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SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF IMPERIAL

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

PLAINTIFF,

vs.

SPENCER CONSTRUCTION, LLC, a
Limited Liability Company; and DOES 1-50,
Inclusive;

DEFENDANTS.

Case No. ECU001860

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

Date: October 31, 2022

Time: 8:30 a.m.

Judge: Hon. Jeffrey B. Jones

Dept.: 7

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1 I. INTRODUCTION

2 Plaintiff MICHAEL HONEA ("Plaintiff") seeks preliminary approval of the Stipulation of
3 Settlement of Class and PAGA Action Claims and Release of Claims ("Agreement")¹, which if
4 approved, would provide valuable monetary relief for approximately 125 Class Members and 115
5 Aggrieved Employees. The basic terms of the Agreement provide for the following:

6 1. The "**Class Members**," "**Class**," and "**Class Period**" shall mean all non-exempt
7 employees who are or previously were employed by Defendant and performed work in California
8 ("**Class Members**" or "**Class**") during the period from April 15, 2017, to February 7, 2022 ("**Class**
9 **Period**"). Agreement at §§ I(G), (H).

10 2. The "**Settlement Class Members**" and "**Settlement Class**" means all Class Members
11 who have not submitted a timely and valid request for exclusion by the Response Deadline. Agreement
12 at § I(HH).

13 a. The "**Class Size**" is comprised approximately 125 individuals who collectively
14 worked approximately 2,425 Workweeks during the Class Period as estimated by Defendant at the time
15 of mediation. Agreement at § III(A)(2).

16 3. The "**Aggrieved Employees**" and "**PAGA Period**" shall mean all non-exempt
17 employees who are or previously were employed by Defendant and performed work in California
18 ("**Aggrieved Employees**") during the period from November 20, 2019, to February 7, 2022 ("**PAGA**
19 **Period**"). Agreement at §§ I(B), (V). Aggrieved Employees may not object to the PAGA Settlement.
20 Agreement at § III(K)(7).

21 a. At the time of mediation, there were approximately 115 Aggrieved Employees
22 during the PAGA Period. (JCL Dec., ¶ 18).

23 4. The "**Gross Settlement Amount**" is One Hundred Fifty Thousand Dollars (\$150,000.00).
24 Agreement at § I(O). The Gross Settlement Amount is non-reversionary and includes the following:

25 a. A "**Class Representative Service Award**" in the amount of \$10,000 to Plaintiff
26 in recognition of his efforts and risks in assisting with the prosecution of the Action. Agreement at §§
27

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

1 I(I); III(L)(9);

2 b. An award of “**Class Counsel Award**” consisting of attorneys’ fees currently not
3 to exceed one-third of the Gross Settlement Amount currently estimated to be \$50,000.00 out of
4 \$150,000.00 *plus* costs of up to \$20,000.00 to be paid to Class Counsel. Agreement at § I(E);

5 c. A “**PAGA Payment**” of Five Thousand Dollars (\$5,000.00) to be allocated from
6 the Gross Settlement Amount for settlement of claims for civil penalties under the Private Attorneys
7 General Act of 2004 (“PAGA Payment”). The Settlement Administrator shall pay \$3,750.00
8 representing 75% of the PAGA Payment to the Labor and Workforce Development Agency (“LWDA
9 Payment”). The Settlement Administrator shall distribute twenty-five percent (25%) of the PAGA
10 Payment (\$1,250.00) to the Aggrieved Employees (“Aggrieved Employee Payment”). Agreement at
11 §§ I(W); III(L)(11); and

12 d. “**Claims Administration Expenses**” not to exceed \$8,000.00 payable to the
13 Settlement Administrator, ILYM Group, Inc., for, *inter alia*, the administration of the Notice Packet
14 and Individual Settlement Payments. Agreement at §§ I(GG), III(L)(12).

15 3. The “**Net Settlement Amount**” refers to the portion of the Gross Settlement Amount less
16 Attorneys’ Fees and costs [“Class Counsel Award”], Class Representative Service Award, PAGA
17 Payment, and Claims Administration Expenses. Agreement at § I(Q). The Net Settlement Amount is
18 approximately \$57,000.00 which will be allocated to all Settlement Class Members on a pro-rata basis
19 according to the number of Workweeks each Settlement Class Member worked during the Class Period.
20 Agreement at § III(L)(1). The entire Net Settlement Amount will be paid to all Settlement Class
21 Members who do not opt out of the Settlement resulting in an average Individual Settlement Payment
22 of approximately **\$456.00**. JCL Dec., ¶ 6.

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

denied or of Defendant prevailing at trial. JCL Dec., ¶ 6.

As discussed below, the proposed Settlement satisfies all criteria for preliminary settlement approval and falls within the range of reasonableness. The average Individual Settlement Payments to the Settlement Class meets or exceeds awards in similar wage and hour class actions. Moreover, the proposed Settlement Class is appropriate for provisional certification. Accordingly, Plaintiff respectfully requests the Court grant preliminary approval of the Settlement. JCL Dec., ¶ 7.

II. FACTS AND PROCEDURE

A. Overview of the Litigation

Defendant operates a construction business which was recently involved in border infrastructure improvements in the state of California, including Imperial County where Plaintiff worked. Plaintiff worked for Defendant as a non-exempt employee in California from approximately December of 2019 to June of 2020. Throughout his employment, Defendant failed to pay Plaintiff wages for all hours worked, including overtime compensation, failed to provide legally compliant meal and rest periods, failed to issue accurate itemized wage statements, failed to pay all wages when due, and failed to reimburse for required business expenses. Throughout his employment, Plaintiff was subject to Defendant's written policies and procedures contained in, among other documents, the "Spencer Construction Employee Handbook." JCL Dec., ¶ 8; Declaration of Michael Honea ("MH Dec.") at ¶¶ 3-5.

Defendant forcefully denies liability for each of Plaintiff's claims. Further, Defendant asserts that it fully complied with all applicable employment laws and raised several other significant defenses to Plaintiff's claims, including but not limited to, compliant compensation policies and plans, complaint meal and rest practices, compliant wage statements, timely paid all wages due upon separation of employment, and compliant reimbursement policies and plans. JCL Dec., ¶ 9.

