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SUPERIOR COURT OF THE STATE OF CALIFORNIA  
FOR THE COUNTY OF LOS ANGELES – SPRING STREET COURTHOUSE

ALEX DE LA CRUZ, individually, and as  
a representative of other aggrieved  
employees,

Plaintiff,

vs.

GANAHL LUMBER COMPANY, a  
California Corporation, and DOES 1  
through 250, inclusive,

Defendants.

Case No.: 20STCV28069

*The Honorable Maren Nelson*

**CLASS ACTION**

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

Date: June 6, 2023

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Dept.: 17

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff seeks preliminary approval of a \$175,000 class action settlement that provides  
4 monetary relief for approximately 619 Class Members. The key terms of the “Class Action and  
5 PAGA Settlement Agreement”<sup>1</sup> are as follows:

6 Settlement Class Members: “All non-exempt workers who have not signed arbitration  
7 agreements and were employed by Ganahl in California during the period between July 23,  
8 2016 and the date the Court grants Preliminary Approval of the Settlement.”

9 (1) A Gross Fund Value of \$175,000 that includes:

- 10 (a) The Net Fund Value (i.e., the Gross Fund Value minus Attorneys’ Fees  
11 and Costs, payroll (employee only) taxes, the Claims Administration Fee,  
12 the LWDA Payment, and the Class Representative Service Award).
- 13 (b) \$58,275 in Attorneys’ Fees (33.3 percent of the Gross Fund) and up to a  
14 maximum of \$5,000 in actual costs to Class Counsel.
- 15 (c) Up to a maximum of \$9,750 as a “capped fee” to the Claims  
16 Administrator, Simpluris.
- 17 (e) \$20,000 PAGA payment pursuant to Private Attorneys General Act (75%  
18 of which, or \$15,000, goes to the LWDA, and the remaining 25%, or  
19 \$5,000, going to the Net Fund).
- 20 (e) \$7,500 Service Award to the class representative.

21 The Settlement is fair, reasonable, and adequate—and meets approval under California  
22 law. Accordingly, Plaintiff respectfully requests that this Court grant preliminary approval of  
23 the Settlement Agreement.

24  
25  
26  
27 <sup>1</sup> Hereinafter, “Settlement Agreement” or “Settlement.” Unless indicated  
28 otherwise, capitalized terms used herein have the same meaning as those defined by the  
Settlement Agreement.

## II. FACTS AND PROCEDURE

### A. Plaintiff Filed a Putative Class Action Alleging Labor Code Violations

On July 23, 2020, plaintiff filed a Class Action Complaint against the Defendant. The Complaint challenged Defendants' alleged wage and hour violations. The Complaint alleges that Defendant failed to: (1) pay all wages, including overtime and minimum wages; (2) failure to provide accurate wage statements; (3) failure to timely pay wages; (4) failure to pay meal period premiums; (5) failure to pay rest period premiums; and (6) unfair competition. The parties have stipulated to a First Amended Complaint which includes a 7<sup>th</sup> cause of action for civil penalties under PAGA. (Buchsbaum Decl. ¶9).

It is important to note that this lawsuit was initiated primarily due to an apparent regular rate overtime miscalculation error. Plaintiff was paid a combination of hourly wages and non-discretionary incentive pay that was based on a formula. The paystubs appeared to show overtime being paid out at 1.5 times the base hourly rate. There was no indication from the actual paystub that the commission earnings were included in the regular rate calculation. This appeared to be a significant problem for the Defendant.

However, the Defendant revealed that there was an ancillary document that was provided to the employees along with the paystub that showed how the regular rate was calculated for the overtime hours associated with the commissions. Plaintiff denies receiving these ancillary documents, but the Defendant contends that it was handed out along with the paystubs. There were records provided that arguably supported the claim that the ancillary sheets were distributed.

That left plaintiff without the primary claim in the lawsuit. The other claims were initially premised on the regular rate violation and could be considered derivative of that claim. There remained the uncertainty of whether passing out an ancillary document along with a paystub was sufficient to meet the requirements of Labor Code §226(a), but there was very little else other than some anecdotal information from the class representative regarding late meals and breaks.

Nevertheless, the Defendant expressed that there was value in reaching a class settlement

1 to put these issues behind it in a more comprehensive way. The Defendant had just settled a  
2 PAGA representative action entitled *Juan Real v. Ganahl Lumber Co.*, Orange County Superior  
3 Court, Case No. 30-2019-01049558-CU-OE-CXC on April 29, 2020 and believed resolving this  
4 case on a class basis would allow it peace to move forward productively.

