greater number of weeks for

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<sup>4</sup> The exclusion of interest and penalties from the fairness evaluation is proper because, first, PAGA penalties are discretionary (*see* Lab. Code § 2699(e)(2) (the court in its discretion "may award a lesser amount than the maximum civil penalty amount specified by this part...")), and, second, courts evaluate the strength of a proposed settlement without taking potential penalties or interest into consideration. *See Rodriguez v. West Publishing Corp.*, 563 F.3d 948, 955 (9th Cir. 2000); *see also Miller v. CEVA Logistics U.S.A., Inc.*, 2015 WL 729638, at \*7 (E.D. Cal. Feb. 19, 2015) (court utilized calculation of a defendant's exposure exclusive of interest and penalties to determine whether the settlement fell within the range of possible approval).

Defendants will receive a larger payment under the Settlement than a Class Member who worked for a shorter amount of time during the relevant period. (Leviant Decl., ¶¶ 11, 17.)

**5. The Proposed Enhancement Payments to Plaintiff Is Fair, Adequate, and Reasonable and Warrants Preliminary Approval.**

The proposed enhancement payment of \$7,500 to Plaintiff is intended to recognize the substantial initiative and significant efforts on behalf of the Class. Courts routinely approve incentive awards to compensate named plaintiffs for the services they provide and the risks they incur during class action litigation, often in much higher amounts than that sought here. *See, e.g., Bell v. Farmers Ins. Exchange*, 115 Cal. App. 4th 715, 726 (2004) (upholding “service payments” to named plaintiffs for their efforts in bringing the case); *Van Vranken v. Atlantic Richfield Co.*, 901 F. Supp. 294 (N.D. Cal. 1995) (approving a \$50,000 enhancement award). Plaintiff contributed time to the prosecution of this matter, including assistance prior to the mediation with information and substantial time conferring with counsel over the course of this litigation and before it was filed. (Leviant Decl., ¶ 32; Maldonado Decl., ¶¶ 14-20.) The enhancement also recognizes the considerable risks Plaintiff undertook on behalf of the Class to be personally liable for all costs incurred regardless of the success of the litigation or class certification, as well as the personal risk of facing intrusive discovery and potential disclosure to future employers that Plaintiff sued a former employer, making future employment prospects uncertain. The accompanying Declaration of Plaintiff confirms his involvement and supports his appointment as the Settlement Class Representative.

**6. The Proposed Award of Attorneys’ Fees and Costs Is Also Fair, Adequate, and Reasonable and Merits Preliminary Approval.**

The California Supreme Court removed any lingering doubt about the use of the percentage of the fund method to award attorney’s fees in California Courts:

We join the overwhelming majority of federal and state courts in holding that when class action litigation establishes a monetary fund for the benefit of the class members, and the trial court in its equitable powers awards class counsel a fee out of that fund, the court may determine the amount of a reasonable fee by choosing an appropriate percentage of the fund created. The recognized advantages of the percentage method—including relative ease of calculation, alignment of incentives between counsel and the class, a better approximation of market conditions in a contingency case, and the encouragement it provides counsel to seek an early settlement and avoid unnecessarily prolonging the litigation (See pt. I, *ante*; *Lealao, supra*, 82 Cal.App.4th at pp. 48–49, 97

1 Cal.Rptr.2d 797; *Rawlings v. Prudential–Bache Properties, Inc.*, *supra*, 9 F.3d at p.  
2 516)—convince us the percentage method is a valuable tool that should not be denied  
our trial courts.

3 *Laffitte v. Robert Half Intern. Inc.*, 1 Cal. 5th 480, 503 (2016).<sup>5</sup> Thus, this Court may and, as strongly  
4 encouraged by the California Supreme Court, *should* award attorney’s fees to Plaintiff’s counsel based  
5 upon the percentage of the fund methodology.

6 Setting *Laffitte* aside, whether the once-again-confirmed percentage of the fund method or the  
7 lodestar method is used, the outcome is roughly the same: “[F]ee awards in class actions average around  
8 one-third of the recovery’ regardless of ‘whether the percentage method or the lodestar method is used.’”  
9 *Amaro v. Anaheim Arena Mgmt., LLC*, 69 Cal. App. 5th 521 (2021) (quoting *Chavez v. Netflix, Inc.*, 162  
10 Cal.App.4th 43, 66, fn. 11 (2008)). This is also consistent with counsels’ experience in class cases. Here,  
11 Plaintiff’s attorneys intend to request attorneys’ fees of up to \$95,000.00 (one-third of the GSA), and  
12 costs capped at \$15,000 (which includes payment for mediation, filing fees, legal research fees, and other  
13 standard expenses). (Leviant Decl., ¶ 31.) Given the efforts and risks involved, as well as the results  
14 achieved, these amounts are within the range of reasonableness and warrant *preliminary approval*.