On November 20, 2020, Plaintiff served Defendant and the Labor and Workforce Development Agency ("LWDA") with a Notice of Violations ("PAGA Notice"). Plaintiff's PAGA Notice set forth the facts and theories supporting Defendant's alleged violations of various provisions of the California Labor Code and applicable Industrial Welfare Commissions ("IWC") Wage Order and of his intent to pursue claims under California Labor Code Private Attorneys General Act, Cal. Lab. Code Sections

2698 *et seq.* (“PAGA”). JCL Dec., ¶ 10.

On April 15, 2021, Plaintiff filed a class action complaint in the Imperial Superior Court, Case Number ECU001860 (“Action”). The Action alleged twelve causes of action against Defendant for: (1) Unfair Competition in Violation of Bus. and Prof. Code sections 17200 *et seq*; (2) Failure to pay minimum wages in violation of California Labor Code sections 1194, 1197 & 1197.1; (3) Failure to pay overtime wages in violation of California Labor Code sections 510 *et seq*; (4) Failure to provide required meal periods in violation of California Labor Code sections 226.7 and 512 and the applicable IWC wage order; (5) Failure to provide required rest periods in violation of California Labor Code sections 226.7 and 512 and the applicable IWC wage order; (6) Failure to reimburse employees for required expenses in violation of Cal. Lab. Code section 2802; (7) Failure to provide accurate itemized wage statements in violation of California Labor Code section 226; (8) Failure to provide wages when due in violation of Cal. Lab. Code sections 201, 202 and 203; (9) Failure to provide personnel files in violation of Cal. Lab. Code section 1198.5; (10) Termination in violation of public policy [Labor Code sections 1102.5 and 6310]; (11) Retaliation in violation of Labor Code section 1102.5, *et seq.*; and (12) Violation of the Private Attorneys General Act [Labor Code section 2698, *et seq.*]. (“Class Claims”). JCL Dec., ¶ 11.

After serving written discovery, the Parties agreed to mediate the Action. To prepare for mediation, the Defendant agreed to informally produce additional documents and data points subject to the mediation privilege, including but not limited to, employee handbooks, the Class Members’ time data, and certain payroll data points. As discussed *infra*, Plaintiff’s counsel retained the forensic consultants at Berger Consulting Group (“BCG”) to analyze Defendant’s time and payroll data. JCL Dec., ¶ 12.

On February 7, 2022, the Parties participated in a full day mediation with Louis Marlin, Esq., an experienced mediator of wage and hour class and PAGA actions. The mediation concluded with a settlement, after both sides agreed to a Mediator’s proposal, which was subsequently memorialized in the form of a Memorandum of Understanding (“MOU”). JCL Dec., ¶ 13.

B. Class Counsel Thoroughly Investigated the Factual and Legal Issues

Months before filing the Action, Class Counsel began its pre-filing investigation into Plaintiff’s

1 complaints. Class Counsel's investigation started with several lengthy interviews with Plaintiff. As
2 part of the interview process, Plaintiff produced documents related to his employment, including his
3 wage statements. At the conclusion of the interviews, Class Counsel determined that each Plaintiff's
4 complaints justified further inquiry. JCL Dec., ¶ 14.

5 Class Counsel subsequently requested Plaintiff's employee file from Defendant. To prepare for
6 mediation, Class Counsel requested documents and data points to further evaluate Plaintiff's claims
7 and Defendant's liability exposure to the Class Members. In response to Class Counsel's request,
8 Defendant produced, among other things, time and payroll records for a sample of Class Members,
9 aggregate workweek and pay period data, and copies of applicable handbooks, policies, and
10 agreements. In total, Defendant produced over 51,000 unique cells of time and payroll data for Class
11 Counsel to analyze. JCL Dec., ¶ 15.

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

17 BCG analyzed Defendant's time and payroll data to assist in the development of various damage
18 models. Among other things, BCG determined the approximate amount of unpaid wages, amount of
19 unpaid overtime wages, number of workweeks, pay periods, average length of shifts and average
20 number of hours worked per week. BCG also estimated the number of missed, late, or truncated meal
21 and rest periods, the amount of unreimbursed expenses, and the amount of missed meal and rest period
22 premiums paid during the Class Period. JCL Dec., ¶ 17.

23 Overall, Class Counsel thoroughly investigated the claims at issue, including: (1) determining
24 Plaintiff's suitability as a putative class representative through interviews, background investigations,
25 and analysis of her employment files; (2) evaluating all of Plaintiff's potential claims; (3) researching
26 similar wage and hour class actions as to the claims brought, the nature of the positions, and the type
27 of employer; (4) analyzing the Settlement Class's time and payroll records; (5) analyzing Defendant's
28 labor policies and practices; (6) researching settlements in similar cases as well as outstanding issues

1 which could affect settlement approval; (7) evaluating Plaintiff's claims and estimating Defendant's
2 liability for purposes of settlement; (8) holding phone interviews with several putative class members;
3 (9) drafting the mediation brief; and (10) participating in the mediation. This investigation allowed
4 Class Counsel to fully assess the nature and magnitude of the claims being settled, as well as the
5 impediments to recovery, such as to make an independent assessment of the reasonableness of the terms
6 to which the Parties have agreed. JCL Dec., ¶ 19.

7 Class Counsel only agreed to enter the Settlement following this thorough investigation and
8 evaluation of Plaintiff's claims. Based on its investigation of the facts, applicable law, and marketplace
9 for similar settlements, and considering the risk of significant delay and uncertainty associated with
10 litigation, and the various defenses asserted by Defendant, Class Counsel firmly believes this
11 Agreement to be in the best interests of the Class Members. Because the Settlement's terms are fair,
12 reasonable, and adequate, the Court should preliminarily approve the Settlement. JCL Dec., ¶ 20.

13 **C. The Parties Settled At Mediation**

14 On February 7, 2022, the Parties conducted a full day of mediation with Louis Marlin, Esq., an
15 experienced mediator of wage and hour class and representative actions. Mediator Marlin helped
16 manage the Parties' expectations and provided a useful, neutral analysis of the issues and risks to both
17 sides. The Parties made substantial progress with Mediator Marlin's assistance. Namely, the Parties
18 exchanged information regarding their respective claims and defense, including their respective
19 evaluation of the damages. The mediation concluded with a settlement, after both sides agreed to a
20 Mediator's proposal. Class Counsel submits that the Settlement constitutes a fair, adequate, and
21 reasonable compromise of the claims at issue. JCL Dec., ¶¶ 21-22.