5 As a result, the Defendant agreed to provide a 10% random sample of the pay and time  
6 records for plaintiff's counsel's review and both sides engaged independent statistical experts to  
7 analyze the records for potential violations and to extrapolate class exposure based on the  
8 sampling. In doing so, plaintiff discovered a number of potential areas of exposure but the  
9 records were largely compliant and did not reveal large scale exposure. As a result, there is a  
10 relatively modest class settlement at issue.

11 1. The Meal and Rest Period Claims

12  
13 Plaintiff's counsel obtained a 10% sampling of the class time and pay data. A statistical  
14 analysis revealed that there were 1173 meal period violations in the sample, but only 436 paid  
15 premiums. Based on average hourly earnings of \$20.68, that extrapolated out to a \$242,576 in  
16 unpaid meal period premiums. The Defendant contended that there was no exposure on these  
17 claims because any meals that were missed, late or short were voluntary. (Buchsbaum Decl.  
18 ¶10).

19  
20 There are no records of rest periods and the Defendant had distributed facially compliant  
21 rest period policies. We viewed the likelihood of class exposure as *de minimis* due to  
22 certification risks and the lack of documentary evidence, but attributed a settlement value of  
23 \$30,000 to this claim, assuming the gross exposure was similar to the \$242,576 for the meal  
24 premiums. (Buchsbaum Decl. ¶10).

25 //

26 //

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2. The Overtime/Minimum Wage Claims

The overtime claim was based on regular rate miscalculation errors due to a failure to combine commission earnings with hourly earnings to arrive at the correct overtime calculation. However, that theory of exposure was revealed as incorrect upon analysis of the full pay records, including the ancillary paperwork that was allegedly provided with the paystubs. We had the time records statistically analyzed for rounding bias, but found that 48.3 percent of the class members were underpaid and 35% were *overpaid*. A total of 29.8 % of the shifts were underpaid and 28.9% were overpaid. California law clearly allows non-biased rounding, so there seemed little from the records to substantiate either minimum wage or overtime exposure. At best, there was some minor rounding bias. The total amount of overtime owed to the class, according to our analysis, was zero, though there was some theoretical exposure related to rounding that had a modest settlement value. Given that the claim was explicitly pled, the Defendant insisted on a release of these claims as part of the class settlement. (Buchsbaum Decl. ¶11).

3. The Waiting Time Penalties

There were 54 separated employees in the class period who may have been denied a proper meal period premium. The average waiting time penalty amounted to \$4891, which resulted in \$264,125 in theoretical exposure.

That said, the failure to pay meal period premiums were subject to a strong good faith defense, including that there was little more than anecdotal evidence that late or short meals were caused by anything other than voluntary waiver. Therefore, we viewed the settlement value of this claim as being very low—roughly 10% of the total exposure.

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1                   4.     The Paystub Claim

2             There are 8620 wage statements in the statutory period. A total of 29% of those wage  
3 statements jumbled sick pay, holiday pay and meal premiums into the “total hours worked”  
4 column. That arguably violated Labor Code §226(a), since some of these hours were not  
5 “worked,” thus resulting in confusion for the employee and difficulty calculating whether pay  
6 was appropriate. As a result, there were 2497 pay periods at issue, with gross exposure of  
7 \$249,700.

8             Further, 15.9% of the wage statements contained incentive pay, which created a second  
9 Labor Code §226(a) problem, since the overtime calculations were only explained on an  
10 ancillary sheet of paper, rather than on the paystub itself. Moreover, there was at least some  
11 controversy about whether these ancillary sheets were even passed out in the first place. Given  
12 1349 pay period at issue, there was \$134,900 in potential exposure at issue on this claim.

13             The Defendant, on the other hand, intended to cite *Fabio Canales v. Wells Fargo Bank*,  
14 23 Cal. App. 5th 1262 (2018), for the proposition that its overtime reporting practices were  
15 sufficient under the law and caused no damage that would lead to any penalties. As a result, the  
16 gross exposure had to be discounted for settlement purposes. (Buchsbaum Decl. ¶15).

17                   5.     The PAGA Claims

18             There were 2497 pay periods in the PAGA period that contained violations. With a 100%  
19 violation rate, the gross exposure was \$249,700 in the absence of “stacking.” However, we  
20 viewed this as an unrealistic settlement value given the court’s discretion to reduce the penalty  
21 payments, particularly when there were already statutory penalties that were being sought. We  
22 viewed the settlement value of being closer to \$10 per pay period, or roughly \$24,000.  
23 (Buchsbaum Decl. ¶17).

