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**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN DIEGO**

DARRELL COLTER, individually, and on
behalf of all others similarly situated,

Plaintiff,

v.

PROPULSION CONTROLS ENGINEERING, a
California corporation, and DOES 1 through 10,
inclusive,

Defendants.

Case No. 37-2020-00030682

CLASS ACTION

[Assigned for all purposes to: Hon. Keri Katz,
Dept. C-74]

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

[Filed concurrently with: Declaration of
Justin F. Marquez in Support of Plaintiff's
Motion for Preliminary Approval of Class
Action Settlement; and [Proposed] Order
Granting Plaintiff's Motion for Preliminary
Approval of Class Action Settlement]

PRELIMINARY APPROVAL HEARING

Date: May 20, 2022
Time: 8:30 a.m.
Dept: C-74

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

2 PLEASE TAKE NOTICE that on May 20, 2022, at 8:30 a.m., in Department C-74 of the
3 San Diego County Superior Court, 330 West Broadway, San Diego, California 92101, pursuant to
4 Code of Civil Procedure § 382 and California Rules of Court 3.769, *et seq.*, Plaintiff Darrell Colter
5 (“Plaintiff”) will move the Court for an Order granting preliminary approval of the proposed class
6 action settlement between Plaintiff and Defendant Propulsion Controls Engineering (“Defendant”).
7 Plaintiff further moves the Court for an Order:

- 8 1. Granting preliminary approval of the Stipulation of Settlement;
- 9 2. Certifying a Class for settlement purposes;
- 10 3. Approving the Notice of Proposed Class Action Settlement (“Notice Packet”) and the
11 plan for distribution of the Notice Packet to Settlement Class Members;
- 12 4. Appointing Plaintiff Darrell Colter as Class Representative for settlement purposes;
- 13 5. Appointing Plaintiff’s Counsel, Wilshire Law Firm, PLC, as Class Counsel for
14 settlement purposes;
- 15 6. Appointing Phoenix Class Action Administration Solutions as the Settlement
16 Administrator; and
- 17 7. Scheduling a Final Approval Hearing.

18 The Motion will be based upon this Notice, the attached Memorandum of Points and
19 Authorities, the Declaration of Justin F. Marquez, filed concurrently herewith, the records and files
20 in this action, and any other further evidence or argument that the Court may properly receive at
21 or before the hearing.

22 Dated: April 28, 2022

WILSHIRE LAW FIRM

23
24 By: _____

Justin J. Marquez
Benjamin H. Haber
Daniel J. Kramer

25
26 Attorneys for Plaintiff
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TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	SUMMARY OF THE LITIGATION AND SETTLEMENT.....	1
A.	Plaintiff’s Claims	1
B.	Discovery and Investigation.....	2
C.	Settlement Negotiations	3
D.	Key Terms of the Proposed Settlement.....	3
III.	DISCUSSION	7
A.	The Settlement Is Fair, Reasonable, Adequate, and the Product of Investigation, Litigation, and Negotiation	8
1.	The Settlement Is the Product of Discovery, Investigation, and Informed and Non-Collusive Arm’s-Length Negotiations.....	8
2.	The Settlement Is Fair and Reasonable in Light of the Parties’ Respective Legal Positions.....	9
3.	Class Counsel Has Extensive Experience in Class Action Litigation.....	10
B.	The Proposed Class Notice of Settlement Should Be Approved	10
C.	The Proposed Attorneys’ Fees and Costs Are Reasonable	10
1.	Class Counsel Request an Award of Fees Based on the “Common Fund” Method	11
2.	The Requested Fee Award Is in Line with Typical Cases	12
3.	This Matter Involves A “Fee-Shifting” Provision of the Labor Code	12
4.	The Experience, Reputation and Ability of Class Counsel Support the Requested Fee Award	13
D.	The Service Award to Named Plaintiff Is Reasonable.....	13
E.	There is Good Cause for Selecting Legal Aid at Work As the <i>Cy Pres</i> Recipient.	15
IV.	CERTIFICATION FOR SETTLEMENT PURPOSES IS WARRANTED	16
A.	Legal Standard	16

1	B. Plaintiff Maintains That the Criteria for Class Certification Are Satisfied for	
2	Settlement Purposes.....	17
3	1. The Classes Are Ascertainable and Numerous	17
4	2. There are Many Common Issues of Law and Fact Which Predominate.....	17
5	3. Plaintiff’s Claims Are Typical of the Claims of the Class.....	18
6	4. Plaintiff and His Counsel Meet the Adequacy Requirement	18
7	5. A Class Action is Superior to a Multiplicity of Litigation.....	19
8	V. THE PROPOSED NOTICE IS CONSTITUTIONALLY SOUND.....	19
9	A. The Proposed Notice Plan Satisfies Due Process	19
10	B. The Notice is Accurate and Informative	19
11	VI. CONCLUSION	20

TABLE OF AUTHORITIES

CASES

<i>Bowles v. Super. Ct.</i> (1955) 44 Cal.2d 574	17
<i>Cartt v. Super Ct.</i> (1975) 50 Cal.App.3d 960.....	19, 20
<i>Chavez v. Netflix, Inc.</i> (2008) 162 Cal.App.4th 43.....	12
<i>City and County of San Francisco v. Sweet</i> (1995) 12 Cal.4th 105.....	11
<i>Classen v. Weller</i> (1983) 145 Cal.App.3d 27	18
<i>Clothesrigger, Inc. v. GTE Corp.</i> (1987) 191 Cal.App.3d 605.....	18
<i>Collins v. Rocha</i> (1972) 7 Cal.3d 232	17
<i>D’Amico v. Bd. of Medical Examiners</i> (1974) 11 Cal.3d 1	11
<i>Daar v. Yellow Cab Co.</i> (1967) 67 Cal. 2d 695.....	16
<i>Dunk v. Ford Motor Co.</i> (1996) 48 Cal.App.4th 1794	7
<i>Gentry v. Super. Ct.</i> (2007) 42 Cal.4th 443.....	14
<i>Kullar v. Foot Locker Retail, Inc.</i> (2008) 168 Cal.App.4th 116.....	8
<i>Laffitte v. Robert Half Int’l Inc.</i> (2016) 1 Cal.5th 480.....	11, 12
<i>Linder v. Thrifty Oil Co.</i> (2000) 23 Cal.4th 429.....	16
<i>Mallick v. Super. Ct.</i> (1979) 89 Cal.App.3d 434.....	7
<i>McGhee v. Bank of America</i> (1976) 60 Cal.App.3d 442	19
<i>Miller v. Woods</i> (1983) 148 Cal. App. 3d 862	19
<i>Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles</i> (2010) 186 Cal.App.4th 399	8, 13
<i>Quinn v. State of California</i> (1995) 15 Cal.3d 162.....	11
<i>Richmond v. Dart Indus., Inc.</i> (1981) 29 Cal. 3d 462.....	16, 17
<i>Rodriguez v. W. Publ’g Corp.</i> (9th Cir. 2009) 563 F.3d 948	13
<i>Rose v. City of Hayward</i> (1981) 126 Cal.App.3d 926	17
<i>Serrano v. Priest</i> (1977) 20 Cal.3d 25.....	11
<i>Stamburgh v. Super. Ct.</i> (1976) 62 Cal.App.3d 231	8
<i>Wershba v. Apple Computers, Inc.</i> (2001) 91 Cal.App.4th 224.....	9
<i>Wilner v. Sunset Life Ins. Co.</i> (2000) 78 Cal.App.4th 952	17