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

23 **1. The Composition of the Settlement Class Members and Aggrieved Employees**

24 The proposed Settlement Class consists of all Defendant's current and former non-exempt
25 employees employed in California during the period from April 15, 2017, through February 7, 2022,
26 who do not file a timely and valid Request for Exclusion. In the data exchanged at the time the
27 Agreement was executed, there were approximately 125 Class Members that worked approximately
28 2,425 workweeks. Agreement at § III(A)(2). Additionally, at the time of mediation, Plaintiff's expert

1 estimated that there were approximately 115 Aggrieved Employees and approximately 2,900 pay
2 periods in the PAGA Period. (JCL Dec., ¶ 18).

3 2. The Settlement Consideration

4 The Parties agreed to settle the underlying class claims in exchange for the Gross Settlement
5 Amount of \$150,000. The Gross Settlement Amount includes: (1) Individual Settlement Payments to
6 the Settlement Class; (2) a Class Representative Service Award of \$10,000 to Plaintiff for his services
7 on behalf of the Settlement Class; and (3) a PAGA Settlement in the amount of \$5,000; (4) Claims
8 Administration Expense estimated at \$8,000; (5) Class Counsel Award in the amount of \$50,000,
9 comprised of attorneys' fees equal to one-third of the Gross Settlement Amount estimated to be
10 \$150,000 and an estimated \$20,000 for actually incurred litigation expenses. *See generally* Agreement
11 at § III(L).

12 Subject to the Court approving the Class Representative Service Award, Class Counsel Award,
13 PAGA Settlement, and the Claims Administration Expense, the Net Settlement Amount will be
14 distributed to each participating member of the Settlement Class Member. Agreement at § III(L)(1).
15 There is no reversion to Defendant and Defendant must separately pay for its share of the employer
16 payroll taxes. Agreement at § III(A)(1).

17 3. The Funding Date

18 Assuming there are no objectors, and no appeal is filed, Defendant will fund the Gross Settlement
19 Amount of \$150,000 on the later of February 7, 2023, or thirty (30) days after the Effective Date.
20 Agreement at § I(N).

21 4. Formula for Calculating Individual Settlement Payments

22 Each Settlement Class Member will receive an Individual Settlement Payment. The Class Data
23 provided by Defendant to the Settlement Administrator will include the number of eligible Workweeks
24 for each Settlement Class Member. Agreement at § III(L)(1). The Individual Settlement Payment will
25 be proportional to the number of Workweeks each Settlement Class Member worked for Defendant in
26 California during the Class Period. Each Settlement Class Member's final Individual Settlement
27 Payment for purposes of payment will be calculated by dividing the total number of Workweeks
28 attributed to all Class Members by all Workweeks attributed to members of the Settlement Class,

multiplied by the Net Settlement Amount. Agreement at § III(L)(1). Each Individual Settlement Payment will be reduced by any legally mandated employee tax withholdings (*e.g.*, employee payroll taxes, etc.). *Id.*

Given that there are approximately 125 Settlement Class Members, *the average gross recovery is approximately \$456.00* (Net Settlement Amount divided by Settlement Class Members). JCL Dec., ¶ 6.

5. Release by Participating Settlement Class Members

Generally, as of the Funding Date, which is the later of February 23, 2023, or thirty (30) days after the Effective Date, Plaintiff and the Settlement Class Members will agree to release the Released Parties from the Released Class Claims, including all class claims alleged in the operative complaint which occurred during the Class Period, and expressly excluding all other claims, including claims for vested benefits (other than vacation and/or paid time off to the extent those are alleged in the operative complaint), wrongful termination, unemployment insurance, disability, social security, workers' compensation, and class claims outside the Class Period. Agreement at §§ I(BB); III(A)(1).

6. PAGA Release by the State of California on behalf of the Aggrieved Employees

Generally, upon the Court's entry of Final Approval Order and Judgment, and funding of the Gross Settlement Amount, Plaintiff, acting as the representative of the State of California, on behalf of the Aggrieved Employees, will release the Released Parties from the Released PAGA Claims which include all PAGA claims alleged in the operative complaint and Plaintiff's PAGA notice to the LWDA which occurred during the PAGA Period, and expressly excluding all other claims, including claims for vested benefits (other than vacation and/or paid time off to the extent those are alleged in the operative complaint and Plaintiff's PAGA notice to the LWDA), wrongful termination, unemployment insurance, disability, social security, workers' compensation, and PAGA claims outside the PAGA Period. Agreement at §§ I(CC); III(C).

III. ARGUMENT

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

The proposed Settlement, including a Gross Settlement Amount of \$150,000, meets the standards for preliminary approval. Pre-trial settlement of complex class actions is a judicially favored

1 remedy. (*Officers for Justice v. Civil Serv. Comm’n* (9th Cir. 1982) 688 F.2d 615, 625 (“Voluntary
2 conciliation and settlement are the preferred means of dispute resolution.”).) Class action settlement
3 approval requires an early “preliminary” review by the trial court and a subsequent “final” review after
4 notice of the settlement has been distributed to class members for their comments and objections.
5 (C.R.C. 3.769(c)-(g); *Cellphone Termination Fee Cases*, 180 Cal.App.4th 1110, 1118 (2010) (the court
6 first “preliminarily approves the settlement” and later “conducts a final approval hearing to inquire into
7 the fairness of the proposed settlement”).)

