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14 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

15 **FOR THE COUNTY OF SANTA CLARA**
16 **(UNLIMITED JURISDICTION)**

17 MARVIN MANN, on behalf of himself, and all
18 others similarly situated,

19 *Plaintiff(s),*

20 vs.

21 WALNUT BREWERY, INC., a Colorado
22 corporation doing business as Rock Bottom
23 Brewery; SPB HOSPITALITY, LLC, a Delaware
24 limited liability company; and DOES 1–50,
25 inclusive,

26 *Defendants.*

Case No.: 21CV377897

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PLAINTIFF'S UNOPPOSED MOTION
FOR PRELIMINARY APPROVAL OF
CLASS ACTION SETTLEMENT**

Action filed: March 10, 2021

Dept: 3, The Honorable Patricia
M. Lucas

Date: June 22, 2022

Time: 1:30 p.m.



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V

Marvin Mann vs. Walnut Brewery, Inc., et al.

MPA in support of Preliminary Approval of Class Action
Settlement



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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff Marvin Mann ("Plaintiff") submits this memorandum of points and authorities
4 in support of his unopposed motion for preliminary approval of the Joint Stipulation of Class
5 Action Settlement (the "Settlement")¹, which provides for a Gross Settlement Amount ("GSA")
6 of \$275,000.00 in compromise of all disputed claims on behalf of all persons against Defendants
7 Walnut Brewery, Inc. and SPB Hospitality, LLC (collectively "Defendants") employed as
8 hourly, non-exempt employees, who worked at Rock Bottom Restaurant & Brewery in Campbell,
9 California during the period of time from June 01, 2020, through October 20, 2021 (the "Class
10 Period"). Through this Motion, Plaintiff respectfully requests for this Court to (1) provisionally
11 certify the below-defined Class for settlement purposes only under Code of Civil Procedure §
12 382; (2) preliminarily approve the Settlement; (3) preliminarily appoint Plaintiff as Class
13 Representative; (4) appoint David Spivak of The Spivak Law Firm and Walter Haines of United
14 Employees Law Group as Class Counsel; (5) approve the proposed notice procedures and related
15 forms; and (6) schedule a final approval hearing.

16 This Court should grant Plaintiff's motion because: (1) for settlement purposes, the
17 Settlement Class meets the requirements for class certification under Code of Civil Procedure §
18 382; (2) the Settlement warrants preliminary approval based on all indicia for fairness,
19 reasonableness, and adequacy; (3) for settlement purposes, Plaintiff is adequate to serve as Class
20 Representative; (4) Plaintiff's attorneys are adequate to serve as Class Counsel; (5) the proposed
21 notice procedures, and related forms, fully comport with due process and adequately apprise
22 Class Members of their rights; and (6) a final approval hearing must be scheduled to allow
23 Settlement Class members an opportunity to be heard regarding the Settlement and to give it
24 finality. Accordingly, for the reasons detailed below, this Court should grant Plaintiff's Motion
25 in its entirety and preliminarily approve the Settlement.

26 ///

27
28 ¹ The Settlement is attached as Exhibit ("Ex.") 1 to the Declaration of David Spivak ("DS"), which is
submitted herewith under a separate cover.



II. FACTUAL AND PROCEDURAL BACKGROUND

Defendant Walnut Brewery, Inc. dba Rock Bottom Brewery is a Colorado corporation with its principal place of business in Colorado. DS, ¶ 4. Defendant SPB Hospitality, LLC, is a Delaware limited liability company headquartered in Houston, Texas. *Id.* Non-Party Craft Brewery Group LLC is a Delaware limited liability company headquartered in Houston Texas. They are operators and franchisors of steakhouses, brewery and craft-beer focused casual dining restaurants, with hundreds of locations in the United States, and approximately eight locations in California. *Id.* Defendant SPB Hospitality, LLC, acquired the Rock Bottom Brewery in Campbell, California, on June 1, 2020, in the bankruptcy proceedings of the prior owner. *Id.* Defendants employed Plaintiff as a bartender and server at their Rock Bottom restaurant in Campbell, California, from about June of 2020, until November 17, 2020. *Id.*

A. Plaintiff's Claims and Procedural History

On December 31, 2020, Plaintiff notified Defendants and the California Labor and Workforce Development Agency ("LWDA"), pursuant to the California Private Attorneys General Act of 2004, California Labor Code sections 2698, *et seq.* ("PAGA"), of alleged Labor Code violations committed by Defendants. DS, ¶ 5, Ex. 2.