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

25             Plaintiff’s Counsel thoroughly investigated and researched the Class claims, as well as  
26 the representative PAGA claims, and their theories of liability, their defenses, and the  
27  
28

1 developing body of law before the Settlement. The comprehensive investigation included the  
2 exchange of documents and statistical information with Defendant, as well as interviews with  
3 Plaintiff regarding the pay practices at issue. Plaintiff's Counsel also retained a statistical  
4 expert to analyze a 10% sampling of pay data. There were also numerous discussions with  
5 Defense Counsel regarding the merits and potential legal defenses. (Buchsbaum Decl. ¶18)  
6 Plaintiff received, among other things, the following information: (1) data and documents  
7 relevant to Class-wide liability ("Class Data") in support of our investigation and evaluation of  
8 Class claims; (2) employee handbooks, procedure manuals, and operations manuals addressing  
9 Defendant's wage and hour practices, e.g., (i) timekeeping and payroll policies, (ii) meal and rest  
10 periods records, (iii) wage statements; (3) employee time and payroll records; and (4) employee  
11 time audit records. (Buchsbaum Decl. ¶18)

12 Using the data supplied by Defendants for mediation and Plaintiff's Counsel's own  
13 investigation, Plaintiffs' Counsel also determined: (i) the approximate average hourly rate of  
14 pay for Class Members; (ii) the total number of former and current employees in the Class  
15 Period; (iii) the total number of Class Members in the PAGA period; and (iv) the total number  
16 of pay periods worked by all Class Members during the Class Period. (Buchsbaum Decl. ¶23)

17 The receipt and analysis of the Class Data was sufficient for the Parties to make an  
18 informed decision about the strengths and weaknesses of Plaintiff's theories of liability,  
19 Defendant's affirmative defenses, Class-wide damages, and benefits of Settlement. (Buchsbaum  
20 Decl. ¶20)

21 Further, and continuing its due diligence, Plaintiff's Counsel (1) determined Plaintiff's  
22 suitability to serve as Class representative, through interviews, background investigations, and  
23 analyses of his employment files and related records; (2) researched wage-and-hour class  
24 actions involving similar claims; (3) engaged in the discovery process; (4) obtained and  
25 analyzed Defendant's wage-and-hour policies and procedures; (5) obtained and analyzed  
26 hundreds of time and corresponding payroll records to determine violation rates and penalty  
27 payments; (6) researched the latest case law bearing on the theories of liability; (7) researched  
28 settlements in similar cases; (8) analyzed the value of Plaintiffs' claims; (9) negotiated the terms

of the Settlement; (10) finalized the Settlement Agreement; (11) helped to finalize the Notice of Class Action Settlement; and (12) drafted preliminary approval papers. (Buchsbaum Decl. ¶21)

### **C. The Parties Settled After Statistical Sampling**

The Parties agreed to informal settlement discussion that involved a voluntary production of a 10% statistical sample of the class members. Plaintiff's counsel then hired a statistician to review the records to extrapolate exposure on a class and PAGA basis. At all times the Parties' negotiations were adversarial and non-collusive. (Buchsbaum Decl. ¶22).

### **D. The Proposed Settlement Fully Resolves Plaintiffs' Claims**

#### **1. Composition of the Settlement Class**

The proposed Settlement Class Members consist of: "All non-exempt workers who have not signed arbitration agreements and were employed by Ganahl in California during the period between July 23, 2016 and the date the Court grants Preliminary Approval of the Settlement.

[Settlement Agreement, at Page 1, ¶1.5]

#### **2. Settlement Consideration**

Plaintiff and Defendants have agreed to fully resolve the class and representative claims for \$175,000. The Gross Fund Value includes: (1) settlement payments to participating Class Members ("Net Fund Value"); (2) attorneys' fees of \$58,275 (1/3 of the gross amount); actual litigation costs up to \$5,000; (3) Claims Administration Fee capped fee at \$9,750; (4) LWDA Payment of \$20,000 (with \$15,000 going to the LWDA, and the remainder, \$5,000, back into the Net Fund); (5) Class Representative Service Award of \$7,500 to the class representative.

The distribution of the Net Fund Value to Class Members is straightforward: Each Class Member's share of the settlement will be proportional to the total number of workweeks or she worked during the Class Period. The distribution of the PAGA portion works the same way,

based proportionally on the number of workweeks during the PAGA period. [See Settlement Agreement, Page 7, ¶3.2).