8 Although Rule of Court Rule 3.769 does not provide detail as to the scope of review of the
9 proposed settlement, preliminary approval is warranted if the settlement falls within a “reasonable
10 range.” (*See North County Contractor’s Assn., Inc. v. Touchstone Ins. Services* (1994) 27 Cal.App.4th
11 1085, 1089-90; Conte & Newberg, *Newberg on Class Actions*, §§ 11.26 (4th ed. 2002).)
12 Reasonableness and fairness are presumed where: (1) the settlement is reached through “arms-length
13 bargaining;” (2) investigation and discovery are “sufficient to allow counsel and the court to act
14 intelligently;” (3) counsel is “experienced in similar litigation. . . .” (*Dunk v. Ford Motor Co.* (1996)
15 48 Cal.App.4th 1794, 1802.) The presumption of fairness is consistent with California’s public policy
16 goal of favoring settlements. (*Stambaugh v. Super. Ct* (1976) 62 Cal.App.3d 231, 236 (“the law wisely
17 favors settlements”); *Cellphone Termination Fee Cases* (2009) 180 Cal.App.4th 1110, 1118 (“public
18 policy generally favors the compromise of complex class action litigation”); *7-Eleven Owners for Fair
19 Franchising v. Southland Corp.* (2000) 85 Cal.App.4th 1135, 1151 (“voluntary conciliation and
20 settlement are the preferred means of dispute resolution ... [t]his is especially true in complex class
21 action litigation”).)

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

28 ///

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

3 “[W]hat transpires in settlement negotiations is highly relevant to the assessment of a proposed
4 settlement’s fairness.” (*State v. Levi Strauss & Co.* (1986) 41 Cal.3d 460, 482.) Courts presume the
5 absence of fraud or collusion in the negotiation of a settlement, unless evidence to the contrary is
6 offered; thus, there is a presumption that settlement negotiations are conducted in good faith. (Newberg,
7 § 11.51.)

8 The Parties participated in mediation with the highly respected mediator Louis Marlin, Esq.,
9 Mediator Marlin managed the Parties’ expectations and provided a useful, neutral analysis of the issues
10 and risks to both sides. (*In re Apple Computer, Inc. Derivative Litig.* No. C 06-4128 JF (HRL), 2008
11 U.S. Dist. LEXIS 108195 (N.D. Cal. Nov. 5, 2008) (mediator’s participation weighs considerably
12 against any inference of a collusive settlement); *D’Amato v. Deutsche Bank* (2d. Cir. 2001) 236 F.3d
13 78, 85 (a “mediator’s involvement in pre-certification settlement negotiations helps to ensure that the
14 proceedings were free of collusion and undue pressure.”).) At all times, the Parties’ negotiations were
15 at an arm’s length, adversarial, and non-collusive. The mediation concluded with a settlement, after
16 both sides agreed to a Mediator’s proposal, which was subsequently memorialized in a Memorandum
17 of Understanding (“MOU”). After reaching an agreement in the principle, the Parties drafted and
18 negotiated a long-form settlement which is the subject of the instant motion. The Agreement is the
19 final product of these mediated negotiations. Objectively, the Settlement terms are fair, adequate and
20 represent a reasonable compromise of the claims at issue. JCL Dec., ¶ 21-22.

21 2. Class Counsel’s Thorough Investigation Provided an Objective Measurement of the
22 Settlement’s Reasonableness.

23 As set forth in greater detail above, Class Counsel conducted a very thorough investigation into
24 the factual and legal issues in dispute. Overall, Class Counsel thoroughly investigated the claims at
25 issue, including: (1) determining Plaintiff’s suitability as a putative class representative through
26 interviews, background investigations, and analysis of his employment files; (2) evaluating all of
27 Plaintiff’s potential claims; (3) researching similar wage and hour class actions as to the claims brought,
28 the nature of the positions, and the type of employer; (4) analyzing the Settlement Class’s time and

1 payroll records; (5) analyzing Defendant’s labor policies and practices; (6) researching settlements in
2 similar cases as well as outstanding issues which could affect settlement approval; (7) evaluating
3 Plaintiff’s claims and estimating Defendant’s liability for purposes of settlement; (8) drafting the
4 mediation brief; and (9) participating in the mediation. This investigation allowed Class Counsel to
5 fully assess the nature and magnitude of the claims being settled, as well as the impediments to
6 recovery, such as to make an independent assessment of the reasonableness of the terms to which the
7 Parties have agreed. JCL Dec., ¶ 19.

8 Class Counsel only agreed to enter the Settlement following this thorough investigation and
9 evaluation of Plaintiff’s claims. Based on this investigation of the facts, applicable law, and
10 marketplace for similar settlements, and considering the risk of significant delay, uncertainty associated
11 with litigation, and the various defenses asserted by Defendant, Class Counsel firmly believes this
12 Agreement to be in the best interests of the Class Members. Because the Settlement’s terms are fair,
13 reasonable, and adequate, the Court should preliminarily approve the Settlement. JCL Dec., ¶ 20.

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

15 The Gross Settlement Amount of \$150,000 is within the range of reasonableness. To determine
16 whether a settlement is fair and reasonable, the court should “consider enough information about the
17 nature and magnitude of the claims being settled, as well as the impediments to recovery, to make an
18 independent assessment of the reasonableness of the terms to which the parties have agreed.” (*Kullar*
19 *v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 133.) In making this determination, the court
20 is “not to try the case” but rather “satisfy itself that the class action settlement is within the ‘ballpark of
21 reasonableness.’” (*Id.* (emphasis added).) For this analysis, courts do “not require any such explicit
22 statement of value; [they] require[] a record which allows an understanding of the amount that is in
23 controversy and the realistic range of outcomes of the litigation.” (*Munoz v. BCI Coca-Cola Bottling*
24 *Co.* (2010) 186 Cal.App.4th 399, 409 (internal citation omitted).) The reasonableness of a settlement
25 is not dependent upon its actual value approaching the potential recovery plaintiffs might have received
26 if they had succeeded at trial.² Indeed, “[t]he determination whether a settlement is reasonable does
27

28 ² Federal district courts recognize that there is an inherent “range of reasonableness” in determining whether to approve a settlement “which recognizes the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion.” *Newman v. Stein* (2d. Cir. 2002) 464 F.2d 689, 693; *see In re*

not involve the use of a ‘mathematical equation yielding a particularized sum.’” (*Frank v. Eastman Kodak Co.* (W.D.N.Y. 2005) 228 FRD. 174, 186 (*quoting In re Michael Milken and Assoc. Sec. Litig.* (S.D.N.Y. 1993) 150 F.R.D. 57, 66).)

