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9 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
10 **FOR THE COUNTY OF LOS ANGELES**

11 EDDIE MCKINNIE, as an individual and on
12 behalf of all others similarly situated and
aggrieved

13 Plaintiff,

14 v.

15 IRON MOUNTAIN SECURE SHREDDING,
16 INC., a Delaware corporation; IRON
MOUNTAIN MANAGEMENT SERVICES,
17 INC., a Delaware corporation; IRON
MOUNTAIN INCORPORATED, a Delaware
18 corporation; IRON MOUNTAIN
FULFILLMENT SERVICES, INC., a
19 Delaware corporation; IRON MOUNTAIN
INFORMATION MANAGEMENT
20 SERVICES, INC., a Delaware corporation;
21 IRON MOUNTAIN DATA CENTERS, LLC,
22 a Delaware limited liability company; IRON
MOUNTAIN INFORMATION
23 MANAGEMENT, LLC, a Delaware limited
liability company; IRON MOUNTAIN DATA
24 CENTERS SERVICES, LLC, a Delaware
limited liability company; and DOES 1-50,
25 inclusive,

26 Defendants.
27
28

Case No.: 21STCV05707

Assigned for All Purposes to:
Hon. David C. Cunningham
Dept. SSC-11

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

[Filed concurrently with Memorandum of Points
and Authorities; Declarations of Zachary M.
Crosner, Eddie McKinnie and Eric Springer;
[Proposed] Order]

Date: November 28, 2022
Time: 1:45 p.m.
Dept. SSC-11

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1 **I. INTRODUCTION**

2 Plaintiff Eddie McKinnie respectfully requests that the Court preliminarily approve the Joint
3 Stipulation and Settlement Agreement of Class Action and PAGA Claims (“Agreement”) entered
4 into between Plaintiff and Defendants Iron Mountain Secure Shredding, Inc., Iron Mountain
5 Incorporated, Iron Mountain Fulfillment Services, Inc., Iron Mountain Information Management
6 Services, Inc., Iron Mountain Data Centers, LLC, Iron Mountain Information Management, LLC,
7 Iron Mountain Data Centers Services, LLC (together “Iron Mountain” or “Defendants”). The
8 proposed settlement seeks to resolve claims in the above captioned matter in exchange for a non-
9 reversionary \$1,500,000 Gross Settlement Amount. The settlement class is comprised of “all current
10 and former non-exempt employees hourly paid of Defendants employed in California at any time
11 from October 1, 2017 to September 1, 2022.” (Agreement, § 26).¹

12 The Agreement and Notice distribution plan are the products of adversarial, arm’s-length
13 negotiations by informed counsel and parties, facilitated by an experienced mediator. The settlement
14 is fair, reasonable, and adequate to all. Plaintiff has analyzed the strengths and vulnerabilities of the
15 claims with Defendants’ potential exposure and determined the \$1,500,000 proposed settlement is
16 well within the range of reasonableness and is in the Class Members’ best interests. The length and
17 risks of trial and perils of litigation that affect the values of the claims were all carefully weighed.
18 In addition, the defenses asserted by Defendants, the uncertainty of class certification, the
19 difficulties of complex litigation, the lengthy process of establishing specific damages and various
20 possible delays and appeals, were also considered by Plaintiff and counsel in negotiating the
21 proposed settlement. Further, the proposed settlement satisfies the criteria for preliminary approval
22 under California Rules of Court, Rule 3.769.

23 Accordingly, Plaintiff seeks: (1) preliminary approval of the settlement; (2) provisional
24 certification of the Class; (3) appointment of Plaintiff as Class Representatives; (4) appointment of
25 Crosner Legal, PC as Class Counsel; (5) approval of the Parties’ proposed Notice of Class Action
26 Settlement (“Notice”) and method of notifying the Class Members; (6) a hearing date for Plaintiff’s
27

28 _____
¹ The fully executed Agreement is attached to the Declaration of Zachary M. Crosner (“Crosner Decl.”) as Exhibit 1.

1 Motion for Final Approval of Class Action Settlement; and (7) entry of an Order Granting
2 Preliminary Approval of Class Action Settlement.

3 **II. BACKGROUND/LITIGATION HISTORY**

4 The Iron Mountain Defendants operate under the Iron Mountain Incorporated corporate
5 structure, and offer a variety of document and data management and storage services. Plaintiff
6 McKinnie worked for Iron Mountain as a non-exempt warehouse worker and “hiker” from
7 approximately December 2018 to July 2020.² (Crosner Decl., ¶ 12.)

8 Plaintiff timely exhausted his administrative remedies with the LWDA on February 11,
9 2021. (Crosner Decl. ¶ 13; Exh. 3.) Plaintiff did not receive notice from the LWDA that it intended
10 to investigate the alleged violations outlined in his PAGA letter.³ (Crosner Decl., ¶ 13.)
11 Consequently, on February 16, 2021, Plaintiff filed a class action complaint against Iron Mountain,
12 and then filed an amended complaint adding claims under PAGA. The operative Complaint alleges
13 claims for minimum and overtime wages, meal and rest break violations, inaccurate wage
14 statements, waiting time penalties, unfair competition, and penalties under PAGA.⁴ (Crosner Decl.,
15 ¶ 13.) Plaintiff will file an amended complaint adding claims for failure to pay accrued vacation
16 wages and expense reimbursement. (Agreement, § 37.)