Given that there are approximately 619 Class Members, the average net recovery will be approximately \$128.39. This average net recovery is on par or higher than other wage and hour class action settlements approved by California state and federal courts. (Buchsbaum Decl. ¶28) *See, e.g., Fukuchi v. Pizza Hut*, Case No. BC302589 (L.A. County Super. Ct.) (average net recovery of approximately \$120); *Contreras v. United Food Group, LLC*, Case No. BC389253 (L.A. County Super. Ct.) (average net recovery of approximately \$120); *Ressler v. Federated Department Stores, Inc.*, Case No. BC335018 (L.A. County Super. Ct.) (average net recovery of approximately \$90); *Doty v. Costco Wholesale Corp.*, Case No. CV05-3241 FMC-JWJx (C.D. Cal. May 14, 2007) (average net recovery of approximately \$65); *Sorenson v. PetSmart, Inc.*, Case No. 2:06-CV-02674-JAM-DAD (E.D. Cal.) (average net recovery of approximately \$60); *Lim v. Victoria's Secret Stores, Inc.*, Case No. 04CC00213 (Orange County Super. Ct.) (average net recovery of approximately \$35); and *Gomez v. Amadeus Salon, Inc.*, Case No. BC392297 (L.A. County Super. Ct.) (average net recovery of approximately \$20.).

### 3. Release by the Settlement Class

In exchange for the Class Settlement Amount, Plaintiffs and Class Members will agree to release the Released Claims. [See Settlement Agreement, at Page 10, ¶6.2] The class representative will also agree to an additional general release of his individual claims as part of the consideration for his enhancement as the class representative. [Id., at ¶6.1.1]

## III. ARGUMENT

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

#### 1. Courts Review Class Action Settlements to Ensure that the Terms Are Fair, Adequate, and Reasonable

California Rule of Court ("Rule"), Rule 3.769 requires litigants to obtain court approval

1 of class action settlements. Approval occurs in two steps: (1) an early “preliminary” review by  
2 the trial court; and (2) a subsequent “final” review after notice of the settlement has been  
3 distributed to class members for their comments and objections. Rules 3.769(c)-(g); *Cellphone*  
4 *Termination Fee Cases*, 180 Cal. App. 4th 1110, 1118 (2009) (the court first “preliminarily  
5 approves the settlement” and later “conducts a final approval hearing to inquire into the fairness  
6 of the proposed settlement”). The motion for preliminary approval must be accompanied by (1)  
7 the settlement agreement, (2) proposed notice to the class, and (3) the proposed order. Rule  
8 3.769(c). The motion must also identify any agreement concerning the payment of attorneys’  
9 fees. Rule 3.769(b).

10 If the trial court grants preliminary approval of a settlement, Rule 3.769(f) requires the  
11 court to (1) schedule a final approval hearing and (2) approve the method by which the parties  
12 are to provide notice to the class of the hearing and “an explanation of the proposed settlement.”  
13 The court must also approve a procedure for class members to file objections to the settlement.  
14 Rule 3.769(f). At the final approval hearing, the court must conduct an inquiry into the fairness  
15 of the proposed settlement. Rule 3.769(g).

16 Although Rule 3.769 does not provide detail as to the scope of review of the proposed  
17 settlement, preliminary approval is warranted if the settlement falls within a “reasonable range.”  
18 *See North County Contractor’s Assn., Inc. v. Touchstone Ins. Services*, 27 Cal. App. 4th 1085,  
19 1089-90 (1994); Conte & Newberg, *Newberg on Class Actions*, §§ 11.26 (4th ed. 2002)  
20 (“Newberg”). Reasonableness and fairness are presumed where: (1) the settlement is reached  
21 through “arms-length bargaining;” (2) investigation and discovery are “sufficient to allow  
22 counsel and the court to act intelligently;” (3) counsel is “experienced in similar litigation;” and  
23 (4) the percentage of objectors “is small.” *Dunk v. Ford Motor Co.*, 48 Cal. App. 4th 1794,  
24 1802 (1996). The presumption of fairness is consistent with California’s public policy goal of  
25 favoring settlements. *Stambaugh v. Super. Ct.*, 62 Cal. App. 3d 231, 236 (1976) (“the law  
26 wisely favors settlements”); *Cellphone Termination Fee Cases*, 180 Cal. App. 4th at 1118  
27 (“public policy generally favors the compromise of complex class action litigation”); *7-Eleven*  
28 *Owners for Fair Franchising v. Southland Corp.*, 85 Cal. App. 4th 1135, 1151 (2000)

1 (“voluntary conciliation and settlement are the preferred means of dispute resolution . . . [t]his is  
2 especially true in complex class action litigation”); *Skulnick v. Roberts Express, Inc.*, 2 Cal.  
3 App. 4th 884, 891 (1992) (“public policy strongly discourages litigation and encourages  
4 settlement [because settlements] can produce peace and goodwill in the community while  
5 reducing the expense and persistency of litigation”).