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

The Gross Settlement Amount of \$150,000 is fair and reasonable considering the nature and magnitude of the claims being settled and the various potential impediments to recovery. Prior to mediation, Class Counsel retained BCG to develop economic damage models measuring Defendant’s liability exposure while accounting for the uncertainties of continued litigation. The various models were informed by Class Counsel’s investigation, including the analysis of a significant sample of time and payroll data. Class Counsel projected Defendant’s liability exposure for *class claims* (excluding PAGA Penalties) amounts to approximately \$714,288.73 dollars if successful at trial. This number reflects the uncertainty regarding several of the claims, together with the uncertainty surrounding derivative liability for inaccurate wage statements and waiting time penalties. Thus, the Gross Settlement Amount of \$150,000 represents approximately 20.9% of Defendant’s *class-wide* liability exposure as estimated by Class Counsel at the time of mediation. The following summarizes Defendant’s estimated exposure. JCL Dec., ¶ 23.

(1) Estimated Damages for Meal and Rest Period Violations.

Plaintiff’s primary claim in this Action is that Defendant failed to provide Class Members with compliant meal and rest periods. Specifically, Plaintiff alleges that as a result of their rigorous work schedules, Plaintiff, Class Members, and Aggrieved Employees were not able to take timely and duty-free meal and rest periods. When Plaintiff, Class Members and Aggrieved Employees were able to take meal and rest periods, they were not permitted to leave the premises and were not allowed to use

Omnivision Tech, Inc. (N.D. Cal. 2008) 559 F.Supp.2d 1036; *see also Nat’l Rural Telecomm. Coop. v. Directv. Inc.* (C.D. Cal. 2004) 221 F.R.D. 523, 527 (“well settled law that a proposed settlement may be acceptable even though it amounts to only a fraction of the potential recovery”); *In re Global Crossing Sec. and ERISA Litig.* (S.D.N.Y 2004) 225 F.R.D. 436, 460 (“settlement amount’s ratio to the maximum potential recovery need not be the sole, or even dominant, consideration when assessing settlements fairness”); *In re IKON Office Solutions, Inc Sec Litig.* (E.D. Pa. 2000) 194 F.R.D. 166, 184 (“the fact that a proposed settlement constitutes a relatively small percentage of the most optimistic estimate does not, in itself, weigh against the settlement; rather the percentage should be considered in light of strength of the claims”); *Officers for Justice v. Civil Serv. Comm.* (9th Cir. 1982) 688 F.2d 615, 628 (it is “the complete package, taken as a whole rather than the individual component parts, that must be examined for overall fairness”).

1 their cellular phones during meal and rest periods in violation of *Augustus v. ABM Security Services,*
2 *Inc.*, (2016) 2 Cal. 5th 257. Consequently, Plaintiff alleges that he is owed meal period premiums for
3 meal and rest period violations that occurred during the Class Period. JCL Dec., ¶ 24.

4 Conversely, Defendant argued, among other things, that it provided all their employees, i.e.,
5 Class Members and Aggrieved Employees, with the opportunity to take compliant meal and rest
6 periods. Defendant also argued that it maintained facially complaint meal and rest period policies.
7 Thus, Defendant argued that there was no potential liability for Plaintiff's alleged meal and rest period
8 violations and any claimed violations required a highly individualized inquiry not suitable to class
9 treatment. Plaintiff estimated the damages for this claim to be approximately \$401,715.00. JCL Dec.,
10 ¶ 25.

11 (2) Estimated Exposure for Off-the-Clock Work.

12 Plaintiff also alleged that Defendant failed to pay its employees for all hours worked.
13 Specifically, Plaintiff asserts that he and other Class Members and Aggrieved Employees performed a
14 substantial amount of off-the-clock work, including, but not limited to, attending pre-shift meetings
15 and repairing the border wall all while off-the-clock. As a result, Defendant failed to accurately
16 compensate Plaintiff and other Class Members for all hours worked and their overtime hours worked.
17 JCL Dec., ¶ 26.

18 Defendant denied liability for the claim. Further, Defendant argued that it had in place a written
19 policy which required its employees to accurately record all their time worked and such written policies
20 and procedures directed its employees not to work while off the clock. Plaintiff estimated Defendant's
21 exposure for underpayment of wages to its non-exempt employees was approximately \$25,116.08. JCL
22 Dec., ¶ 27.

23 (3) Exposure for Unpaid Overtime.

24 Plaintiff further alleged that Defendants failed to accurately compensate Plaintiff and the Class
25 Members for overtime hours worked. Defendants denied liability and argued that they accurately
26 compensated its employees for all overtime hours worked. Plaintiff estimated that Defendants'
27 exposure for this claim was approximately \$41,742.35. JCL Dec., ¶ 28.

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

2 Plaintiff alleges that Defendants' alleged violations resulted in derivative violations of Labor
3 Code sections 203 and 226(a). Class Counsel considered the arguable presence of various penalties
4 and weighed the potential recoveries against probable defenses. Specifically, Defendants could argue
5 that Plaintiff could not prove the "willful" prong needed to obtain waiting time penalties under Labor
6 Code section 203. Additionally, Defendants could argue that Plaintiff could not show that Class
7 Members suffered an "injury" because of wage statement violations, as required by Labor Code section
8 226. JCL Dec., ¶ 29.

9 At the time of mediation, meal and rest period violations did not entitle employees like Plaintiff
10 and the Class Members to pursue the derivative waiting time and itemized wage statement penalties.
11 (*See Naranjo v. Spectrum Security Services, Inc.* (May 23, 2022, S258966) Cal.5th __ [p. 9]
12 <http://courts.ca.gov/opinions>; *Maldonado v. Epsilon Plastics, Inc.* (2018) 22 Cal.App.5th 1308.)
13 Although the California Supreme Court in has since concluded that meal and rest premium are "wages,"
14 at the time the Settlement was negotiated, Plaintiff would have had to overcome precedent to prove the
15 Class deserved the penalties at the time of mediation. *See, e.g., Howard v. CVS Caremark Corp.*, 2014
16 U.S. Dist. LEXIS 172406 (C.D. Cal. Dec. 9, 2014) (denying class certification for the same penalty
17 claims); *Alonzo v. Maximus, Inc.*, 832 F. Supp. 2d 1122, 1134-1137 (C.D. Cal. 2011) (finding
18 insufficient evidence of bad faith or actual injury). Plaintiff could not give the penalty claims great
19 weight given that they depended on proving the underlying claims, which had their own risks. Plaintiff
20 estimated Defendant's exposure for this claim to be approximately \$242,092.80 (\$142,375.00 for wage
21 statement violations and \$99,717.80 for waiting time penalties). JCL Dec., ¶ 30.