17 On February 14, 2022, the Parties participated in mediation with Gig Kyriacou, Esq., a
18 respected wage and hour class action mediator. The mediation lasted a full day and with the
19 mediator’s assistance the Parties reached agreement on all major issues and executed a
20 Memorandum of Understanding. They then formally reduced the proposed settlement to the
21 Agreement now before the Court for approval. The Agreement meets the requirements in the LASC
22 Checklist for Preliminary Approval.. The Agreement has also been uploaded to the LWDA.
23 (Crosner Decl., ¶ 14; Exh. 6.)

24 ////

25 ² Plaintiff filed an individual case against Iron Mountain, LASC Case No. 21STCV06585, alleging disability
26 discrimination, failure to accommodate, failure to engage in the interactive process, and retaliation. Plaintiff is
27 entering into a separate and confidential settlement of these claims, the terms of which will be made available to the
28 Court for *in camera* review as necessary. (Crosner Decl., ¶ 12.)

³ Plaintiff submitted an amended PAGA notice on August 25, 2022 adding allegations for failure to pay accrued
vacation wages and expense reimbursement. (Crosner Decl., ¶ 13; Exh.

⁴ Plaintiff uploaded the complaint to the LWDA. (Crosner Decl., ¶ 14; Exh.5.)

1 **III. INVESTIGATION**

2 Prior to the mediation, Defendants provided Plaintiff with extensive informal discovery,
3 including Plaintiff's personnel, time, and payroll records, time and payroll records for a randomly
4 selected sampling of Class Members, wage statement exemplars, Defendants' employee handbooks,
5 including Defendants' policies and procedures regarding the payment of wages, the provision of
6 meal and rest breaks, timekeeping policies (including recording hours), issuance of wage statements,
7 and termination wages, as well as information regarding the number of putative Class Members who
8 are current and former employees, the number of PAGA Members, the number of workweeks
9 throughout the Class Period, and the number of pay periods throughout the PAGA Period. From this
10 information, Plaintiff was able to analyze Defendants' liability for the claims asserted in this case
11 and, with the assistance of Plaintiff's experts at Berger Consulting Group, the potential exposure
12 and damages. (Crosner Decl., ¶ 15.)

13 Based on this informal discovery, Plaintiff contends the Class Members were not paid all
14 minimum or overtime wages, not provided with legally compliant meal and rest periods, did not
15 receive compliant wage statements, and did not receive all wages due on separation of employment.
16 In considering the reasonableness of the proposed settlement, Plaintiff considered each of
17 Defendants' counterarguments, which sharply contested Plaintiff's claims. Plaintiff's Counsel
18 weighed the strength of Defendants' arguments, including the risks of prevailing at class
19 certification and on the merits, and determined that the proposed settlement is in the best interests
20 of the Class. Although remaining confident in the strength of their claims, all these factors led
21 Plaintiff to discount the exposure analysis, discussed in detail below. (Crosner Decl., ¶ 16.)

22 **IV. TERMS OF THE PROPOSED SETTLEMENT**

23 **A. Deductions from the Settlement**

24 The Parties have agreed (subject to the Court's approval) that this action be settled and
25 compromised for the non-reversionary total sum of \$1,500,000.00 ("Gross Settlement Amount" or
26 "GSA") (Agreement, §§ 9, 39), which includes: (a) attorney's fees of up to \$500,000 (one-third of
27
28

1 the GSA)⁵ to compensate Class Counsel for work already performed and all work remaining to be
2 performed (Agreement, § 46.); (b) actual litigation expenses as documented⁶ (*Id.*); (c) an
3 Enhancement Award in an amount not to exceed \$5,000.00 (Agreement, § 7, 47); (d) Administration
4 Costs to Simpluris, Inc. (the proposed settlement administrator) in an amount not to exceed
5 \$16,000.00 (Agreement, § 45); and (e) PAGA penalties to the LWDA of \$75,000.00 (which is 75%
6 of the \$100,000.00 PAGA Payment, with the remaining 25% or \$25,000.00 to PAGA Members)
7 (Agreement, § 43). Employer-side payroll taxes (including FICA, FUTA, and SDI) will be paid by
8 Defendants separate and apart from the GSA. (Agreement, §§ 9, 39.)

9 **B. Calculation of the Individual Settlement Payments to Class and PAGA**
10 **Members**

11 After all Court-approved deductions from the GSA, it is estimated that \$_____ (“Net
12 Settlement Amount” or “NSA”), less all applicable employee-side taxes, will be distributed to the
13 estimated 1,523⁷ Class Members, with an average individual settlement amount of around \$567.⁸
14 Additionally, it is estimated that the 25% PAGA Payment (\$25,000.00) will be distributed to the
15 estimated 1,465⁹ PAGA Members, resulting in an average payment of \$17.06.¹⁰ per PAGA Member.
16 (Crosner Decl., ¶¶ 18-19.) Under no circumstances will any portion of the Settlement revert to
17 Defendants. (Agreement, § 9.)

18 Subject to the terms and conditions of the Settlement, Simpluris will calculate and issue
19 Individual Settlement Payments to Participating Class Members based on the following formula:

20 Each Participating Class Member will receive a proportionate share of the Net
21 Settlement Amount that is equal to (i) the number of weeks he or she worked for
22 Defendants in California during the Class Period based on the Class Data provided
23 by Defendants, divided by (ii) the total number of weeks worked by all Participating
Class Members during the Class Period based on the same Class Data, which is then

24 ⁵ The percentage method, with or without a lodestar cross-check, may be used in common fund cases like this one.
25 *Laffitte v. Robert Half Internat., Inc.* (2016) 1 Cal.5th 480, 503. In support of their fee request at Final Approval, Class
Counsel will provide the Court with lodestar information to permit the Court to do a lodestar cross-check in connection
with Class Counsel’s request for attorney’s fees.