STATUTES

<i>Dennis v. Kellogg Co.</i> (9th Cir. 2012) 697 F.3d 858	15
<i>Frank v. Eastman Kodak Co.</i> (W.D.N.Y. 2005) 228 F.R.D. 174	14
<i>Leyva v. Medline Ind.</i> (9th Cir. 2013) 716 F.3d 510	19
<i>Priddy v. Edelman</i> (6th Cir. 1989) 883 F.2d 438	8
<i>Six Mexican Workers v. Arizona Citrus Growers</i> (9th Cir. 1990) 904 F.2d 1301.....	15
<i>Van Vranken v. Atlantic Richfield Company</i> (N.D. Cal. 1995) 901 F.Supp. 294.....	12

OTHER AUTHORITIES

Cal. Civ. Proc. Code § 384.....	15
Code of Civil Procedure § 382.....	16, 17
Labor Code § 1194	12
Labor Code § 90.5	14

REGULATIONS

California Rules of Court, Rule 3.766.....	19
California Rules of Court, Rule 3.769(f).....	10

CONSTITUTIONAL PROVISIONS

Conte & Newberg, <i>Newberg on Class Actions</i> (3rd Ed.) § 11.51	8
Conte & Newberg, <i>Newberg on Class Actions</i> (3rd Ed.) § 14.03	12
Conte & Newberg, <i>Newberg on Class Actions</i> (3rd Ed.) § 8.39	20

8

Theodore Eisenberg & Jeffrey P. Miller, “Incentive Awards to Class Action Plaintiffs: An Empirical Study”, 53 <i>UCLA L. Rev.</i> 1303 (2006)	14, 15
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff Darrell Colter (“Plaintiff”) seeks preliminary approval of a proposed \$1,375,000.00 non-reversionary, wage and hour class action settlement with Defendant Propulsion Controls Engineering (“Defendant,” and together with Plaintiff, the “Parties”). The Settlement will provide substantial monetary payments to approximately 711 class members. And, as set forth more fully below, the proposed Settlement satisfies all the criteria for settlement approval under California law. The Settlement was reached after extensive investigation, discovery, and negotiations. The negotiations were at arms-length and were facilitated by an experienced class action mediator, Steven J. Serratore, Esq., over the course of a full day of mediation that was conducted via Zoom. Accordingly, Plaintiff requests that the Court preliminarily approve the proposed Settlement, certify the proposed settlement class, approve the proposed notice, and set a Final Approval Hearing.

II. SUMMARY OF THE LITIGATION AND SETTLEMENT

A. Plaintiff’s Claims

This is a wage and hour class action and Private Attorneys General Act (“PAGA”) (Cal. Lab. Code §§ 2699, *et seq.*) representative action. Plaintiff and the putative class members worked in California as non-exempt employees for Defendant during the class period. Defendant provides ship repair services in the commercial, military and private yacht industries and maintains its headquarters in San Diego, California. (Declaration of Justin F. Marquez in Support of Plaintiff’s Motion for Preliminary Approval of Class Action Settlement [“Marquez Decl.”], ¶ 2.)

Plaintiff alleges that Defendant’s payroll, timekeeping, and wage and hour practices resulted in Labor Code violations. Plaintiff alleges that Defendant failed to pay for all hours by implementing a rounding policy that systematically underpaid Plaintiff and putative class members’ wages. Plaintiff further alleges that Defendant failed to include all remuneration in the employees’ overtime rate and meal and rest period premiums. Plaintiff further alleges that Defendant failed to provide employees with legally compliant meal and rest periods. Based on these allegations, Plaintiff asserts claims against Defendant for failure to pay minimum and

1 straight time wages, failure to pay overtime wages, failure to provide meal periods, failure to
2 authorize and permit rest periods, failure to timely pay all final wages at termination, failure to
3 provide accurate itemized wage statements, failure to indemnify employees for expenditures,
4 unfair business practices, and civil penalties under PAGA. (*Id.* at ¶ 3.)

5 On September 1, 2020, Plaintiff filed a putative wage-and-hour class action complaint
6 against Defendant for: (1) failure to pay minimum and straight time wages (Cal. Lab. Code §§
7 204, 1194, 1194.2, and 1197); (2) failure to pay overtime wages (Cal. Lab. Code §§ 1194 and
8 1198); (3) failure to provide meal periods (Cal. Lab. Code §§ 226.7 and 512); (4) failure to
9 authorize and permit rest periods (Cal. Lab. Code §§ 226.7); (5) failure to timely pay final wages
10 at termination (Cal. Lab. Code §§ 201-203); (6) failure to provide accurate itemized wage
11 statements (Cal. Lab. Code § 226); (7) failure to indemnify employees for expenditures (Cal.
12 Lab. Code § 2802); and (8) unfair business practices (Cal. Bus. & Prof. Code §§ 17200, *et seq.*).
13 (*Id.* at ¶ 4.) On November 19, 2020, Plaintiff filed a First Amended Class Action Complaint.
14 (*Id.*) On February 22, 2022, Plaintiff filed a Second Amended Class and Representative Action
15 Complaint adding a claim for civil penalties under PAGA. (*Id.*)

16 **B. Discovery and Investigation**

17 Following the filing of the Complaint, the Parties informally exchanged documents and
18 information before mediating this action. Defendant produced a sampling of timekeeping and
19 payroll records for the class members. Defendant also provided documents of their wage and
20 hour policies and practices during the class period, and information regarding the total number
21 of current and former employees. (*Id.* at ¶ 5.)

22 After reviewing the documents regarding Defendant's wage and hour policies and
23 practices and analyzing Defendant's timekeeping and payroll records, Class Counsel was able
24 to evaluate the probability of class certification, success on the merits, and Defendant's
25 maximum monetary exposure for all claims. (*Id.* at ¶ 6.) Class Counsel also investigated the
26 applicable law regarding the claims and defenses asserted in the litigation. (*Id.*) Class Counsel
27 reviewed these records and utilized an expert to prepare a damages analysis prior to mediation.
28 (*Id.*)

1 **C. Settlement Negotiations**

2 On October 21, 2021, the Parties participated in private mediation with experienced class
3 action mediator, Steven J. Serratore, Esq. (*Id.* at ¶ 7.) The mediation was conducted via Zoom.
4 The settlement negotiations were at arm’s length and, although conducted in a professional
5 manner, were adversarial. The Parties went into the mediation willing to explore the potential
6 for a settlement of the dispute, but each side was also prepared to litigate their position through
7 trial and appeal if a settlement had not been reached. (*Id.*)

8 After extensive negotiations and discussions regarding the strengths and weaknesses of
9 Plaintiff’s claims and Defendant’s defenses, the Parties were able to reach a resolution, the
10 material terms of which are encompassed within the Settlement Agreement. (*Id.* at ¶ 8; Ex. 1
11 [Stipulation of Settlement (“Settlement” or “Settlement Agreement”)].)