22 (5) Exposure for Unreimbursed Business Expenses

23 Plaintiff alleged that Defendants required Class Members to incur personal expenses for the use
24 of their personal cellular phones. California employers who require employees to incur personal
25 business expenses for work purposes must reimburse the employee for the cost incurred. (*See Cal.*
26 *Labor Code § 2802(a)*, providing that "[a]n employer shall indemnify his or her employee for all
27 necessary expenditures or losses incurred by the employee in direct consequence of the discharge of
28

1 his or her duties, or of his or her obedience to the directions of the employer..."). Specifically, Plaintiff
2 was required to use his cellular phone in furtherance of his job duties. JCL Dec., ¶ 31.

3 Again, Defendant vigorously denied any liability for this claim. Defendant argued that any use
4 of cellular phones was discretionary, and use was not mandatory to complete job tasks. Plaintiff
5 estimated Defendants' exposure for this claim to be approximately \$3,622.50. JCL Dec., ¶ 32.

6 (6) Defendants' PAGA Exposure

7 Class Counsel's damage models also estimated Defendant's exposure for PAGA penalties. At
8 the time of mediation, Plaintiff estimated Defendant's PAGA exposure ranged from approximately
9 \$15,500.00 dollars to approximately \$930,500.00 dollars. JCL Dec., ¶ 33.

10 Under PAGA, Courts have considerable discretion to reduce the penalty award. In *Fleming v.*
11 *Covidien*, 2011 U.S. Dist. LEXIS 154590 (C.D. Cal. 2011), a federal court reduced PAGA penalties
12 from \$2,800,000 to \$500,000, a reduction of 82.2%, because the court found maximum penalties
13 "unjust" because the employees had suffered no injuries. Some trial courts have actually awarded no
14 civil penalties, even when Labor Code violations are established. *See In re Nordstrom Com. Cases*, 186
15 Cal.App.4th 576, 589 (2010) (affirming an award of \$0 in PAGA penalties in a wage and hour class
16 action); *In re Taco Bell Wage & Hour Actions*, 2016 U.S. Dist. LEXIS 48557, *40-43 (E.D. Cal. Apr.
17 6, 2016) (PAGA penalties denied after trial).

18 In order to recover any PAGA penalties, Plaintiff would be required at trial to prove each of the
19 underlying Labor Code violations. *See Cardenas v. McLane Foodservice, Inc.*, 2011 U.S. Dist. LEXIS
20 13126, *10 (C.D. Cal. 2011) ("Given the statutory language [of PAGA], a plaintiff cannot recover on
21 behalf of individuals whom the plaintiff has not proven suffered a violation of the Labor Code by the
22 defendant."). Here, Plaintiff would need to prove that each Aggrieved Employee suffered a violation for
23 each pay period the employee worked. Again, Defendant raised several defenses that presented serious
24 threats to the claims of the Plaintiff and the Aggrieved Employees. In addition to those arguments
25 discussed *supra*, Defendant also argued that the Court of Appeals decision in *Cacho v. Eurostar, Inc.*
26 (2019) 43 Cal.App.5th 885, weakened Plaintiff's claims, on liability, value, and manageability as to the
27 rest period claims. JCL Dec., ¶ 34.

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

7 The proposed Settlement allocates \$5,000 to satisfy the PAGA claims. This amount represents
8 approximately 3.33% of the Gross Settlement Amount. This is well within the range *See, e.g., Nordstrom*
9 *Comm'n Cases* (2010) 186 Cal.App.4th 576, 589 (approving 0% PAGA allocation); *Berry v. Urban*
10 *Outfitters* (N.D. Cal. Lead Case No. 13-cv-02628-JSW) (approving 1% PAGA allocation in \$5M
11 settlement); *Jack v. Hartford Fire Ins. Co.* (S.D. Cal. 2011) 2011 WL 4899942 * 6 (approving \$3,000
12 PAGA allocation in \$1.2M settlement); *Singer v. Becton Dickinson & Co.* (S.D. Cal. 2010) 2010 WL
13 2196104 *2 (approving \$3,000 PAGA allocation in \$1M settlement); and *Hopson v. Hanesbrands, Inc*
14 (N.D. Cal. 2009) 2009 WL 928133 * 9 (approving \$1,500 PAGA allocation in \$1.026M settlement.)
15 JCL Dec., ¶ 35.

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

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

22 With respect to the most immediate challenge, i.e., class certification, the risks attendant to the
23 certification of similar wage and hour claims are demonstrated by *Magadia v. Wal-Mart Associates,*
24 *Inc.* (9th Cir. 2021) 999 F.3d 668. There, the Ninth Circuit, vacated reversed and remanded a \$110
25 million judgement against an employer for, *inter alia*, inaccurately paying overtime, and directed the
26 trial court to enter judgement in favor of the employer. *See also O’Conner v. Uber Technologies, Inc.*
27 (9th Cir. 2018) 904 F.3d 1087 (decertification of wage and hour misclassification action); *see also*
28 *Duran v. U.S. Bank National Association* (2014) 59 Cal.4th 1, 31 (reversing a trial verdict in favor

plaintiffs in a wage and hour class action)); *Tien v. Tenet Healthcare Corp.* (2012) 209 Cal.App.4th 1077, 1088 (“[T]he reason, if any, that employees might not take their breaks were predominantly individualized questions of fact not susceptible to class treatment.”); *Ali v. U.S.A. Cab Ltd.* (2009) 176 Cal.App.4th 1333, 1341 (affirming denial of certification because employees’ declarations attesting to having taken meal and rest breaks demonstrated that individualized inquiries were required to show harm); *Campbell v. Best Buy Stores, L.P.*, (C.D. Cal. 2013) 2013 WL 5302217 at *11-13 (following *Brinker* and denying certification of proposed off-the-clock and rest and meal break classes due to lack of uniform policy); *Brown v. Fed Express Corp.* (C.D. Cal. 2008) 249 F.R.D. 580, 587-88 (denying certification of driver meal and rest period claims based on the predominance of individual issues). Collectively, the examples cited above illustrate the uncertain nature of class litigation. Consequently, the uncertainty of obtaining certification through a contested motion is a significant risk factor favoring settlement. JCL Dec., ¶¶ 37.