26 ⁶ At Final Approval, Class Counsel will provide documentation regarding actual expenses incurred to support Class
Counsel’s request for reimbursement of actual expenses. Counsel’s current expenses are \$13,837.63, and will not exceed
\$15,000. (Crosner Decl., ¶ 17.)

27 ⁷ This is based on information provided by Defendants in advance of mediation and separately confirmed by Plaintiff.

28 ⁸ \$864,000 NSA /1,523 Class Members

⁹ This information is also based on data provided by Defendants in advance of mediation.

¹⁰ \$25,000 (25% PAGA Payment) /1,465 PAGA Members

multiplied by the NSA. One day worked in a given week will be credited as a week for purposes of this calculation. Therefore, the value of each Class Member's Individual Settlement Share ties directly to the amount of weeks that he or she worked. (Agreement, § 42.)

Additionally, Simpluris will calculate and issue payments to PAGA Members based on the following formula:

Each PAGA Member will receive a proportionate share of the 25% PAGA Payment payable to PAGA Members that is equal to (i) the number of pay periods he or she worked for Defendants in California during the PAGA Period based on the Class Data provided by Defendants, divided by (ii) the total number of pay periods worked by all PAGA Members during the PAGA Period based on the same Class Data, which is then multiplied by the 25% PAGA Payment. One day worked in a given pay period will be credited as a pay period for purposes of this calculation. Therefore, the value of each PAGA Member's share of the PAGA Payment ties directly to the amount of pay periods that he or she worked. (Agreement, § 43).

The number of pay periods and weeks worked by each Participating Class Member and PAGA Member will be derived from Defendants' records. (Agreement, §§ 42-43, 50.) Each Class Member's gross settlement award will be apportioned as follows: one-third wages and two-thirds penalties and interest. (Agreement, § 42.d.) Simpluris will be responsible for issuing Form W-2s for amounts deemed "wages" and Form 1099s for the portions allocated to penalties and interest. (Agreement, §§ 42.d., 48.)

C. Uncashed Funds to Unclaimed Property Fund

Settlement checks must be cashed or deposited within 180 days after the checks are mailed to them. (Agreement, § 42.f.) In the event a settlement check remains uncashed, such uncashed funds shall be transmitted to the State Controller's Office Unclaimed Property Fund in the name of the Participating Class Member and/or PAGA Member for later claim. (Agreement, § 42.f.) Because this lawsuit benefits Class Members/PAGA Members who release claims by participating in the lawsuit, the funds representing their settlement payments should remain their property. By sending the uncashed funds to the Unclaimed Property Fund in the name of the Class Member/PAGA Member, he or she can claim his or her property at a future date convenient to the Class Member. Therefore, there will be no unpaid residue or unclaimed or abandoned Class Member funds under California Code of Civil Procedure section 384(a). At Final Approval, Class Counsel will request the Court set a compliance deadline/hearing under Code of Civil Procedure § 384(b), for filing an amended judgment and report with the data required under Section 384. (Crosner Decl., ¶ 22.)

1 **C. Notice and Extended Response Deadline for Re-Mailed Notices**

2 Within forty five days after entry of the Preliminary Approval Order, Defendants will
3 provide Simpluris with the Class Data, containing each Class Member's first and last name, last
4 known mailing address, Social Security number, total number of weeks worked during the Class
5 Period, and total number of pay periods worked during the PAGA Period. (Agreement, § 50.)
6 Simpluris will maintain the Class Data as private and confidential. (Agreement, § 51.)

7 Prior to mailing, Simpluris will perform a search for updated addresses in the National
8 Change of Address Database. (Agreement, § 52.) Simpluris will use the NCOA and skip traces to
9 attempt to find current addresses for any Notice returned as undeliverable. If Simpluris is unable to
10 obtain a better address for a Class Member, the Notice will be deemed undeliverable. (Agreement,
11 § 52.) Within seven days after receipt of the class data, Simpluris will mail via regular First-Class
12 mail the Notice to all Class Members. (Agreement, § 52.)

13 The contents of the Notice are consistent with the terms of the Agreement. The Notice
14 informs Class Members how and when to request exclusion from or object to the settlement and of
15 their estimated payment amount which they will automatically receive a settlement payment if they
16 do nothing. (Crosner Decl., ¶ 25; Exh. 2.)

17 **D. Responses to the Settlement and Deadline Thereon**

18 Class Members will have 45 days from the initial mailing of the Notice to respond to the
19 settlement by submitting a challenge to the number of weeks or pay periods attributed to them,
20 submitting an objection, or requesting to be excluded from the settlement and the consequences of
21 each choice. (Agreement, §§ 42.b., 55, 58.) Class Members can object to the settlement in writing
22 via mail or fax by submitting a document with their name, the words "Notice of Objection" or
23 "Formal Objection" and a description of the arguments supporting their objection. Class Members
24 are informed that the Court will hear any objections from any Class Member who attends the Final
25 Approval Hearing. (Agreement, § 58.)

26 Class Members can also submit a written request for exclusion from the settlement by
27 mailing or faxing a written request, including his or her name, address, and phone number, and a
28 statement demonstrating his or her intent to opt out of the settlement. (Agreement, § 55.)

1 The Notice also informs the Class Member/PAGA Members that they can dispute the
2 number of weeks/pay periods allotted to them to calculate their settlement payments by contacting
3 Simpluris before the Response Deadline and include any documentation supporting the dispute.
4 Simpluris will investigate the dispute, request additional information from Defendants, and make a
5 final decision as to the number of eligible work weeks/pay periods. (Agreement, § 42.d.)