12 Class Counsel has conducted a thorough investigation into the facts of this case. Based
13 on the foregoing informal discovery and their own independent investigation and evaluation,
14 Class Counsel is of the opinion that the Settlement is fair, reasonable, and adequate and is in
15 the best interests of the Settlement Class Members in light of all known facts and circumstances,
16 the risk of significant delay, the defenses that could be asserted by Defendant both to
17 certification and on the merits, trial risk, and appellate risk. (Marquez Decl., ¶ 15.)

18 Indeed, the \$1,375,000.00 Settlement represents approximately **54.6% of Class**
19 **Counsel’s assessment of the realistic maximum recovery** of \$2,518,792.93. (*Id.* at ¶ 23.)
20 Although Class Counsel estimated that Defendant’s maximum potential liability for all claims
21 was approximately \$14,265,328.70, when the risk of prevailing at certification and trial are
22 factored into the equation, Class Counsel believes that Defendant’s realistic exposure was
23 **\$2,518,792.93**, meaning the Settlement achieves a significant recovery. (*Id.* at ¶¶ 17-23.)
24 Considering the risk and uncertainty of prevailing at class certification and at trial, this is an
25 excellent result for the Class. Indeed, because of the proposed Settlement, class members will
26 receive timely, guaranteed relief and will avoid the risk of an unfavorable judgment.

27 **D. Key Terms of the Proposed Settlement**

28 Under the Settlement, Defendant will pay \$1,375,000.00 to resolve this litigation. This

amount is all-inclusive. The Settlement’s key terms include:

1. Settlement Class: For settlement purposes only, the Parties agree to the certification of a class pursuant to California Code of Civil Procedure § 382 defined as: “All persons who were employed by Defendant and performed work for Defendant in California as a non-exempt employee during the Settlement Period (together, collectively referred to as the “Class Members”).” (Settlement, § I (P).)

2. Settlement Period: The Settlement Period means the period from September 1, 2016 through January 19, 2022. (Settlement, § I (Q).)

3. Settlement Amount: This amount is \$1,375,000.00, for all claims, including wages, interest, the Net Settlement Payments, the Class Counsel Award, litigation costs, Administrative Costs, payment to the Labor and Workforce Development Agency (“LWDA”) for the alleged PAGA penalties, all other penalties, and the Class Representative Service Award. (Settlement, § I (O).)

4. No Reversion: This is a non-reversionary settlement. Settlement checks will be valid for one hundred and eighty (180) days from the date of issuance. Pursuant to California Code of Civil Procedure § 384(a), any unpaid cash residue or unclaimed or abandoned class member funds, plus any accrued interest thereon, will be sent to Legal Aid at Work at 180 Montgomery Street, Suite 600, San Francisco, CA 94104. (Settlement, § XI (D).) Neither Plaintiff nor Class Counsel have any interest, financial or otherwise, in the proposed *cy pres* recipient. (Marquez Decl., ¶¶ 12-13.)

5. Release as to All Settlement Class Members: The class release is limited to “any and all claims, causes of action, demands, rights, and liability that were alleged in the Second Amended Complaint or which could have been alleged in the Second Amended Complaint based on the facts and allegations asserted therein arising during the Settlement Period against Defendant, and its parents, subsidiaries, affiliates, officers, shareholders, directors, agents, employees, attorneys, and insurers (“Released Parties”), including any claims for violation of the California Labor Code or any other state, local, or federal law, statute, regulation or ordinance imposing liability and/or obligations that could be brought based on the allegations in the Second Amended

1 Complaint, through the Settlement Period, including the Fair Labor Standards Act (the “Released
2 Claims”). This release specifically includes claims for any wages, statutory penalties, civil
3 penalties, liquidated damages, interest, restitution, attorneys’ fees and costs for the following: 1)
4 all claims, under any legal theory of liability, for the failure to pay overtime or double time wages
5 owed pursuant to California Labor Code §§ 204, 510, 1194, and 1198, the IWC Wage Orders or
6 any comparable federal statute under any theory of liability, including the Fair Labor Standards
7 Act (FLSA); 2) all claims, under any legal theory of liability, for the failure to pay all wages of
8 any kind, including any minimum wage or straight time wages, owed pursuant to California Labor
9 Code §§ 204, 510, 1194, 1194.2, 1197, and 1198, the IWC Wage Orders, local minimum wage
10 ordinances, or any comparable federal statute under any theory of liability, including the Fair Labor
11 Standards Act (FLSA); 3) all claims, under any legal theory of liability, for failure to provide meal
12 periods pursuant to California Labor Code §§ 226.7 and 512, and the IWC Wage Orders; 4) all
13 claims, under any legal theory of liability, for the failure to provide rest periods pursuant to
14 California Labor Code § 226.7 and the IWC Wage Orders; 5) all claims, under any legal theory of
15 liability, for the failure to properly calculate any premiums owed and/or paid pursuant to California
16 Labor Code § 226.7(b), and the IWC Wage Orders; 6) all claims, under any legal theory of liability,
17 for failure to indemnify employees for expenditures pursuant to California Labor Code § 2802; 7)
18 all claims, under any legal theory of liability, for violation of Business & Professions Code §§
19 17200, *et seq.*; 8) all claims, under any legal theory of liability, for any penalties of any kind arising
20 from an alleged failure to pay final wages or other amounts allegedly owed to Class Members
21 pursuant to California Labor Code §§ 201-203; 9) all claims, under any legal theory of liability, for
22 any penalties of any kind arising from any alleged wage statement violations pursuant to California
23 Labor Code §§ 226, 1174, and 1174.5; and 10-1) all claims, under any legal theory of liability, for
24 civil penalties pursuant to PAGA (Labor Code §§ 2698 *et seq.*) for the various Labor Code
25 violations alleged, including penalties pursuant to California Labor Code §§ 210, 226.3, 1174.5,
26 558, and 1197.1.” (Settlement, § VII (A).)

27 6. PAGA Allocation: The settlement includes \$50,000.00 allocated to Plaintiff’s
28 claims under PAGA, with 75% (\$37,500.00) being paid to the LWDA and 25% (\$12,500.00) being

1 paid to the Aggrieved Employees. (Settlement, § XVI.) Class Counsel submitted the proposed
2 settlement to the LWDA before filing this Motion for Preliminary Approval. (Marquez Decl., ¶
3 9.)