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

## 13 14 **2. Plaintiffs’ Counsel Conducted A Thorough Investigation of the Factual** 15 **and Legal Issues**

16 As set forth in greater detail above, based on our analysis of documents produced by  
17 Defendant (including time and payroll records, and policies and procedures manuals) and  
18 information provided during interviews, Plaintiff’s Counsel was able to realistically assess the  
19 value of the class claims and intelligently engage defense counsel in settlement discussions that  
20 culminated in the proposed settlement now before the Court. (Buchsbaum Decl. ¶39)

21 By engaging in a thorough investigation and evaluation of Plaintiffs’ claims, Plaintiffs’  
22 Counsel can state with confidence that the Settlement, for the consideration and on the terms set  
23 forth in the Settlement Agreement, is fair, reasonable, and adequate, and is in the best interests  
24 of Class Members. (Buchsbaum Decl. ¶25)

25 As noted in this brief, Plaintiff undertook substantial efforts to investigate and analyze  
26 class liability, including through a random sampling of pay records that were analyzed by a  
27 statistical expert, who was able to make statistical extrapolations regarding liability. The  
28 realistic settlement value of the case was, in our view, between \$100,000 and \$300,000. The

1 full exposure of approximately \$1,138,000 million had to be discounted due to certification  
2 risks, as well as the concern that the Court might have reduced the PAGA penalty substantially  
3 based on factors related to their derivative nature and the fact that a prior PAGA lawsuit had  
4 already been settled in the recent past over similar issues that have since been addressed by the  
5 company. (Buchsbaum Decl. ¶26)

6 At the end of the day, given the legal uncertainties regarding litigation, the evidentiary  
7 challenges with the meal and rest period claims, the risk that some of these issues could not be  
8 certified, and the fact that liability was disputed, we viewed a settlement of \$175,000 as being a  
9 very reasonable compromise, and in line with the discount related to these risks, even though the  
10 theoretical exposure was considerably higher. (Buchsbaum Decl. ¶27)

11  
12 **3. The Settlement Was Reached through Arm's-Length Bargaining in**  
13 **Which All Parties Were Represented by Experienced Counsel**

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

19 The Parties engaged in a non-collusive, open settlement dialogue that included the  
20 voluntary disclosure of a 10% sampling to be reviewed by an expert statistician, who was able  
21 to make statistical extrapolations from the data. The Parties were represented by experienced  
22 class action counsel throughout the negotiations resulting in this Settlement. Plaintiff’s Counsel  
23 regularly litigates wage and hour class actions and has reached numerous class action and  
24 representative settlements. The Defendant’s lawyers are also sophisticated, experienced class  
25 action lawyers. (Buchsbaum Decl., at ¶28.)

26 **4. The Proposed Settlement Is Reasonable Given the Strengths of Plaintiffs’**  
27 **Claims and the Risks and Expense of Litigation**

28 Of the many factors that courts consider in deciding whether to approve a class action

1 settlement, “[t]he most important factor is the strength of the case for Plaintiffs on the merits,  
2 balanced against the amount offered in settlement.” *Kullar v. Foot Locker Retail, Inc.*, 168 Cal.  
3 App. 4th 116, 130 (2008); *see also Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles*, 186  
4 Cal. App. 4th 399, 407-8 (2010).

5  
6 Plaintiff was cautiously optimistic about the chances of prevailing on the class claims, as  
7 well as the additional representative PAGA claims. Nevertheless, we recognized that had the  
8 litigation continued, we may have encountered significant legal, practical, and factual hurdles  
9 that could have prevented the Class from obtaining any recovery, including failure to certify a  
10 class. (Buchsbaum, Decl. ¶29)

11 The time and effort—not to mention the uncertainty—that would be expended to pursue  
12 further litigation may easily eclipse the amount that is recoverable. For example, if this action  
13 had settled following additional litigation, the settlement amount would likely have taken into  
14 account the additional costs incurred, and there may have been less available for Class  
15 Members. Plaintiff and his counsel would have had to devote considerable time and resources  
16 towards trial and the difficult and complicated issues of proof. *See Local Joint Exec. Bd. of*  
17 *Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc.*, 244 F.3d 1152, 1163 (9th Cir. 2001)  
18 (explaining that “[i]f plaintiffs cannot proceed as a class, some—perhaps most—will be unable  
19 to proceed as individuals because of the disparity between their litigation costs and what they  
20 hope to recover.”). (Buchsbaum Decl. ¶30).