6 **E. Funding and Distribution of the Settlement**

7 Defendants shall fund the settlement within fourteen calendar days after the Effective Date.
8 (Agreement, § 41.). Simpluris shall disburse all payments required under this Settlement within
9 seven calendar days of receipt of the GSA. (Agreement, § 42.e.)

10 **F. Release of Claims**

11 Upon final approval, Participating Class Members shall forever release the Released
12 Parties¹¹ for the Released Claims for the Class Period. (Agreement, § 62.) The Released Claims
13 include “all claims pleaded in the Complaint and First Amended Complaint in the Class Lawsuit
14 and any PAGA letters and amended PAGA letters sent to the LWDA by Plaintiff during or prior to
15 the Class Lawsuit, and which could have been alleged under the same or similar facts , allegations
16 and/or claims pleaded in the Lawsuit, against the Released Parties, for work performed during the
17 Class Period” (Agreement, § 62), and as specified in Subsections a.-d. of Section 62.

18 As discussed below, Plaintiff’s Counsel is convinced that the proposed settlement is in the
19 Class Members’ best interests based on the negotiations and a detailed knowledge of the issues
20 present in this action. The length and risks of trial and perils of litigation that affect the value of the
21 claims were all carefully weighed. In addition, the affirmative defenses asserted by Defendants, the
22 uncertainty of class certification, the difficulties of complex litigation, the lengthy process of
23 establishing specific damages and various possible delays and appeals were also carefully
24 considered by Plaintiff’s Counsel in arriving at the proposed settlement. (Crosner Decl., ¶ 31.)

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26
27 ¹¹ “Released Parties” means Defendants and any of their past, present, and future direct or indirect parents, subsidiaries,
28 predecessors, successors, and affiliates, as well as each of their past, present, and future officers, directors, employees,
partners, members, shareholders and agents, attorneys, insurers, reinsurers, and any individual or entity which could be
jointly liable with Defendants. (Agreement, § 24.)

1 **G. The Class Representative Service Award Is Justified Given the Risks and**
2 **Should be Preliminarily Approved**

3 The Agreement provides for a service payment not to exceed \$5,000.00 to Plaintiff.
4 (Agreement, § 47.) Courts routinely approve service payments, or incentive awards, to compensate
5 named plaintiffs for the services they provide and the risks they incur during class litigation. *In re*
6 *Cellphone Fee Termination Cases* (2010) 186 Cal. App. 4th 1380, 1393 (“These awards are
7 discretionary...and are intended to compensate class representatives for work done on behalf of the
8 class, to make up for financial or reputational risk undertaken in bringing the action, and, sometimes,
9 to recognize their willingness to act as a private attorney general.”); *Bell v. Farmers Ins. Exch.*
10 (2004) 115 Cal. App. 4th 715, 725-26 (upholding service payments to class representatives); Manual
11 § 21.62 n.971 (noting that service payments are warranted).

12 The requested service award is reasonable in light of the benefits Plaintiff conferred upon
13 the entire Class, resulting in a benefit to all Class Members and the State of California, the time
14 spent assisting counsel with the investigation and prosecution of these claims, commitment to
15 responding to discovery, and consenting to the proposed Agreement. Furthermore, by attaching his
16 name to this lawsuit, Plaintiff also took on the reputational risk that future employers would learn
17 of his participation in this case and would unfairly associate them with costly litigation, costing them
18 future employment opportunities. Any future employer could easily perform a simple Google search
19 – an unauthorized simple background check unknown to Plaintiff that can still provide a plethora of
20 information – and conclude that Plaintiff is not worth the risk of hiring given his prior involvement
21 in a lawsuit against a former employer. This is the kind of reputational risk, borne only by Plaintiff
22 and no other Class Member, that the incentive award is meant to compensate. Furthermore, in
23 pursuing this action on behalf of the Class, Plaintiff risked a judgment against him for attorney’s
24 fees and costs in the event this matter had been lost. For these reasons, at final approval, Plaintiff
25 will request the Court award him an enhancement payment in an amount that does not exceed
26 \$5,000. (Crosner Decl., ¶¶ 32-33; Declaration of Eddie McKinnie, ¶¶ 2-10.)

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1 **IV. ARGUMENT**

2 In deciding whether to approve a proposed class action settlement under Code of Civil
3 Procedure section 382, the Court must find that a proposed settlement is “fair, adequate and
4 reasonable.” *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1801 [quoting *Officers for*
5 *Justice v. Civil Serv. Comm’n* (9th Cir. 1982) 688 F.2d 615, 625, cert. den. (1983) 459 U.S. 1217].
6 A proposed class action settlement is **presumed** fair under the following circumstances: (1) the
7 parties reached settlement after arms-length negotiations; (2) investigation and discovery were
8 sufficient to allow counsel and the court to act intelligently; (3) counsel is experienced in similar
9 litigation; and (4) the percentage of objectors is small. *Id.* at 1802. As the following shows, all of
10 these elements are present here and the Court should grant of preliminary approval.

11 **A. The Settlement was Reached as a Result of Arm’s Length Negotiations**

12 The proposed settlement was reached as a result of arm’s-length negotiations. Though
13 cordial and professional, the settlement negotiations have been, at all times, adversarial and non-
14 collusive in nature. Following mediation, Counsel for the Parties conducted extensive arm’s length
15 settlement negotiations regarding the settlement termes memorialized in the Agreement. (Crosner
16 Decl., ¶ 34.)