4 7. Net Settlement Fund: The “Net Settlement Fund” or “Net Settlement Amount” is
5 the amount that remains and that shall be paid to Settlement Class Members after the following
6 amounts are subtracted: (1) attorneys’ fees and Litigation costs, (2) Administrative Costs, (3)
7 enhancement to the Named Plaintiff, and (4) the PAGA Settlement. (Settlement, § I (K).)

8 8. Distribution Formula: Members of the Settlement Class not opting out will receive
9 a lump sum payment as good and valuable consideration for the waiver and release of claims as
10 set forth in Section D (5), above, in an amount determined by the Settlement Administrator in
11 accordance with the provisions as outlined in Section XI(A) of the Settlement Agreement.

12 9. Tax Allocation: Any settlement money paid to Settlement Class Members will be
13 allocated as 10% wages, 45% penalties, and 45% interest. (Settlement, § XV.)

14 10. Class Representative Service Award: Subject to Court approval, Plaintiff shall be
15 paid an enhancement award not to exceed \$10,000.00, which will be paid from the Settlement
16 Amount. (Settlement, § XIV.) This amount is for Plaintiff’s time and effort in bringing and
17 presenting the action, and in exchange for a general release of all claims, known or unknown,
18 pursuant to Civil Code Section 1542. (Settlement, § VII (B).) If the Court approves a lesser
19 enhancement, then the unapproved portion or portions shall revert into the Net Settlement Amount.
20 (Settlement, § XIV.)

21 11. Attorneys’ Fees and Costs: The Settlement provides that Defendant will not oppose
22 a fee application of up to 33 1/3% (\$458,333.33) of the Settlement Amount, plus actual out-of-
23 pocket Litigation costs not to exceed \$25,000.00. (Settlement, § XIII.) At this time, Class
24 Counsel’s costs are approximately \$16,449.89. (Marquez Decl., ¶ 38.)

25 12. Notice of Proposed Class Action Settlement: The Notice sets forth in plain terms, a
26 statement of the case, the terms of the Settlement Agreement, the approximate amount of attorneys’
27 fees, costs, and service award being sought, and an explanation of how the settlement allocations
28 are calculated. (Settlement, Ex. A.) The Notice also sets forth the approximate amount of money

1 the class members would receive in the event all class members participate in the settlement. (*Id.*)
2 The Notice also provides a clear procedure for class members to opt-out in the event they decide
3 to not participate in the settlement. (*Id.*) Class Members will be notified by first class mail of the
4 settlement. (Settlement, § IX (C).) Phoenix Class Action Administration Solutions, the proposed
5 Settlement Administrator, will undertake its best efforts to ensure that the notice is provided to the
6 current addresses of class members, including conducting a national change of address search and
7 re-mailing the notice to updated addresses. (*Id.*) Notice will be provided in English and Spanish.
8 (Marquez Decl., ¶ 11; Ex. 2 [Settlement Administrator Bid].)

9 13. Workweek Disputes: The Notice sets forth each class members' total workweeks
10 and provides a clear procedure for class members to dispute their allocated number of total
11 workweeks in the event they wish to do so. (Settlement, Ex. A.)

12 **III. DISCUSSION**

13 To prevent fraud, collusion, or unfairness to the class, the settlement of a class action
14 requires court approval. (*Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1800-01.) This
15 Court has wide discretion to determine whether the proposed settlement is fair. (*Mallick v. Super.*
16 *Ct.* (1979) 89 Cal.App.3d 434, 438.) Fairness is presumed when: (1) the settlement is reached
17 through arm's-length bargaining; (2) investigation is sufficient to allow counsel and the court to
18 act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of objectors
19 is small. (*Dunk*, 48 Cal.App.4th at p. 1800.)

20 In considering whether a settlement is reasonable, the trial court should consider relevant
21 factors, which may include the strength of Plaintiff's case, the risk, expense, complexity and likely
22 duration of further litigation, the risk of maintaining class action status through trial, the amount
23 offered in settlement, the extent of discovery completed and the stage of the proceedings, the
24 experience and views of counsel, the presence of a governmental participant, and the reaction of
25 the class members to the proposed settlement. (*Kullar v. Foot Locker Retail, Inc.*, (2008) 168
26 Cal.App.4th 116, 128.) In order to approve a class action settlement, the court must satisfy itself
27 that the class settlement is within the "ballpark" of reasonableness. (*Id.* at p. 133.) The record
28 need not contain an explicit statement of the maximum theoretical recovery. (*Munoz v. BCI Coca-*

1 *Cola Bottling Co. of Los Angeles* (2010) 186 Cal.App.4th 399, 408-9 [holding that *Kullar* does not
2 require “an explicit statement of the maximum amount the plaintiff class could recover if it
3 prevailed on all its claims”, but instead, only an “understanding of the amount that is in controversy
4 and the realistic range of outcomes of the litigation.”].)

5 As discussed below, Class Counsel has provided information exceeding the threshold
6 required to provide this Court with materials and information necessary to determine that the
7 proposed settlement is fair, adequate, and reasonable.

8 **A. The Settlement Is Fair, Reasonable, Adequate, and the Product of**
9 **Investigation, Litigation, and Negotiation**

10 **1. The Settlement Is the Product of Discovery, Investigation, and**
11 **Informed and Non-Collusive Arm’s-Length Negotiations**

12 Courts presume the absence of fraud or collusion in the negotiation of a settlement, unless
13 evidence to the contrary is offered; thus, there is a presumption here that the negotiations were
14 conducted in good faith. (Conte & Newberg, *Newberg on Class Actions* (3rd Ed.) § 11.51.)
15 Settlement is favored, and settlement agreements are realistically assessed. (*Stamburgh v. Super.*
16 *Ct.* (1976) 62 Cal.App.3d 231, 236; *Priddy v. Edelman* (6th Cir. 1989) 883 F.2d 438, 447 [“The
17 fact that a plaintiff might have received more if the case had been fully litigated is no reason not
18 to approve the settlement.”].)

19 The Settlement was reached following extensive negotiations following a full day of
20 mediation with experienced employment mediator Steven J. Serratore, Esq. (Marquez Decl., ¶¶ 7-
21 8.) The settlement negotiations were at arm’s length and, although conducted in a professional
22 manner, were adversarial. (*Id.*) The Parties went into the mediation willing to explore the potential
23 for a settlement of the dispute, but each side was also prepared to litigate their or its position
24 through trial and appeal if a settlement had not been reached. (*Id.*)

25 Prior to reaching this settlement, Class Counsel conducted informal discovery concerning
26 the claims set forth in the Litigation, such as a sample of class member timekeeping and payroll
27 records, Defendant’s policies and procedures concerning the payment of wages, the provision of
28 meal and rest breaks, issuance of wage statements, and providing all wages at separation, as well

1 as information regarding the number of putative class members and the mix of current versus
2 former employees, the wage rates in effect, and the amount of meal and rest period premium wages
3 paid to class members. (*Id.* at ¶¶ 5-6.) In conjunction with their extensive factual investigation,
4 Class Counsel investigated the applicable law regarding the claims and defenses asserted in the
5 litigation. (*Id.*) Thus, Plaintiff and his counsel were able to act intelligently and effectively in
6 negotiating the proposed Settlement. (*Id.*)

7 Class Counsel also has considerable experience and has demonstrated competence with
8 litigating wage and hour class actions. (*Id.* at ¶¶ 40-50.) Again, this supports the position that the
9 terms of the Settlement are premised on objective evidence that has been considered and weighed
10 in light of the risks, expenses, and time consumption to both sides of continued litigation of this
11 action.