21 In short, given the substantial risks in litigating this action, and the uncertainty of  
22 success, the Settlement represents a reasonable compromise of Plaintiff’s claims, and ensures  
23 that Class Members receive a fair and adequate recovery. (Buchsbaum Decl. ¶31)

24  
25 **B. The Proposed Notice Properly Informs Class Members about the Case and**  
26 **the Settlement**

27 Class members are entitled to the best practical notice under the circumstances. *Kass v.*  
28 *Young*, 67 Cal. App. 3d 100, 106 (1977). The purpose of the notice is to give class members

sufficient information to decide whether they should accept the benefits offered, opt out and pursue their own remedies, or object to the settlement. *Trotsky v. Los Angeles Fed. Savings & Loan Assn.*, 48 Cal. App. 3d 143, 151-52 (1975). The notice must advise class members “that they may be excluded from the class if they so request and that they will be bound by the judgment, whether favorable or not, if they do not request exclusion.” *Kass*, 67 Cal. App. 3d at 106. In a case such as this involving a significant number of class members, California authorities generally require service of the class notice by mail or similar reliable means. *Chance v. Super. Ct.*, 58 Cal. 2d 275, 290 (1962); *Caritt v. Super. Ct.*, 50 Cal. App. 3d 960, 972 (1975).<sup>2</sup>

The Parties have jointly drafted the Notice of Class Action Settlement, which fairly and neutrally informs Class Members of their rights and remedies in this action. We have determined that a Spanish Translation *is* necessary based on the composition of the workforce. The proposed Class Notice will be mailed to all Class Members by First Class mail and will include information regarding the nature of the lawsuit, a summary of the substance of the Settlement’s terms, the class definition, and the time period within which to opt out, or to object to the Settlement, the date for the final approval hearing, the formula used to calculate settlement payments, and the terms and scope of the Released Claims. (See Notice re: Pendency of Class Action Settlement.).

If the mail is undeliverable and there is no forwarding address, the Claims Administrator will verify the addresses produced by Defendant for each Class Member using a “skip trace,” including the National Change of Address Database. *Id.* In the event Class Notices are returned as undeliverable, the Claims Administrator will attempt to locate a current address. This method was negotiated by the Parties to maximize the Class Member response rate while ensuring cost effective administration of the Settlement. In the past, similar notice methods to Plaintiffs class

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<sup>2</sup> Due process does not require that each class member actually receive a notice, but rather a procedure reasonably 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*, 826 F.2d 729, 732 (7th Cir. 1987).

members have resulted in strong response rates.

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

**C. The Proposed PAGA Settlement Is Reasonable**

Pursuant to the Settlement Agreement, \$20,000 from the Class Settlement Amount will be allocated to the resolution of Plaintiffs’ PAGA claims, of which 75% (\$15,000) will be paid directly to the LWDA, and the remaining 25% (\$5,000) will be paid to Participating Class Members. This result was reached after good-faith negotiation between the parties. Where PAGA penalties are negotiated in good faith and “there is no indication that [the] amount was the result of self-interest at the expense of other Class Members,” such amounts are generally considered reasonable. *Hopson v. Hanesbrands Inc.*, Case No. 08-00844, 2009 U.S. Dist. LEXIS 33900, at \*24 (N.D. Cal. Apr. 3, 2009); *see, e.g., Nordstrom Com. Cases*, 186 Cal. App. 4th 576, 579 (2010) (“[T]rial court did not abuse its discretion in approving a settlement which does not allocate any damages to the PAGA claims.”).

**D. The Proposed Class Representative Enhancement Payment Is Reasonable**

Named Plaintiff is eligible for a payment that reasonably compensates her for undertaking and fulfilling a fiduciary duty to represent absent class members. *Cellphone Termination Fee Cases*, 186 Cal. App. 4th at 1393; *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). “Incentive awards are fairly typical in class action cases. Such awards are discretionary and are intended to compensate class representatives for work done on behalf of the class . . .” *Rodriguez v. West Publ’g Corp.*, 563 F.3d 948, 958 (9th Cir. 2009) (citing 4 William B. Rubenstein et al., *Newberg on Class Actions* § 11:38 (4th ed. 2008)). These payments work both as an inducement to participate in the suit and as compensation for time spent in litigation activities. *See In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d at 463 (describe the

1 service award as an *incentive* to the class representatives).