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

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

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

Finally, continuing to litigate this action would require continued and extensive resources coupled with significant Court time to proceed through trial and post-trial motions, which can often take years. Furthermore, wage and hour litigation is complex and expensive, as it often necessitates extensive expert testimony, particularly with regards to damages. But even if Plaintiff is successful at trial, Plaintiff is acutely aware that a judgment does not end the litigation. Plaintiff fully expects that Defendant would appeal any favorable judgment. As demonstrated by *Magadia, supra*, 999 F.3d 668,

1 the risk of an appeal and subsequent reversal is real. JCL Dec., ¶ 38. “Avoiding such a trial and the
2 subsequent appeals in this complex case strongly militates in favor of settlement rather than further
3 protracted and uncertain litigation.” (*Nat’l Rural Telecomms. Coop v. DirecTV* (C.D. Cal. 2004) 221
4 F.R.D. 523, 527.) Thus, “unless the settlement is clearly inadequate, its acceptance and approval are
5 preferable to lengthy and expensive litigation with uncertain results.” (*Id.* at 526.)

6 Given the amount of the settlement here, as compared to potential value of the claims, offset by
7 the various inherent risks to continued litigation, the settlement is fair and reasonable. JCL Dec., ¶ 39.

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

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

18 The Parties jointly drafted the Notice Packet which fairly and neutrally informs the Class
19 Members of their rights and remedies. The Settlement Administrator will first verify addresses, then
20 mail the proposed Notice Packet to all Class Members. The Notice Packet will include information
21 regarding the nature of the lawsuit, a summary of the substance of the Settlement’s terms, the procedure,
22 and time period within which to requests for exclusions or objections to the Settlement, the date for the
23 final approval hearing, the formula used to calculate settlement payments, and the terms and scope of
24 the Released Class Claims. Agreement at § III(K)(2)(a). This method was negotiated by the Parties to
25 ensure delivering the most reasonable method of notice to the Class Members while ensuring cost

26
27 ³ Due process does not require that each class member actually receive a notice, but rather a procedure reasonably certain
28 to reach class members. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 1789, at 253 (2d ed. 1986). If
appropriate notice is given, class members will be bound by the judgment even if they never actually receive the notice.
Fontana v. Elrod (7th Cir. 1987) 826 F.2d 729, 732.

effective administration of the Settlement. JCL Dec., ¶¶ 40-41.

Accordingly, both the method of disseminating the Notice Packet and content of the Notice Packet satisfy due process. (See C.R.C. 3.776(e)-(f); *State of Cal. v. Levi Strauss* (1986) 41 Cal.3d 460,485 (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 Court Should Preliminarily Approve the Class Representative Service Award

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

The Settlement provides for a Class Representative Service Award of \$10,000⁴ for Plaintiff. The

⁴ The amount of the requested enhancement payment-\$10,000-is reasonable by reference to the amounts that California courts (both federal and state) have repeatedly found to be reasonable for wage and hour class action settlements: See *Baker v. LA. Fitness Int'l, LLC*, No. BC438654 (L.A. County Super. Ct. Dec. 12, 2012) (awarding \$10,000 enhancement payments to three of the named plaintiffs); *Blue v. Codwell Banker Residential Brokerage Co.*, No. BC417335 (L.A. County Super. Ct. Mar. 21, 2011) (awarding \$10,000 enhancement payment); *Buckmire v. Jo-Ann Stores, Inc.*, No. BC394795 (L.A. County Super. Ct. June 11, 2010) (awarding \$10,000 enhancement payments to the named plaintiff); *Coleman v. Estes Express Lines, Inc.*, No. BC429042 (L.A. County Super. Ct. Oct. 3, 2013) (awarding \$10,000 enhancement payment); *Ethridge v. Universal Health Services, Inc.*, No. BC391958 (L.A. County Super. Ct. May 27, 2011) (awarding \$10,000 enhancement payment); *Hickson v. South Coast Auto Insurance Marketing, Inc.*, No. BC390395 (L.A. County Super. Ct. Mar. 27, 2012) (awarding \$10,000 enhancement payment); *Hill v. Sunglass Hut Int'l, Inc.*, No. BC422934 (L.A. County Super. Ct. July 2, 2012) (awarding \$10,000 enhancement payments to the named plaintiffs); *Kabamba v. Victoria's Secret Stores, LLC*, No. BC368528 (L.A. County Super. Ct. Aug. 19, 2011) (awarding enhancement payments of \$ 10,000 to the named plaintiffs along with additional compensation for their general release of claims); *Magee v. American Residential Services, LLC*, No. BC423798 (L.A. County Super. Ct. Apr. 21, 2011) (awarding \$15,000 enhancement payment); *Mares v. BFS Retail & Commercial Operations, LLC*, No. BC375967 (L.A. County Super. Ct. June 24, 2010) (awarding \$15,000 enhancement payments to the named plaintiffs); *Nevarez v. Trader Joe's Co.*, No. BC373910 (L.A. County Super. Ct. Jan. 29, 2010) (awarding \$10,000 enhancement payment); *Ordaz v. Rose Hills Mortuary, LP.*, No. BC386500 (L.A. County Super. Ct. Mar. 19, 2010) (awarding 10,000 enhancement payments to the named plaintiffs); *Sheldon v. AHMC Monterey Park Hospital LP*, No. BC440282 (L.A. County Super. Ct. Feb. 22, 2013) (awarding \$10,000 enhancement payment); *Silva v. Catholic Moray Services, Inc.*, No. BC408054 (L.A. County Super. Ct. Feb. 8, 2011) (awarding \$10,000 enhancement payments to the named plaintiffs); *Weisbarth v. Banc West Investment Services, Inc.*, No. BC422202 (L.A. County Super. Ct. May 24, 2013) (awarding \$10,000 enhancement payment); *Zamora v. Balboa Life & Casualty LLC*, No. BC360026 (L.A. County Super. Ct. Mar. 7, 2013) (awarding \$25,000 enhancement payments to the named plaintiffs); *Acheson v. Express, LLC*, No. 109CV135335 (Santa Clara County Super. Ct. Sep. 13, 2011) (awarding \$10,000 enhancement payment); *Aguiar v. Cingular Wireless, LLC*, No. CV 06-8197 DDP (AJWx) (C.D. Cal.