12 **2. The Settlement Is Fair and Reasonable in Light of the Parties’**
13 **Respective Legal Positions**

14 A settlement is not judged against what Plaintiff might recover had he prevailed at trial, nor
15 does the settlement have to provide 100% of the damages sought to be fair and reasonable.
16 (*Wershba v. Apple Computers, Inc.* (2001) 91 Cal.App.4th 224, 246, 250 [“Compromise is inherent
17 and necessary in the settlement process...even if the relief afforded by the proposed settlement is
18 substantially narrower than it would be if the suits were to be successfully litigated, this is no bar
19 to a class settlement because the public interest may indeed be served by a voluntary settlement in
20 which each side gives ground in the interest of avoiding litigation.”].)

21 This settlement avoids the risks and the accompanying expense of further litigation.
22 (Marquez Decl., ¶ 25.) While Plaintiff is confident in the merits of their overall claims, a legitimate
23 controversy exists as to each cause of action. (*Id.* at ¶ 24.) For example, Plaintiff and class
24 members worked a portion of their workdays on federal enclaves, which are subject to potential
25 federal exemptions. (*Id.*) Plaintiff also recognizes that proving the amount of wages due to each
26 class member would be an expensive, time-consuming, and uncertain proposition. (*Id.*)

27 The proposed settlement of \$1,375,000.00 therefore represents a substantial recovery when
28 compared to Plaintiff’s reasonably forecasted recovery. (*Id.* at ¶¶ 17-27.) Because of the proposed

1 Settlement, class members will receive timely, guaranteed relief and will avoid the risk of an
2 unfavorable judgment. When considering the risks of litigation, the uncertainties involved in
3 achieving class certification, the burdens of proof necessary to establish liability, the probability
4 of appeal of a favorable judgment, it is clear that the settlement amount of \$1,375,000.00 is within
5 the “ballpark” of reasonableness, and preliminary settlement approval is appropriate. (*Id.*) ***Indeed,***
6 ***each Settlement Class Member is eligible to receive an average net benefit of approximately***
7 ***\$1,148.62.*** (*Id.* at ¶ 26.)

8 **3. Class Counsel Has Extensive Experience in Class Action Litigation**

9 The settlement negotiations were conducted by highly capable and experienced counsel.
10 Class Counsel have a strong record of vigorous and effective advocacy for their clients and are
11 experienced in handling complex wage and hour class action litigation. (Marquez Decl., ¶¶ 39-
12 50.) Although Plaintiff and his counsel were prepared to litigate the claims alleged in the litigation,
13 they support the proposed Settlement as being in the best interests of the class.

14 **B. The Proposed Class Notice of Settlement Should Be Approved**

15 The Notice of Proposed Class Action Settlement, which is attached to the Settlement
16 Agreement as Exhibit A, should be approved for dissemination to the class. The Notice sufficiently
17 informs the class of the terms of the settlement and of their rights to be excluded from the
18 settlement. And if there are class members who wish to object to this proposed class action
19 settlement, they will have the opportunity to submit their objections and be heard at the Final
20 Approval Hearing. Accordingly, the proposed Notice meets all the requirements of Rule 3.769(f)
21 of the California Rules of Court.

22 **C. The Proposed Attorneys’ Fees and Costs Are Reasonable**

23 Under the Settlement, subject to the Court’s approval, Defendant agreed not to oppose Class
24 Counsel’s request for reasonable attorneys’ fees in amount of \$458,333.33, which is 33 1/3% of
25 the gross Settlement Amount, and up to \$25,000.00 in costs, to be paid out of the Settlement
26 Amount. These amounts are disclosed to all class members in the Notice of Proposed Class Action
27 Settlement and are reasonable.

1 **1. Class Counsel Request an Award of Fees Based on the “Common**
2 **Fund” Method**

3 California courts have long awarded attorneys’ fees as a percentage of the benefit created
4 by counsel in pursuing claims on behalf of a class. The California Supreme Court held that “when
5 a number of persons is entitled in common to a specific fund, and an action brought by a plaintiff
6 or plaintiffs for the benefit of all results in the creation or preservation of that fund, such plaintiff
7 or plaintiffs may be awarded attorneys’ fees out of the fund.” (*Serrano v. Priest* (1977) 20 Cal.3d
8 25, 34, quoting *D’Amico v. Bd. of Medical Examiners* (1974) 11 Cal.3d 1.)

9 Class Counsel seek an award of attorneys’ fees on the “percentage of recovery/common
10 fund” theory. The purpose of this approach is to “spread litigation costs proportionally among all
11 the beneficiaries so that the active beneficiary does not bear the entire burden alone.” (*Vincent*,
12 *supra*, 557 F.2d at p. 769.) In *Quinn v. State of California* (1995) 15 Cal.3d 162, the California
13 Supreme Court stated: “[O]ne who expends attorneys’ fees in winning a suit which creates a fund
14 from which others derive benefits may require those passive beneficiaries to bear a fair share of
15 the litigation costs.” (*Id.* at p. 167.) Similarly, in *City and County of San Francisco v. Sweet*
16 (1995) 12 Cal.4th 105, the California Supreme Court recognized that the common fund doctrine
17 has been applied “consistently in California when an action brought by one party creates a fund in
18 which other persons are entitled to share.” (*Id.* at p. 110.)

19 The California Supreme Court recently affirmed in *Laffitte v. Robert Half Int’l Inc.* (2016)
20 1 Cal.5th 480 that, “when class action litigation establishes a monetary fund for the benefit of the
21 class members, and the trial court in its equitable powers awards class counsel a fee out of that
22 fund, the court may determine the amount of a reasonable fee by choosing an appropriate
23 percentage of the fund created.” (*Id.* at p. 503.) The court explained: “The recognized advantages
24 of the percentage method—including relative ease of calculation, alignment of incentives between
25 counsel and the class, a better approximation of market conditions in a contingency case, and the
26 encouragement it provides counsel to seek an early settlement and avoid unnecessarily prolonging
27 the litigation—convince us the percentage method is a valuable tool that should not be denied our
28 trial courts.” (*Id.* [internal citations omitted].)