#### 15 7. The Proposed Payment to the Administrator Is Fair and Reasonable

16 In deciding whether to approve a proposed settlement, a trial court must determine if the  
17 proposed settlement is fair under the circumstances of the case. *Mallick*, 89 Cal.App.3d at 438. In  
18 exercising this power, the overriding concern is to ensure that a proposed settlement is “fair, adequate,  
19 and reasonable.” *Dunk*, 48 Cal.App.4th at 1801 (internal quotations omitted). ILYM Group, Inc., which  
20 was selected due to its competitive bid, estimates that administration can be performed for **\$8,990.00**. In  
21 counsel’s experience, based on similar actions, an estimated cost of **\$8,990.00** is a fair and reasonable  
22 amount for administration fees and should be preliminarily approved. (Leviant Decl., ¶ 34.)

#### 23 8. The PAGA Allocation is Reasonable

24 “In determining whether the proposed settlement falls within the range of reasonableness,  
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26 <sup>5</sup> The Supreme Court also corrected the misconception that *Dunk* should be viewed as expressing  
27 doubt about the use of the percentage method: “The *Dunk* court, while finding the percentage method  
28 inapplicable to the settlement before it due to the lack of a readily valued common fund, did not purport  
to bar its usage generally in common fund cases.” *Laffitte*, 1 Cal. 5th at 501.

perhaps the most important factor to consider is plaintiffs' expected recovery balanced against the value of the settlement offer." *Cotter v. Lyft, Inc.*, 176 F. Supp. 3d 930, 935 (N.D. Cal. 2016) (internal quotation omitted). Significantly, the ultimate decision as to the amount of penalties is always up to the discretion of the Court. Labor Code § 2699(e)(2) states: "In any action by an aggrieved employee seeking recovery of a civil penalty available under subdivision (a) or (f), a court may award a lesser amount than the maximum civil penalty amount specified by this part if, based on the facts and circumstances of the particular case, to do otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory."

The PAGA allocation is reasonable because the settlement of the underlying wage and hour claims is robust and serves the deterrent purpose of the PAGA statute. *O'Connor v. Uber Technologies, Inc.*, 201 F.Supp.3d 1110, 1135 (N.D. Cal. 2016) ("By providing fair compensation to the class members as employees and substantial monetary relief, a settlement not only vindicates the rights of class members as employees, but may have a deterrent effect upon the defendant employer and other employers, an objective of PAGA."); *see also Visceral v. Mistras Group*, 2016 WL 5907869 \*9 (N.D. Cal. 2016) ("Applying O'Connor's sliding scale approach, settlement of the PAGA claim may be substantially reduced below its standalone settlement value without sacrificing its statutory purposes because the non PAGA settlement is relatively substantial.")

In addition, there is no evidence that a court or a commissioner had informed Defendants that their conduct violated the Labor Code. *Amaral v. Cintas Corp.*, 163 Cal. App. 4th 1157, 1209 (2008); *Willis v. Xerox Bus. Servs., LLC*, 2013 WL 6053831, \*7-8 (E.D. Cal. 2013) ("Under California law, courts have held that employers are not subject to heightened penalties for subsequent violations until and unless a court or commissioner notified the employer that it is in violation of the Labor Code.") And in *Cotter*, the court found a significant reduction of the PAGA claim would be appropriate because "[t]his does not appear to be a case where a company has deliberately sought to evade the law." *Cotter*, 176 F. Supp. 3d at 941. Here, Defendants can state a strong case that, as the Court concluded in *Cotter*, its efforts to devise compliant operational policies do not indicate an organization that has deliberately sought to evade the law. This is a very significant risk factor.

To assess the fairness, adequacy, and reasonableness of a settlement, the court should also