1 service award is fair and reasonable compensation for the Plaintiff's efforts bringing the action,
2 assisting Class Counsel with the litigation and settlement, regularly conferring with Class Counsel on
3 the status of his case and the strategies for prosecuting the claims, reviewing the proposed Settlement
4 to ensure that its terms are fair and provide adequate relief for the Settlement Class. JCL Dec., ¶ 42.

5 Class Counsel on behalf of Plaintiff will file a formal motion for the negotiated Class
6 Representative Service Award once preliminary approval of the Settlement is granted. Plaintiff
7 respectfully submits that the above showing is sufficient for preliminary approval of the negotiated
8 Class Representative Service Award. JCL Dec., ¶ 43.

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

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

20 Class Counsel took this matter on a contingency fee basis and invested significant time and
21 expense successfully prosecuting Plaintiff's claims. As discussed *supra*, the estimated average
22 Individual Settlement Payment illustrates the demonstrably positive outcome for the Settlement Class
23 Members. Considering the positive outcome for the Class Members, and in light of the supporting
24

25 Mar. 17, 2011) (awarding \$14,767 enhancement payment); *Bejarano v. Amerisave Mortgage Corp.*, No. EDCV 08-00599 SGL (Opx)
26 (C.D. Cal. June 22, 2010) (awarding \$10,000 enhancement payment); *Carbajal v. Sally Beauty Supply LLC*, No. CIVVS 1004307 (San
Bernardino Super. Ct. Aug. 6, 2012) (awarding \$10,000 enhancement payments to the named Plaintiffs); *Contreras v. Serco Inc.*, No. 10-
27 cv-04526-CAS-JEMx (C.D. Cal. Sep. 10, 2012) (awarding \$10,000 enhancement payment); *Guerrero v. R.R. Donnelley & Sons Co.*, No.
RIC 10005196 (Riverside Super. Ct. July 16, 2013) (awarding \$10,000 enhancement payment); *Kisliuk v. ADT Security Services, Inc.*, No.
CV08-0324 DSF (RZx) (C.D. Cal. Jan. 10, 2011) (awarding \$10,000 enhancement payment); *Morales v. BCBG Maxaria Int'l Holdings,*
28 *Inc.*, No. JCCP 4582 (Orange County Super. Ct. Jan. 24, 2013) (awarding \$10,000 enhancement payment); and *Barrett v. Doyon Security*
Services, LLC, Nos. BS900199, BS900517 (San Bernardino County Super. Ct. Apr. 23, 2010) (awarding \$10,000 enhancement payment).

1 authority, the proposed Class Counsel Award is fair and reasonable. JCL Dec., ¶ 44.

2 Plaintiff will file a formal motion for the negotiated Class Counsel Award once preliminary
3 approval of the Settlement is granted. Plaintiff respectfully submits that the above showing is sufficient
4 for preliminary approval of the negotiated attorneys' fees. JCL Dec., ¶ 45.

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

6 For Settlement, Plaintiff contends, and Defendant does not dispute, that provisional certification
7 of the Class is appropriate. JCL Dec., ¶ 46.

8 1. The Standard for Class Certification

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

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

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

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

27 In April 2012, the Supreme Court expounded on the element of predominance: The “ultimate
28 question” the element of predominance presents is whether “the issues which may be jointly tried, when

1 compared with those requiring separate adjudication, are so numerous or substantial that the
2 maintenance of a class action would be advantageous to the judicial process and to the litigants.”
3 (*Brinker*, 53 Cal. 4th at 1021-1022 (citations omitted).)

4 Because all Class Members are Defendant’s current and former employees, the class is readily
5 ascertainable from Defendant’s regular business records, i.e., payroll records. JCL Dec., ¶ 47.

6 The statutes relating to each of Plaintiff’s claims apply with equal force and effect to the entire
7 Settlement Class. Factually, Defendant’s policies and practices apply class-wide, and Defendant’s
8 liability can be determined by facts common to all members of the class. The wage and hour issues are
9 both numerous and substantial, and a class action is the most advantageous method of dealing with the
10 claims of the Settlement Class. JCL Dec., ¶ 48.

11 Plaintiff’s wage and hour claims are typical of the proposed Settlement Class because they arise
12 from the same factual basis and are based on the same legal theories applicable to the other Class
13 Members. Likewise, Plaintiff’s interests are entirely coextensive with the interests of the Settlement
14 Class. Plaintiff alleges that he was injured by the same company-wide practices to which the proposed
15 Class Members were subject to and seeks the same relief. Plaintiff has already demonstrated his ability
16 to advocate for the interests of the Class Member by initiating this litigation, undertaking extensive
17 class discovery, and evaluating the proposed settlement to assure that it is fair. JCL Dec., ¶ 49.

18 Additionally, Plaintiff is represented by competent Class Counsel who have extensive experience
19 in litigating wage and hour class action cases. Class Counsel successfully briefed, argued, certified, and
20 gained state court settlement approval of the same class-wide causes of action that are at issue in this
21 case. Class Counsel’s wage and hour class action experience establishes that they are well qualified to
22 represent the interests of this Class. JCL Dec., ¶¶ 51-58, Declaration of Shani Zakay, ¶¶ 1-3;
23 Declaration of Nicholas J. De Blouw 1-2.

24 A class action is superior to a multitude of individual lawsuits. Given the size and amount of
25 each individual claim, the Class Members likely have little incentive to litigate their claims on an
26 individual basis because the out-of-pocket expense and personal commitment necessary to litigate each
27 claim outweighs any potential recovery. In sum, class treatment is superior to individual, case-by-case
28 adjudication. JCL Dec., ¶ 50.

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Dated: September 30, 2022

By: Jean-Claude Lapuyade
Jean-Claude Lapuyade, Esq.