17 While Plaintiff believes in the merits of his case, he also recognizes the inherent risks of
18 litigation and understand the benefit of Class Members receiving significant settlement funds
19 immediately as opposed to risking continued litigation in achieving class certification, the merits of
20 the case before and after trial, the damages awarded and/or an appeal that can take several more
21 years to litigate. (Crosner Decl., ¶ 35.)

22 **B. The Settlement is the Result of Thorough Investigation and Discovery**

23 The Parties thoroughly investigated and evaluated the factual strengths and weaknesses of
24 their arguments before reaching the proposed settlement, and engaged in sufficient investigation,
25 research and discovery, referenced above, to support the settlement. The proposed settlement was
26 only possible following significant analysis and evaluation of Defendants’ relevant policies and
27 procedures, as well as the data it produced for the putative Class, which permitted Plaintiff’s Counsel
28 and expert to engage in a comprehensive analysis of liability and potential damages to prepare for

1 mediation. (Crosner Decl., ¶¶ 36-37.) This litigation has reached the stage where “the Parties
2 certainly have a clear view of the strengths and weaknesses of their cases” sufficient to support the
3 Settlement. *Boyd v. Bechtel Corp.* (N.D. Cal. 1979) 485 F. Supp. 610, 617.

4 **C. Counsel for the Parties are Experienced in Similar Litigation**

5 Counsel for the Parties are particularly experienced in wage and hour employment law, class
6 actions and PAGA actions. Plaintiff’s Counsel has prosecuted numerous cases on behalf of
7 employees for wage and hour violations and thus are experienced and qualified to evaluate the class
8 and PAGA claims, evaluate settlement versus trial on a fully informed basis, and to evaluate the
9 viability of the defenses. This experience informed Plaintiff’s Counsel on the risks and uncertainties
10 of further litigation and guided their determination to endorse the proposed settlement.¹² (Crosner
11 Decl. ¶¶ 6-11.)

12 **D. The Proposed Settlement is a Reasonable Compromise of Claims**

13 An understanding of the amount in controversy is an important factor into whether the
14 settlement “of the class members’ claims is reasonable in light of the strengths and weaknesses of
15 the claims and the risks of the particular litigation.” *Kullar v. Foot Locker Retail, Inc.* (2008) 168
16 Cal.App.4th 116, 129; *Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles* (2010) 186 Cal.App.4th
17 399, 409. The most important factor in this regard is “the strength of the case for plaintiffs on the
18 merits, balanced against the amount offered in settlement.” *Kullar*, 168 Cal.App.4th at 129..

19 In weighing the strength of Plaintiff’s case, *Kullar* instructs that the court is not to “decide
20 the merits of the case or to substitute its evaluation of the most appropriate settlement for that of the
21 attorneys.” 168 Cal.App.4th at 133. Further, this analysis does not require an explicit statement of
22 the maximum amount the plaintiff class could recover if it prevailed on all its claims, provided there
23 is a record which allows “an understanding of the amount that is in controversy and the realistic
24 range of outcomes of the litigation.” *Munoz*, 186 Cal. App. 4th at 409. Put differently, “as the court
25 does when it approves a settlement as in good faith under Code of Civil Procedure section 877.6,
26 the court must at least satisfy itself that the class settlement is within the ‘ballpark’ of

27 _____
28 ¹² The final factor mentioned in *Dunk* - the number of objectors - is not determinable until the Notice of Class Action
Settlement has been provided to the Class and they have had an opportunity to respond. This information will be
provided to the Court in conjunction with the Motion for Final Approval of Class Action Settlement.

1 reasonableness.” *Kullar*, 168 Cal. App. 4th at 133 citing *Tech-Bilt v. Woodward-Clyde & Associates*
2 (1985) 38 Cal. 3d 488, 499-500. As shown below, the Parties’ investigation and discovery revealed
3 several reasons to discount claims and agree to this settlement.

4 **E The Settlement is Fair and Reasonable Based on the Strengths of Plaintiff’s**
5 **Case and the Risks and Costs of Further Litigation**

6 The proposed settlement was only possible following significant analysis and evaluation of
7 Defendants’ relevant policies and procedures, as well as the data that Defendants produced for the
8 Class. This permitted Plaintiff’s Counsel to engage in a comprehensive analysis of liability and
9 potential damages. The discovery conducted resulted in Plaintiff’s central theories of liability, which
10 are based on Plaintiff’s claims that Defendants failed to provide compliant meal and rest periods,
11 failed to pay all minimum and overtime wages, failed to provide accurate, itemized wage statements
12 and failed to pay all wages due on separation of employment As explained above, Defendants
13 maintain that the discovery produced demonstrates that it would succeed at both class certification
14 and on the merits. (Crosner Decl., ¶ 37.)

15 Plaintiff believes this case is suitable for certification on the claimed basis that there are
16 company-wide policies that Plaintiff contends violate California law and uniformly affect the Class
17 Members. However, Defendants’ counterarguments raise uncertainties with respect to both class
18 certification and success on the merits. As the California Supreme Court emphasized in *Sav-On v.*
19 *Superior Court* (2004) 34 Cal.4th 319 (2004), class certification is always a matter of the trial court’s
20 sound discretion, and decisions following *Sav-On* have reached different conclusions with respect to
21 certification of wage and hour claims.¹³ While remaining confident in the strengths of his claims,
22 all of these factors led Plaintiff to discount the following maximum potential damage claims.
23 (Crosner Decl., ¶ 38.)