2 The Parties have negotiated an enhancement payment for the class representative in the  
3 amount of \$7,500 for his efforts in bringing the original action, serving as private attorney  
4 general under PAGA, assisting counsel with informal discovery, regularly conferring with  
5 counsel on the status of his case and the strategies for prosecuting the claims, and reviewing the  
6 proposed settlement to ensure that its terms are fair and that it provides adequate relief for the  
7 Settlement Class. She is also signing a general release.

8 These enhancement payments are fair and reasonable compensation for Plaintiffs'  
9 services to the Class. Modest payments to named plaintiffs for their services as class  
10 representatives are customary and generally approved. *See Van Vranken v. Atlantic Richfield*  
11 *Co.*, 901 F. Supp. 294, 300 (N.D. Cal. 1995).

12 Courts have recognized that employees face a particular set of challenges when bringing  
13 class action suits. Current employees risk retaliation or, less explicitly, greater difficulties in the  
14 workplace as a result of bringing suit. *See Guippone v. BH S&B Holdings LLC*, No. 09 Civ.  
15 1029, 2011 U.S. Dist. LEXIS 126026, at \*20 (S.D.N.Y. Oct. 28, 2011) ("Even where there is  
16 not a record of actual retaliation, notoriety, or personal difficulties, class representatives merit  
17 recognition for assuming the risk of such for the sake of absent class members."). Both current  
18 and current employees also place their future employment prospects in peril by becoming class  
19 representatives, as "the fact that a plaintiff has filed a federal lawsuit is searchable on the  
20 internet and may become known to prospective employers when evaluating the person." *Id.* at  
21 \*4. It is common for employers to screen employee candidates to determine whether they have  
22 ever filed suit, and that employee candidates who might be branded "litigious" are likely to be  
23 screened out of the process. In fact, an entire industry has developed for providing employers  
24 with background information on employee candidates.<sup>3</sup> By bringing this action against an

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25  
26 <sup>3</sup> The companies that provide these services actually promote themselves by touting  
27 their ability to identify and weed out potentially litigious employee candidates:

- 28
- "Our value-added partner uses sophisticated technology to ensure the officers and managers of our clients can significantly reduce the likelihood of hiring

1 employer, Plaintiff has assumed considerable reputational risk that may impact his ability to  
2 find employment in the near and distant future. Long after this action is forgotten by Class  
3 Members, these Class Representatives will have to endure the risk of being branded “litigious”  
4 by prospective employers, and may have employment applications rejected on that basis alone.

5 Finally, Named Plaintiff also released her personal damages as part of the Cal. Civ. Code  
6 § 1542 general release he executed, which is considerably broader than the separate, narrower  
7 release required of the Settlement Class. Named Plaintiff’s execution of a general release—  
8 entailing an additional detriment for Named Plaintiff that does not apply to other Class  
9 Members—further supports his request for an enhancement award. *See Schaffer v. Litton Loan*  
10 *Servicing, LP*, No. 05-07673-MMM, 2012 U.S. Dist. LEXIS 189830, \*64 (C.D. Cal. Nov. 13,  
11 2012) (“[C]lass representatives released their actual damages claims as part of the Settlement.  
12 This [“personal benefit”] factor, therefore, weighs in favor of approving the incentive awards.”).

13 For all these reasons, the request enhancement payment to Named Plaintiff is reasonable  
14 and should be awarded.

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litigious and untrustworthy employees by providing the information needed to  
make critical hiring decisions. We specifically help you avoid the traps, pitfalls  
and legal issues that plague many companies today.” *Sentric, Inc.*,  
[http://www.sentric.net/solutions/workforce-management/ancillary-](http://www.sentric.net/solutions/workforce-management/ancillary-products/pre-employment-screening;)  
products/pre-employment-screening;

- “In today’s litigious culture, employers simply cannot afford to hire employees who will put their company at risk.” *Back Track Screening*, <http://www.btscreening.com/wp-content/uploads/2012/09/Screening-101.pdf>;
- “Background screening has become a necessity in today’s litigious society. An employer, who bases their hiring decisions based solely on instinct, may very well open the door to extremely expensive lawsuits. Bad decision making from the start can cause huge budgetary impacts upon your company and also destroy the reputation of all those involved.” *Quest Background Services – The Screening Specialists*, [http://www.questbackgrounds.com/pre-employment\\_screening.htm](http://www.questbackgrounds.com/pre-employment_screening.htm);
- “In today’s litigious culture, you simply cannot afford to hire employees who will put your company at risk.” *Credit Technologies, Inc.*, [http://www.credittechnologies.com/Employment\\_Screening.asp](http://www.credittechnologies.com/Employment_Screening.asp).