1 consider the expense, complexity and likely duration of further litigation. *Dunk*, 48 Cal. App. 4th at  
2 1801. Here, the expense, complexity and likely duration of future litigation was to some extent an  
3 unknown. However, what is certain is that to adequately establish the foundational violations that would  
4 support a substantial penalty award, tremendous time and expense would be invested. To adequately  
5 establish that aggrieved employees experience the alleged violations, and at what frequency, most of the  
6 aggrieved employees would need to be interviewed in a systematic fashion and their testimony cataloged  
7 in way sufficiently meaningful to permit the submission of summary evidence at trial, such as via survey.  
8 *First*, the burdensome nature of such a process would be expensive and time-consuming. *Second*, the  
9 individuals already interviewed confirmed substantial risk that the Court would either substantially  
10 reduce any penalty ultimately awarded *or* conclude that the conduct was insufficient to support a penalty  
11 award. *Third*, it would be essentially impossible to formulate an objectively reliable means of  
12 summarizing testimonial experiences, other than by an extraordinarily detailed survey. And formulating  
13 such a survey would have been important, since frequency of violations would need to be established  
14 before any penalties could be recovered. At least as to claims such as meal period and rest break  
15 violations, the decisions of aggrieved employees are a major factor in assessing liability. In sum, the  
16 evidence collected to date leads Plaintiff to conclude that, to the extent violations occurred, a fact which  
17 Defendants dispute, the violations were **not** systematic and **not** uniform across all of Defendants'  
18 estimated 88 employees who worked during the PAGA period. Alternatively, direct testimony would  
19 have been required from as many of the roughly 88 aggrieved employees as could be obtained, which  
20 would be, at best, very difficult. Proof of this sort gives rise to a manageability argument that could  
21 substantially reduce the size of the aggrieved employee group.

22 Finally, the PAGA allocation is fair. The LWDA is receiving \$40,000. The Class is receiving,  
23 net, an estimated \$118,510.01 for the releases of eight other theories of recovery (inclusive of the  
24 \$10,000 as the aggrieved employees' share of the PAGA Allocation). The proportion is in favor of the  
25 Class Members. An allocation to the LWDA equal to 33.75% of the Net Settlement Amount is not  
26 unfair and satisfies the policies underlying California's wage and hour laws.

## 27 **VI. THE COURT SHOULD SCHEDULE A FINAL FAIRNESS HEARING**

28 The last step in the settlement approval process is the fairness hearing, where the Court makes a

1 final determination about the propriety of settlement. Plaintiff requests that the fairness hearing in this  
2 case be scheduled for about 150 days after issuance of the Court's Order granting preliminary approval  
3 of the Settlement. Under the Settlement, the Defendants will have 14 days to provide the mailing data to  
4 the Settlement Administrator, which will then have 30 days to mail out class notice. Class Members  
5 have 60 days after mailing of the notice to submit exclusions or objections (with a 14-day extension  
6 available for late-returned and re-mailed notices). Plaintiff proposes that the final approval hearing be  
7 scheduled for the first available date that is 150 days or later after preliminary approval is granted.

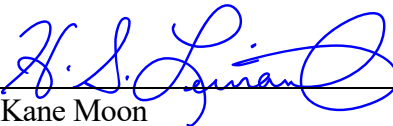
8 **VII. CONCLUSION**

9 For all the foregoing reasons, because the Class meets the requirements for certification, because  
10 the Settlement bears all requisite indicia of fairness, reasonableness, and adequacy, and because the  
11 proposed notice procedure and forms comport with Rule 3.766 and due process, this Court should grant  
12 this Motion for Preliminary Approval, adopt the [Proposed] Order Granting Preliminary Approval of  
13 Class Action Settlement submitted herewith, and schedule a Final Fairness Hearing.

14 Respectfully submitted,

15 Dated: March 18, 2022

**MOON & YANG, APC**

16 By:   
17 Kane Moon  
18 H. Scott Leviant  
19 Lilit Tunyan  
20 Mariam Ghazaryan

Attorneys for Plaintiff Alejandro Maldonado

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**PROOF OF SERVICE**

**STATE OF CALIFORNIA, COUNTY OF LOS ANGELES**

I am employed in the State of California, County of Los Angeles. I am over the age of 18 and not a party to the within suit; my business address is 1055 W. 7<sup>th</sup> Street, Suite 1880, Los Angeles, CA 90017.

On the date indicated below, I served the document described as: **PLAINTIFF'S NOTICE OF MOTION AND MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT; MEMORANDUM OF POINTS AND AUTHORITIES** on the interested parties in this action by sending [ ] the original [or] [✓] a true copy thereof [✓] to interested parties as follows [or] [ ] as stated on the attached service list:

Vincent Chen, Esq.  
(vincent.chen@jacksonlewis.com)  
Peter Woo, Esq.  
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Irvine, CA 92618  
Fax: (949) 885-1380

*Attorneys for Defendants*

[✓] **BY ELECTRONIC SERVICE:** Based on a court order or an agreement of the parties to accept electronic service, I caused the documents to be sent to the persons at the electronic service addresses listed above via third-party cloud service CASEANYWHERE. I did not receive an error message.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this **March 18, 2022** at Los Angeles, California.

\_\_\_\_\_  
H. Scott Leviant  
Type or Print Name

\_\_\_\_\_  
  
Signature