2. The Requested Fee Award Is in Line with Typical Cases

According to a leading treatise on class actions, “No general rule can be articulated on what is a reasonable percentage of a common fund. Usually, 50% of the fund is the upper limit on a reasonable fee award from a common fund in order to assure that the fees do not consume a disproportionate part of the recovery obtained for the class, although somewhat larger percentages are not unprecedented.” (*See* Conte & Newberg, *Newberg on Class Actions* (3rd Ed.) § 14.03.) Attorneys’ fees that are fifty percent of the fund are typically considered the upper limit, with thirty to forty percent commonly awarded in cases where the settlement is relatively small. (*Id.*; see also *Van Vranken v. Atlantic Richfield Company* (N.D. Cal. 1995) 901 F.Supp. 294 [stating that most cases where 30-50 percent was awarded involved “smaller” settlement funds of under \$10 million].)

Here, Plaintiff requests attorneys’ fees equal to 33 1/3% of the Settlement Amount, which is in line with the prevailing guidelines established in California case law and academic literature and is consistent with awards in California. (*See Chavez v. Netflix, Inc.* (2008) 162 Cal.App.4th 43, 66, n.11 [“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.”].) Accordingly, Plaintiff respectfully requests that the Court approve the attorneys’ fees as negotiated by the Parties and requested herein.

3. This Matter Involves A “Fee-Shifting” Provision of the Labor Code

Labor Code § 1194(a) provides for the recovery of “minimum wage or overtime compensation, including interest thereon, reasonable attorney’s fees, and costs of suit.” Under this section, Plaintiff would be permitted to recover his actual attorneys’ fees, even if those fees were larger than the total class recovery at the conclusion of this case. This settlement is beneficial in that it limits the risk of continued expenses and consumption of time, energy, and resources facing Defendant while at the same time rewarding Class Counsel for their decision to assume risk by taking on this matter. In fact, prosecution of this action involved significant financial risk for Class Counsel. (Marquez Decl., ¶¶ 34-36.) Class Counsel undertook this matter solely on a contingent basis, with no guarantee of recovery. (*Id.*) Once counsel undertook this litigation on behalf of the

1 Class, Class Counsel committed to pursue it to its conclusion, placing its fiduciary duty to the Class
2 ahead of all other concerns.

3 **4. The Experience, Reputation and Ability of Class Counsel Support the**
4 **Requested Fee Award**

5 As demonstrated by their past experience in pursuing class actions on behalf of consumers
6 and employees, Class Counsel possess considerable expertise in litigating class actions. (Marquez
7 Decl., ¶¶ 40-50.) Class Counsel has been involved as lead counsel or co-counsel in several class
8 actions that resulted in millions in recovery. (*Id.*) Because it is reasonable to compensate class
9 counsel commensurate with their skill, reputation and experience, Class Counsel’s requested fee
10 award is supported here.

11 Class Counsel’s experience in wage and hour class actions was integral in evaluating the
12 strengths and weaknesses of the case against Defendant and the reasonableness of the settlement.
13 Practice in the narrow field of wage and hour litigation requires skill and knowledge concerning
14 the rapidly evolving substantive law (state and federal), as well as the procedural law of class
15 action litigation. Based on these and other factors, Class Counsel has frequently received fee
16 awards of this percentage from the gross recovery for the class. Therefore, the requested fee award
17 is reasonable and fair.

18 **D. The Service Award to Named Plaintiff Is Reasonable**

19 Named plaintiffs in class action lawsuits “are eligible for reasonable incentive payments to
20 compensate them for the expense or risk they have incurred in conferring a benefit on other
21 members of the class.” (*Munoz, supra*, 86 Cal.App.4th at p. 412.) Courts routinely grant approval
22 of class action settlement agreements containing enhancements for the class representatives, which
23 are necessary to provide incentive to represent the class, and are appropriate given the benefit the
24 class representatives help to bring about for the class. (*See Rodriguez v. W. Publ’g Corp.* (9th Cir.
25 2009) 563 F.3d 948, 958-59.)

26 Service awards are particularly important to plaintiffs in wage and hour cases because they
27 promote the important public policies underlying the wage and hour laws. This strong policy is
28 codified in California Labor Code section 90.5, which provides, “it is the policy of this state to

1 vigorously enforce minimum labor standards in order to ensure employees are not required or
2 permitted to work under substandard unlawful conditions....”). Nonetheless, the California
3 Supreme Court has noted that “retaliation against employees for asserting statutory rights under
4 the Labor Code is widespread,” despite anti-retaliation statutes designed to protect employees.
5 (*Gentry v. Super. Ct.* (2007) 42 Cal.4th 443, 460-61.) In this context, class representatives should
6 be rewarded for assuming the risk of retaliation for the sake of class members. (*See Frank v.*
7 *Eastman Kodak Co.* (W.D.N.Y. 2005) 228 F.R.D. 174, 187.)

8 Under the settlement agreement, subject to the Court’s approval, Defendant agreed not to
9 oppose Plaintiff’s request for a Service Award in the amount of \$10,000.00 to Plaintiff, to be paid
10 from the Settlement Amount. This amount is also in exchange for Plaintiff’s general release of all
11 claims against Defendant. Class Counsel represent that Plaintiff devoted a great deal of time and
12 work assisting counsel in the case, communicated with counsel very frequently for litigation and
13 to prepare for mediation, and was frequently in contact with Class Counsel during the mediation.
14 (Marquez Decl., ¶¶ 28-32.) This amount is reasonable particularly in light of the substantial
15 benefits Plaintiff generated for all class members. (*Id.*) Indeed, in *Karl Adams, III, et al. v.*
16 *MarketStar Corporation, et al.*, No. 2:14-cv-02509-TLN-DB, Class Counsel Justin F. Marquez
17 helped negotiate a \$2.5 million class action settlement for 339 class members, and the court
18 approved a \$25,000.00 class representative incentive award for each named plaintiff. (Marquez
19 Decl., ¶ 32.)

20 When compared with the amounts awarded in typical class action cases, the amount
21 requested here is particularly reasonable. Indeed, a **2006** study examining the average incentive
22 award given to class action plaintiffs from **1993 to 2002** found that the “average award per class
23 representative was \$15,992 and the median award per class representative was \$4,357.” (Theodore
24 Eisenberg & Jeffrey P. Miller, “Incentive Awards to Class Action Plaintiffs: An Empirical Study”,
25 53 UCLA L. Rev. 1303, 1308 (2006).) That same study found that named plaintiffs in employment
26 discrimination class actions received an average award of \$69,850 and a median award of \$31,081,
27 while named plaintiffs in other employment class actions received an average award of \$12,121
28 and a median award of \$13,059. (*Id.* at p. 1334.) The authors of the study found that higher awards

1 in employment cases reflected the “courts’ wish to make representative plaintiffs whole by
2 compensating them for the high costs of their service to the class, including risks of stigmatization
3 or retaliation on the job.” (*Id.* at p. 1308.)