24 /////

25 _____
26 ¹³ *E.g., Harris v. Superior Court*, 154 Cal.App.4th 164 (2007) (reversing decertification of class claiming
27 misclassification and ordering summary adjudication in favor of employees), *review granted*, 171 P.3d 545 (2007) (not
28 cited as precedent, but rather for illustrative purposes only); *Walsh v. IKON Solutions, Inc.*, 148 Cal.App.4th 1440
(2007) (affirming decertification of class claiming misclassification); *Aguilar v. Cintas Corp. No. 2*, 144 Cal.App.4th
121 (2006) (reversing denial of certification); *Dunbar v. Albertson’s Inc.*, 141 Cal.App.4th 1422 (2006) (affirming
denial of certification).

1 **1. The Settlement Amount is Reasonable**

2 Defendants provided Plaintiff with class-wide data from which Plaintiff's Counsel could
3 extrapolate a damage analysis in preparation of mediation. Prior to mediation, there were a total of
4 1,523 Class Members (approximately 800 formerly employed in the limitations period). There are
5 also approximately 1,465 aggrieved employees and 67,982 pay periods within the PAGA Period.
6 (Crosner Decl., ¶ 39.)

7 Plaintiff contends Defendants failed to provide legally compliant meal and rest breaks.
8 Specifically, as to meal breaks, Plaintiff contends Defendants routinely failed to provide second
9 meal periods on shifts lasting over 10 hours, and further that the Class Members frequently were
10 unable to start their first meal period until after the fifth hour work. Plaintiff claims this violates
11 Labor Code sections 512, 226.7, and the applicable IWC Wage Orders, as well as *Brinker*
12 *Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004 and *Augustus v. ABM Security Serv.,*
13 *Inc.* (2016) 2 Cal.5th 257 for failure to provide all required meal periods and within the required
14 time frames. (Crosner Decl., ¶ 40.) On the rest break claims, Plaintiff primarily contends Defendants
15 failed to provide required third rest periods on shifts over 10 hours. (Crosner Decl., ¶ 40.)

16 Defendants deny Plaintiff's contentions, claiming they made meal and rest breaks available
17 to Class Members in compliance with California law. Defendants contend their meal and rest break
18 policies are lawful and that Class Members were frequently reminded they were required to take all
19 meal and rest breaks. Defendants also contend that time records demonstrate that Class Members
20 took duty-free, timely meal and rest breaks, and further that Defendants paid meal premiums.
21 Defendants contend their meal and rest break policies and practices comported with the flexibility
22 the *Brinker* court held was integral to California's meal and rest period requirements. Finally,
23 Defendants argue that Plaintiff's meal and rest break claims are not susceptible to common proof,
24 as the claims would require individualized inquiry, including whether there was an unlawful
25 companywide policy, whether employees had the opportunity to take meal and rest periods, whether
26 they voluntarily chose to forego their meal and rest periods, and whether Defendants ever prevented
27 them from taking meal and rest periods. Accordingly, Defendants contend these claims are
28 vulnerable to a ruling that class treatment is not appropriate. (Crosner Decl., ¶ 41.) Without taking

1 into consideration any of Defendant's defenses to certification or on the merits, Plaintiff calculated
2 Defendants' maximum exposure for the meal and rest break claims as approximately \$11,665,500.
3 (Crosner Decl., ¶ 42.)

4 Plaintiff also asserts Defendants' rounding of time entries deprived employees of earned
5 wages and, coupled with the allegations that Class Members performed off the clock work prior to
6 their shifts, give rise to unpaid minimum wages. Plaintiff further contends Defendants failed to pay
7 all overtime wages at the regular rate of pay, as Defendants failed to incorporate non-discretionary
8 bonuses paid during the same pay periods that overtime wages were earned, in violation of *Alvarado*
9 *v. Dart Container Corp.* (2018) 4 Cal.5th 542. (Crosner Decl., ¶ 43.) Without taking into
10 consideration any of Defendants' defenses to certification or on the merits, Plaintiff's expert
11 calculated Defendants' maximum exposure for this claim as about \$288,600 on the off the
12 clock/rounding claim and about \$4,000 on the regular rate claim. (Crosner Decl., ¶ 44.)

13 Plaintiff's claims for inaccurate wage statements and waiting time penalties are derivative
14 of the unpaid wage claims. Should those claims fail, Plaintiff's claim for inaccurate wage statements
15 and waiting time penalties would also fail. Defendants also contend they would not be liable for
16 waiting time penalties because a "good faith dispute" exists over the payment of past wages. Cal.
17 Code Regs. Tit. 8 § 13520; *Amaral v. Cintas Corp. No. 2* (2008) 163 Cal.App.4th 1157, 1201.
18 Further, Defendants contend Plaintiff would have to prove that Defendants "willfully" failed to pay
19 Class Members appropriate wages due upon separation of employment. Defendants contend that
20 any failure to pay wages upon separation was not willful. (Crosner Decl., ¶ 45.) Without taking into
21 consideration any of Defendants' defenses to certification or on the merits, Plaintiff calculated
22 Defendants' maximum exposure for wage statement penalties as \$3,587,000 and waiting time
23 penalties as \$4,047,360.¹⁴ (Crosner Decl., ¶ 46.)

24 As far as potential PAGA liability, the theoretical civil penalties likely exceed \$___ million
25 should Plaintiff prevail on all claims and establish violations of the multiple Labor Code sections at

26 _____
27 ¹⁴ Plaintiff also asserted claims for failure to pay accrued vacation wages on termination, as well as an unreimbursed
28 business expenses claim based on alleged use of personal cell phones for business purposes. Based on our investigation,
we ultimately concluded there was little evidence of any systemic violations on either theory that could be resolved on
a class or representative basis. Accordingly, we assigned no value to these claims. (Crosner Decl., ¶ 47.)