**E. The Negotiated Attorneys' Fees and Costs Are Reasonable**

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

At final approval, Plaintiffs will seek Court-approval of attorneys' fees and costs of \$58,275 (or one-third of the Class Settlement Amount) and up to \$5,000 respectively.

**F. California Law Authorizes Provisional Certification for Settlement Purposes**  
**The California Standard for Class Certification**

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

**G. The Proposed Settlement Class is Ascertainable and There is a Well-Defined Community of Interest Among Class Members**

Whether a class is "ascertainable" within the meaning of Section 382 is "determined by

1 examining (1) the class definition, (2) the size of the class, and (3) the means available for  
2 identifying class members.” *Lee v. Dynamex*, 166 Cal. App. 4th 1325, 1334 (2008). Class  
3 members are ascertainable where they may be readily identified without unreasonable expense  
4 or time by reference to official records. *Id.*

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

9 In April of 2012, the California Supreme Court expounded on the element of  
10 predominance:

11 The “ultimate question” the element of predominance presents is  
12 whether “the issues which may be jointly tried, when compared  
13 with those requiring separate adjudication, are so numerous or  
14 substantial that the maintenance of a class action would be  
15 advantageous to the judicial process and to the litigants.”

16 *Brinker*, 53 Cal. 4th at 1021-1022 (citations omitted).

17 The proposed Settlement Class consists of approximately 619 individuals, making  
18 joinder of all Class Members impracticable. Further, because all Class Members are either  
19 current or former employees of Defendant, the class is readily ascertainable from Defendants’  
20 regular business records. (Buchsbaum Decl. ¶33)

21 The California statutes relating to each of Plaintiffs’ claims apply with equal force and  
22 effect to all Class Members. Factually, Plaintiff claims that Defendants’ policies and practices  
23 apply class-wide and Defendants’ liability can be determined by facts common to all members  
24 of the class. The wage and hour issues are both numerous and substantial, and a class action is  
25 the most advantageous method of dealing with the claims of the Settlement Class Members.  
26 (Buchsbaum Decl. ¶34)

27 Named Plaintiff’s wage and hour claims are typical of the proposed Settlement Class  
28

1 because they arise from the same factual basis and are based on the same legal theories  
2 applicable to the other Class Members. Likewise, Named Plaintiff's interests are entirely  
3 coextensive with the interests of the Class. Named Plaintiff was allegedly injured by the same  
4 Company-wide practices to which the proposed Settlement Class was subject and seeks the  
5 same relief. Named Plaintiff has already demonstrated his ability to advocate for the interests of  
6 the Class by initiating this litigation, undertaking extensive class discovery, and evaluating the  
7 proposed settlement to ensure that it is fair. (Buchsbaum Decl. ¶35)

8 Additionally, Plaintiffs are represented by competent counsel who has extensive  
9 experience in litigating wage and hour class action cases. See Buchsbaum Dec., at §§1-8.  
10 Plaintiffs' Counsel have successfully briefed, argued, certified, and gained court settlement  
11 approval of the same class-wide causes of action that are at issue in this case. Plaintiff's  
12 Counsel's wage and hour class action expertise establishes they are well qualified to represent  
13 the interests of this Class. (Buchsbaum Decl. ¶36)

14 A class action is superior to a multitude of individual lawsuits. Given the size and  
15 amount of each individual Class Member's claim, Class Members likely have little incentive to  
16 litigate their claims on an individual basis because the out-of-pocket expense and personal  
17 commitment necessary to litigate each claim outweighs any potential recovery. In sum, class  
18 treatment is superior to individual, case-by-case adjudication. (Buchsbaum Decl. ¶37)

### 19 20 **III. CONCLUSION**

21 The Parties have negotiated a fair and reasonable settlement of claims. Having  
22 appropriately presented the materials and information necessary for preliminary approval,  
23 Plaintiff requests that the Court preliminarily approve the settlement.

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Dated: February 21, 2023

Respectfully Submitted,

LAW OFFICES OF BUCHSBAUM & HAAG,  
A Limited Liability Partnership

By:   
Brent Buchsbaum, Attorney for Plaintiffs

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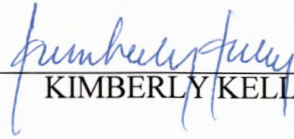
document(s) to be sent from *kim@buchsbaumhaag.com* to the person(s) at the e-mail address(es) listed above.

**XX BY CASE ANYWHERE ELECTRONIC SERVICE:** I certify that a true and correct copy of the above referenced document(s) was electronically served on counsel of record by transmission to CASE ANYWHERE.

**XX STATE** I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed, February 21, 2023, at Long Beach, California.



KIMBERLY KELLY, Declarant