4 **E. There is Good Cause for Selecting Legal Aid at Work As the *Cy Pres***
5 **Recipient.**

6 A *cy pres* award allows for “aggregate calculation of damages, the use of summary claim
7 procedures, and distribution of unclaimed funds to indirectly benefit the entire class.” (*Six Mexican*
8 *Workers v. Arizona Citrus Growers* (9th Cir. 1990) 904 F.2d 1301, 1305.) “To ensure that the
9 settlement retains some connection to the plaintiff class and the underlying claims, however, a *cy*
10 *pres* award must qualify as ‘the next best distribution’ to giving the funds directly to class
11 members.” (*Dennis v. Kellogg Co.* (9th Cir. 2012) 697 F.3d 858, 865, quoting *Six Mexican*
12 *Workers*, 904 F.2d at 1308.)

13 Moreover, in the class action context, California Code of Civil Procedure permits unpaid
14 cash residues in a class action settlement to be distributed to “**nonprofit organizations or**
15 **foundations to support projects that will benefit the class or similarly situated persons,** or that
16 **promote the law consistent with the objectives and purposes of the underlying cause of action,**
17 to child advocacy programs, or to **nonprofit organizations providing civil legal services to the**
18 **indigent.**” (Cal. Civ. Proc. Code § 384(b) (emphasis added).)

19 Here, under the terms of the settlement agreement, in the event settlement checks remain
20 uncashed after 180 days, those funds shall be donated to Legal Aid at Work as a *cy pres* beneficiary.
21 (Settlement, § XI (D).) Legal Aid at Work is a nonprofit organization that provides legal assistance
22 to low-income, working families throughout California.¹ The organization also frequently
23 represents low-wage workers who are victims of wage violations.² Accordingly, Legal Aid at
24 Work is a proper recipient of *cy pres* funds for this action.

25 _____
26 ¹ See “Our Mission and How We Work,” Legal Aid at Work website, *available at*
27 <https://legalaidatwork.org/our-mission-and-how-we-work/> (April 28, 2022).

28 ² See “Winning Fair Wages and Working Conditions,” Legal Aid at Work website,
available at <https://legalaidatwork.org/our-programs/combating-wage-theft/> (April 28, 2022).

1 **IV. CERTIFICATION FOR SETTLEMENT PURPOSES IS WARRANTED**

2 **A. Legal Standard**

3 The proposed Settlement Class is well suited for class certification. All of the claims derive
4 from a core set of alleged violations of California’s wage and hour laws and regulations. For the
5 reasons set forth more fully below, for purposes of settlement only, the Class satisfies the
6 prerequisites for certification under Code of Civil Procedure § 382. Section 382 provides: “when
7 the question is one of a common or general interest, of many persons, or when the parties are
8 numerous, and it is impracticable to bring them all before the court, one or more may sue or defend
9 for the benefit of all.” (Code Civ. Proc., § 382.) There are two requirements to section 382: “(1)
10 There must be an ascertainable class; and (2) there must be a well-defined community of interest
11 in the questions of law and fact involved affecting the parties to be represented.” (*Daar v. Yellow*
12 *Cab Co.* (1967) 67 Cal. 2d 695, 704 [citations omitted].) To clarify these requirements, the
13 California Supreme Court has looked to Federal Rule of Civil Procedure 23 to explain that the
14 community-of-interest requirement itself embodies three factors: “(1) predominant questions of
15 law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class
16 representatives who can adequately represent the class.” (*Richmond v. Dart Indus., Inc.* (1981) 29
17 Cal. 3d 462, 470.)

18 California law and policy favor the fullest and most flexible use of the class action device.
19 (*Id.* at pp. 469-73.) Indeed, “Courts long have acknowledged the importance of class actions as a
20 means to prevent a failure of justice in our judicial system” particularly where the rights of
21 consumers are at issue. (*Linder v. Thrifty Oil Co.* (2000) 23 Cal. 4th 429, 434.) Any doubt as to
22 the appropriateness of class treatment should be resolved in favor of certification. (*Richmond,*
23 *supra*, 29 Cal.3d at pp. 473-75.)

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1 **B. Plaintiff Maintains That the Criteria for Class Certification Are Satisfied for**
2 **Settlement Purposes.**

3 **1. The Classes Are Ascertainable and Numerous**

4 The proposed class that Plaintiff seeks to represent is easily ascertainable, and includes
5 approximately 711 employees of Defendant.

6 Plaintiff maintains that there is an easily ascertainable class, defined by objective and
7 precise criteria. Because class members are identified using specific criteria in the regular business
8 records of Defendant (i.e., job classification), the class is ascertainable. (*Wilner v. Sunset Life Ins.*
9 *Co.* (2000) 78 Cal.App.4th 952, 959-60 [class membership defined by ownership of product that
10 is the subject of the lawsuit is sufficient to make the class ascertainable].)

11 “The requirement of Code of Civil Procedure section 382 that there be ‘many’ parties to a
12 class action suit is indefinite and has been construed liberally.” (*Rose v. City of Hayward* (1981)
13 126 Cal.App.3d 926, 934.) “Where a question is of common interest to ‘many’ persons, an action
14 may be maintained as a class action even where the parties are numerous and it is in fact practicable
15 to join them all.” (*Id.*) “No set number is required as a matter of law for the maintenance of a
16 class action.” (*Id.*) “Thus, our Supreme Court has upheld a class representing the 10 beneficiaries
17 of a trust in an action for removal of the trustees.” (*Id.*, citing *Bowles v. Super. Ct.* (1955) 44 Cal.2d
18 574; see also, *Collins v. Rocha* (1972) 7 Cal.3d 232 [upholding a 35 member class.]) Therefore,
19 Plaintiff contends that numerosity is plainly satisfied.

20 **2. There are Many Common Issues of Law and Fact Which Predominate**

21 The Court should grant conditional class certification for settlement purposes here on the
22 grounds that questions of law and fact common to all class and subclass predominate over any
23 individual questions. This inquiry tests whether proposed classes are sufficiently cohesive to
24 warrant adjudication by representation. (*See, e.g., Clothesrigger, Inc. v. GTE Corp.* (1987) 191
25 Cal.App.3d 605.)

26 Here, the employment practices at issue are: whether Defendant had legally compliant
27 policies and practices for all hours worked, including overtime wages; whether Defendant had
28 legally compliant policies and practices to provide employees with meal periods; whether

1 Defendant had legally compliant policies and practices authorizing and permitting its employees
2 to take rest periods; whether final payment of wages was untimely and excluded unpaid wages,
3 including meal period premium and rest period premium wages; whether the wage statements were
4 consequently non-compliant; and whether Defendant adequately reimbursed employees for
5 business expenditures. Plaintiff contends that the factual and legal issues are the same for all of
6 the identified class members, including Plaintiff. Further, Plaintiff contends that all class members
7 suffered from, and seek redress for, the same alleged injuries.