1 issue. (Crosner Decl., ¶ 48.) As with the class claims, Plaintiff discounted the potential PAGA
2 penalties based on Defendants' various defenses on the merits and also accounted for the Court's
3 wide discretion to reduce such penalties, or to decline to award penalties at all. Labor Code §
4 2699(e)(2); *Carrington v. Starbucks Corp.* (2018) 30 Cal.App.5th 504 (trial court awarded penalties
5 of \$5 per pay period after a bench trial, which decision was upheld on appeal); *In re Taco Bell Wage*
6 *and Hour Actions* (E.D. Cal. Apr. 8, 2016) 2016 U.S. Dist. LEXIS 48557 (PAGA penalties denied
7 after trial). Accordingly, the Parties allocated \$40,000 to PAGA penalties.

8 Plaintiff submits this amount is reasonable under the circumstances and in line with
9 comparable settlements in other wage and hour class actions in California. *E.g.*, *Van Kempen v.*
10 *Matheson Tri-Gas, Inc.* (N.D. Cal. Aug. 25, 2017) 2017 U.S. Dist. LEXIS 137182 (granting final
11 approval of \$5,000 PAGA penalty from \$370,000 settlement, or 1.4 percent of total settlement);
12 *Slavkov v. First Water Heater Partners I* (N.D. Cal. July 25, 2017) 2017 U.S. Dist. LEXIS 116303
13 (finding a \$7,500 PAGA payment reasonable when measured against the overall settlement of
14 \$345,000 and the possible weaknesses in plaintiffs' case, or 2.2 percent of total settlement).
15 Additionally, the LWDA has been informed of the terms of the PAGA portion of the settlement,
16 and will be able to weigh in as necessary. *Jennings v. Open Door Mktg. Inc.* (N.D. Cal. Oct. 3, 2018)
17 2018 U.S. Dist. LEXIS 171356, at *27 (approving settlement with PAGA penalties of 0.6% where
18 "[p]laintiffs [have] submitted the settlement agreement to the LWDA, and the LWDA has not
19 objected to the settlement.

20 Thus, Plaintiff and his counsel discounted the value of the class claims consistent with the
21 risks discussed above, and carefully weighed the likelihood of the class receiving substantially
22 greater benefit if the litigation continued. Plaintiff and counsel concluded – in light of these very
23 real and substantial risks – settlement on the proposed terms and without prolonged and costly
24 litigation was in the best interests of the class. The overall \$1,500,000 recovery represents a
25 significant percentage of Defendants' potential exposure, and is roughly 7-8% of the theoretical
26 maximum value of the class claims (\$1,500,000/\$19,592,465). Given Defendants' multi-layered
27 defenses and all other potential risks of continued litigation, a total recovery for the class of
28 \$1,500,000, which will result in average award of some \$567 per class member, plus additional

1 sums under PAGA, is a significant result well within the range of reasonableness considering all
2 potential outcomes, and it will provide direct monetary awards to all Class Members without further
3 delay. [Crosner Decl., ¶ 49.]

4 Importantly, the mere fact that a settlement does not provide the same recovery as might be
5 achieved at trial is not a proper indicator of whether the settlement is fair, reasonable, and adequate.
6 Wershba, 91 Cal.App.4th at 246, 250 (“Compromise is inherent and necessary in the settlement
7 process...even if the relief afforded by the proposed settlement is substantially narrower than it
8 would be if the suits were to be successfully litigated, this is no bar to a class settlement because the
9 public interest may indeed be served by a voluntary settlement in which each side gives ground in
10 the interest of avoiding litigation”); 7-Eleven Owners for Fair Franchising v. Southland Corp. (2000)
11 85 Cal.App.4th 1135, 1150 (“The fact that a proposed settlement may amount to only a fraction of
12 the potential recovery does not, in and of itself, mean that the proposed settlement is grossly
13 inadequate and should be disapproved”); White v. Experian Information Solutions, Inc. (C.D. Cal.
14 2011) 803 F.Supp.2d 1086, 1098 (rejecting contention settlement was not fair and reasonable even
15 though it represented 99% discount off the maximum value of the claims); Lane v. Facebook, Inc.
16 (9th Cir. 2012) 696 F.3d 811, 819 (“[T]he question whether a settlement is fundamentally fair . . . is
17 different from the question whether the settlement is perfect in the estimation of the reviewing
18 court”). Importantly as well, the proposed settlement is non-reversionary and will provide
19 immediate benefits to the Class Members without a claims process. White, 803 F.Supp.2d at 1098;
20 c.f., Federal Judicial Center, Managing Class Action Litigation: A Pocket Guide for Judges (3d ed.
21 2010) at 20, available at [http:// www.fjc.gov/sites/default/files/2012/ClassGd3.pdf](http://www.fjc.gov/sites/default/files/2012/ClassGd3.pdf) (reversionary
22 provisions and/or cumbersome claims process may indicate lack of fairness). Plaintiff and his
23 counsel submit the settlement is within the “range of reasonableness,” and is fair and adequate for
24 the Class.

25 **F. Provisional Class Certification Should be Granted**

26 A class action is appropriate when the class is ascertainable and there is “a well-defined
27 community of interest in the questions of law and fact involved affecting the parties to be
28 represented.” Code Civ. Proc. § 382. Class certification requirements under Section 382 follow Rule

23 of the Federal Rules of Civil Procedure, and require: numerosity, typicality of the class representatives' claims, adequacy of representation, predominance of common issues, and superiority. Fed.R.Civ.Pro. 23(b)(3); *Hanlon v. Chrysler Corp.* (9th Cir. 1998) 150 F.3d 1011, 1019. While a court must certify a class for settlement purposes if a class has not already been certified, "it is well established that trial courts should use different standards to determine the propriety of a settlement class, as opposed to a litigation class certification. Specifically, a lesser standard of scrutiny is used for settlement cases." *Glob. Minerals & Metals Corp. v. Superior Court* (2013) 113 Cal.App.4th 836, 859 citing *Dunk*, Cal.App.4th 1794, 1807, n.19; *Wershba v. Apple Computer* (2001) 91 Cal.App.4th 224, 237-38.

Here, Plaintiff seeks approval of the following Class for settlement purposes only: all current and former non-exempt employees hourly paid of Defendants employed in California at any time from October 1, 2017 to September 1, 2022." (Agreement, § 26.)

1. The Proposed Class is Sufficiently Numerous and Ascertainable

First, the class is both sufficiently numerous, consisting of approximately 1,523 individuals, and ascertainable by reference to Defendants' personnel and payroll records. (Crosner Decl., ¶ 50.) "There is no set number required to maintain a class action, and the statutory test is whether a class is so numerous that 'it is impracticable to bring them all before the court.'" *Hebbard v. Colgrove* (1972) 28 Cal. App. 3d 1017, 1030 (noting that there is no set minimum to meet the numerosity prerequisite, but that a class of as few as 28 is acceptable); *Bowles v. Superior Court* (1995) 44 Cal. 2d 574 (upholding a class of ten members); *Rose v. City of Hayward* (1981) 126 Cal. App. 3d 926, 932 (finding that "Class Members are 'ascertainable' where they may be readily identified without unreasonable expense or time by reference to official records."). Thus, the ascertainability requirement is met.

2. The Typicality and Adequacy Requirements Are Met

The typicality requirement is met if the claims of the named representative are typical of those of the Class, though, "they need not be substantially identical." *Classen v. Weller* (1983) 145 Cal.App.3d 27, 46-47. Here, Plaintiff contends his claims are typical of the Class Members' claims because they arise from the same factual basis and are based on the same legal theories applicable

1 to the Class Members. Plaintiff further contends Defendants’ policies applied to all Class Members
2 and each Class Member is challenging the same policies and practices. As such, the typicality
3 requirement is satisfied for purposes of settlement. (McKinnie Decl., ¶¶ 2-3; Crosner Decl. ¶ 51-5.)

4 Adequacy requires that the Plaintiff have no interests adverse to the interests of the proposed
5 Class Members and be committed to vigorously prosecuting the case on behalf of the Class. *McGhee*
6 *v. Bank of America* (1976) 70 Cal.App.3d 442, 450-51. Plaintiff has been and will continue to be
7 committed to vigorously prosecuting this case, and he has no conflicts of interest with the Class.
8 (McKinnie Decl., ¶¶ 3-7; Crosner Decl., ¶ 52.)

9 3. The Commonality Requirement is Met

10 Next, common questions of law and fact predominate – particularly for purposes of a
11 settlement class – as the Class Members all were subject to the same meal and rest break policies
12 and alleged “de facto” policies resulting in meal period violations, and similarly subject to the same
13 improper time rounding policy. Since the focus of the claims against Defendants concerns the
14 legality of common policies applied uniformly to the entire class, common issues predominate over
15 individualized inquiries concerning liability. For instance, Defendants’ meal and rest break policy
16 is company-wide policy applied equally and consistently to all class members, and this policy is
17 either compliant with California law or it is not. Regardless of that determination, it will decide
18 liability for all class members one way or another. Similarly, whether the time rounding policy
19 improperly deprived class member of hours worked or was entirely neutral is another question
20 common to all class members. [Crosner Decl., ¶ 53.]

21 By now it is well-settled a theory of recovery asserting the existence of a uniform policy
22 violating California law is sufficient to satisfy the requirements for class certification. Jones v.
23 Farmers Ins. Exch. (2013) 221 Cal.App.4th 986, 996 (“Claims alleging that a uniform policy
24 consistently applied to a group of employees is in violation of the wage and hour laws are of the
25 sort routinely, and properly, found suitable for class treatment”); Williams v. Superior Court (2013)
26 221 Cal.App.4th 1353 (“A company-wide practice can sustain a common question of fact or law
27 that supports commonality for class certification”). Lastly, a class action is superior to other means
28 for the fair and efficient adjudication of this controversy. [Crosner Decl., ¶ 54.]

1 **G. Simpluris Should be Appointed as the Settlement Administrator**

2 The Parties agreed to use Simpluris, Inc. as the Settlement Administrator in this matter.
3 (Agreement, § 1.2). Simpluris is highly qualified and experienced as a settlement administrator,
4 committed to the security of data (having experienced no data breaches at all), carries insurance for
5 the theft of money or data, and has no relationship with Counsel. (Declaration of Eric Springer, ¶¶
6 2-13; Exhs. A-C; Crosner Decl., ¶ 55.)

7 **V. CONCLUSION**

8 Plaintiff respectfully submits that the proposed settlement is in the best interests of the Class
9 Members, as it is fair, adequate, and reasonable. Plaintiff accordingly requests the Court certify the
10 class for settlement purposes, appoint Plaintiff as Class Representatives, appoint Plaintiff's Counsel
11 as Class Counsel, appoint Simpluris, Inc. as Settlement Administrator, approve the method of notice
12 and the Notice to be sent to the Class, preliminarily approve the Settlement Agreement, enter the
13 proposed order filed herewith, and set a Final Approval hearing date.

14
15 Dated: September 12, 2022

CROSNER LEGAL, P.C.

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18 Michael Crosner
19 Zachary Crosner
20 Attorneys for Plaintiff Eddie McKinnie
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