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

9 The typicality requirement does not focus on the individual characteristics or circumstances
10 of the representative plaintiff compared to those of the remainder of the class, but rather upon the
11 typicality of the proposed representative's claims as they relate to the defendant's conduct and
12 activities. (*Classen v. Weller* (1983) 145 Cal.App.3d 27, 47 ["[t]he only requirements are that
13 common questions of law and fact predominate and that the class representative be similarly
14 situated" vis-à-vis the class.].) A representative plaintiff's claims are typical of the class if they
15 arise from the same event, practice or course of conduct, and if the claims rest on the same legal
16 theories. (*Id.*) That is precisely the case here. Plaintiff is a former employee of Defendant; as
17 such, he alleges that he was subject to the same policies and practices as other similarly situated
18 employees.

19 **4. Plaintiff and His Counsel Meet the Adequacy Requirement**

20 The adequacy of representation requirement is met by fulfilling two conditions: first, a
21 named plaintiff must be represented by counsel qualified to conduct the pending litigation; second,
22 a named plaintiff's interests cannot be antagonistic to those of the class. (*McGhee v. Bank of*
23 *America* (1976) 60 Cal.App.3d 442, 451.)

24 All of these requirements are met here for settlement purposes. Plaintiff retained counsel
25 with extensive experience in prosecuting complex class actions, including similar class actions that
26 previously settled. (Marquez Decl., ¶¶ 40-50.) Class Counsel unquestionably is "qualified,
27 experienced and generally able to conduct the proposed litigation." (*Miller v. Woods* (1983) 148
28 Cal.App.3d 862, 875.) In addition, Plaintiff has no conflicts, and Plaintiff has, with counsel,

1 litigated this case and diligently reviewed the settlement terms, showing their dedication.
2 Plaintiff's willingness to serve as a representative demonstrates his serious commitment to bringing
3 about the best results possible for the class and subclass. (*McGhee, supra*, 60 Cal.App.3d at p.
4 451.)

5 **5. A Class Action is Superior to a Multiplicity of Litigation**

6 Finally, in making its class certification decision, the Court must determine that a class
7 action would be superior to alternative means for the fair and efficient adjudication of the litigation.
8 By consolidating many potential individual actions into a single proceeding, this Court's use of the
9 class action device enables it to manage this litigation in a manner that serves the economics of
10 time, effort and expense for the litigants and the judicial system. Absent class treatment, similarly-
11 situated employees with small but nevertheless meritorious claims for damages would, as a
12 practical matter, have no means of redress because of the time, effort and expense required to
13 prosecute individual actions. (*Gentry v. Super. Ct.* (2007) 42 Cal. 4th 443, 457-62; *Leyva v.*
14 *Medline Ind.* (9th Cir. 2013) 716 F.3d 510, 515.) Moreover, in the context of settlement, the
15 superiority concerns are essentially non-existent.

16 **V. THE PROPOSED NOTICE IS CONSTITUTIONALLY SOUND**

17 **A. The Proposed Notice Plan Satisfies Due Process**

18 Notice requirements are set forth in the California Rules of Court. (Cal. Rules of Court,
19 Rule 3.766 (e) and (f).) California law vests the Court with broad discretion in fashioning an
20 appropriate notice program. (*Cartt v. Super Ct.* (1975) 50 Cal.App.3d 960, 973-74.) There is no
21 statutory or due process requirement that all class members receive actual notice, but in this matter,
22 the class members will receive direct mailed notice. As the Court of Appeals has explained, "[t]he
23 notice given should have a reasonable chance of reaching a substantial percentage of the Class
24 Members" (*Id.* at p. 974.) In this case, notice of the proposed settlement will be provided by
25 direct mailing, the best possible form of notice.

26 **B. The Notice is Accurate and Informative**

27 The Notice of Proposed Class Action Settlement should be approved. It will be
28 disseminated through direct U.S. first class mail to the last known address for each Class Member.

1 It informs the Class Members of the terms of the settlement and their right to be excluded from the
2 Settlement. And if there are Class Members who wish to object to this proposed class action
3 settlement, they will have the opportunity to submit their objections and be heard at the Final
4 Approval Hearing.

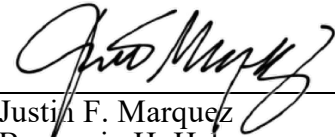
5 The Notice also fulfills the requirement of neutrality in class notices. (Conte & Newberg,
6 Newberg on Class Actions (3rd Ed.) § 8.39.) It summarizes the proceedings to date and the
7 terms and conditions of the settlement agreement, in an informative and coherent manner. It
8 makes clear that the settlement agreement does not constitute an admission of liability by the
9 Defendant, which denies all liability, and it recognizes that this Court has not ruled on the merits
10 of the action. It also states that the final settlement approval decision has yet to be made.
11 Accordingly, the Notice complies with the standards of fairness, completeness, and neutrality
12 required of a combined settlement-certification class notice.

13 **VI. CONCLUSION**

14 For the foregoing reasons, Plaintiff respectfully requests that the Court grant preliminary
15 approval of the proposed settlement and set a Final Approval Hearing in October 2022, or the
16 first available date thereafter.

17 Dated: April 28, 2022

WILSHIRE LAW FIRM

18
19 By:  _____

20 Justin F. Marquez
Benjamin H. Haber
Daniel J. Kramer

21 Attorneys for Plaintiff
22
23
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25
26
27
28

PROOF OF SERVICE

Darrel Colter v. Propulsion Controls Engineering
Case No.: 37-2020-00030682

STATE OF CALIFORNIA)
) ss
COUNTY OF LOS ANGELES)

I, Ashley Narinyans, state that I am employed in the aforesaid County, State of California; I am over the age of eighteen years and not a party to the within action; my business address is 3055 Wilshire Blvd., 12th Floor, Los Angeles, California 90010. My electronic service address is anarinyans@wilshirelawfirm.com.

On **April 28, 2022**, I served the foregoing **PLAINTIFF'S NOTICE OF MOTION AND MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT; MEMORANDUM OF POINTS AND AUTHORITIES**, on the interested parties by placing a true copy thereof, enclosed in a sealed envelope by following one of the methods of service as follows:

LOIS M. KOSCH (SBN 131859)
lkosch@wilsonturnerkosmo.com
NICOLE R. ROYSDON (SBN 262237)
nroyson@wilsonturnerkosmo.com
Kilsha A. Castro
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402 West Broadway, Suite 1600
San Diego, California 92101
Telephone: (619) 236-9600
Facsimile: (619) 236-9669

Attorneys for Defendant
Propulsion Controls Engineering

(X) **BY UPLOAD:** I hereby certify that the documents were uploaded by my office to the State of California Labor and Workforce Development Agency Online Filing Site.

(X) **BY E-MAIL:** I hereby certify that this document was served from Los Angeles, California, by e-mail delivery on the parties listed herein at their most recent known email address or e-mail of record in this action.

I declare under the penalty of perjury under the laws of the State of California, that the foregoing is true and correct.

Executed on **April 28, 2022**, at Los Angeles, California.

Ashley Narinyans
Type or Print Name


Signature