On March 10, 2021, Plaintiff filed a Class Action Complaint in the Santa Clara Superior Court, Case No. 21CV377897, against Defendants on behalf of himself and others similarly situated, alleging causes of action on a class-wide basis for failure to provide meal and rest breaks (Lab. Code §§ 226.7, 512, and 1198), failure to pay all wages earned for all hours worked (Lab. Code §§ 510, 1194, 1197, and 1198), failure to indemnify (Lab. Code §§ 1198 and 2802), wage statement penalties (Lab. Code § 226), waiting time penalties (Lab. Code §§ 201–203), unfair competition (Bus. & Prof. Code §§ 17200, *et seq.*), and adding a cause of action for civil penalties under PAGA (Lab. Code §§ 2698, *et seq.*) DS, ¶ 6, Ex. 3. On May 10, 2021, Defendants removed the action to the United States District Court for the Northern District of California where the case is assigned to the Honorable Yvonne Gonzalez Rogers, Case No. 4:21-CV-03500-YGR. DS, ¶ 7, Ex. 4. On May 19, 2021, Defendants filed their Motion to Dismiss, Compel Arbitration, and Stay Proceedings. DS, ¶ 8, Ex. 5. On May 25, 2021, the parties decided that it was in their



1 mutual interests to discuss Plaintiff's allegations informally through mediation. DS, ¶ 9. On
2 September 20, 2021, in receipt of the parties' September 17, 2021, Stipulation to Postpone
3 Briefing and Hearing Schedules for Defendants' Motion to Dismiss, Compel Arbitration, and
4 Stay Proceedings, the Court issued an order Administratively Terminating Motion Pending ADR
5 and Setting Compliance Deadline for November 12, 2021. DS, ¶ 9, Ex. 6.

6 On November 9, 2021, in receipt of the parties' Joint Statement representing that they
7 had complied with the Court's order setting a compliance deadline in light of the parties' pending
8 mediation, the Court issued an order vacating the compliance hearing set for November 12, 2021,
9 and set a further compliance deadline for February 11, 2022, in light of the parties' anticipated
10 settlement. DS, ¶ 10, Ex. 7. On February 10, 2022, in receipt of the parties' February 4th, 2022,
11 Joint Stipulation to Remand, the Court issued an order remanding the case to the Santa Clara
12 Superior Court. DS, ¶ 11, Ex. 8.

13 **B. Mediation with Michael Loeb, Esq.**

14 On October 20, 2021, the parties attended and participated in good faith, arms' length
15 settlement discussions at a mediation session with Michael Loeb, Esq., a highly experienced
16 professional mediator. DS, ¶ 12. Although the Parties did not settle at mediation, they continued
17 confidential settlement negotiations with the assistance of the mediator. *Id.* On November 2,
18 2021, the Parties agreed to the material terms of the Settlement. *Id.*

19 In advance of the mediation, and before agreeing to the terms of the Settlement, the
20 Parties engaged in informal discovery. DS, ¶ 13. Through informal discovery, Defendants
21 produced Plaintiff's personnel file, copies of Defendants' relevant company written policies,
22 time-keeping records, and time and payroll data for a random sample of putative class members
23 specifically selected by Plaintiff's counsel. *Id.* Now that the Parties have finalized the long-form
24 Settlement, Plaintiff submits it to this Court for preliminary approval. *Id.*

25 **III. OVERVIEW OF SETTLEMENT**

26 **A. Settlement Class Definition**

27 "Class" or "Class Members" means all persons Defendants and Craft Brewery Group,
28 LLC employed as hourly, non-exempt employees, who worked at Rock Bottom Restaurant &



Brewery in Campbell, California during the Class Period. “Class Member” means a single, non-exempt employee who worked for Defendants and Craft Brewery Group, LLC in California during the Class Period. The “Class Period” means the period of time from June 01, 2020, through October 20, 2021. Settlement, § I.

B. Monetary Terms

In consideration for settlement of the Class Action, Defendants agree to pay a total of Two Hundred and Seventy-Five Thousand Dollars and Zero Cents (\$275,000.00.00) (the “Gross Settlement Amount” or “GSA”). The GSA will be all-inclusive and includes: (1) all Settlement Shares to Class Members; (2) an Incentive Award to Plaintiff, as class representative and private attorney general, for up to \$15,000; (3) a Fee Award for Class Counsel’s attorneys’ fees of not more than one third of the GSA (\$91,666.66) and for litigation costs not to exceed \$15,000 (“Costs Award”) (4) the Settlement Administrator’s Fees in an amount currently estimated to not exceed \$10,000.00; and (5) \$4,000 for PAGA penalties under California Labor Code §§ 2699 *et seq.* (75% or \$3,000 will go to the California Labor & Workforce Development Agency (“LWDA”) and 25% or \$1,000 will go to Class Members). The GSA is non-reversionary. The Settlement is not a claims-made settlement. The GSA shall be exclusive of Defendants’ employer-side payroll taxes, which Defendants shall pay in addition to the GSA. Settlement, §§ I(L), III(C).

Defendants shall be required to pay the GSA within ten (10) calendar days after the Effective Date.² Settlement, § IV(J). Within 10 calendar days of the Effective Date, Defendants shall deposit the Settlement proceeds in an account designated by the Settlement Administrator: (i) the total amount of all Settlement Shares to Participating Class Members, (ii) the Court approved Class Counsel fees & costs, (iii) the Court-approved Class Representative Payment,

² “Effective Date” is defined as follows: If no objection to this Settlement or to any of the terms and or conditions of the Settlement are filed by Plaintiff, another member of the Settlement class, or any intervenor to this Lawsuit, the Effective Date shall occur on the day that the Court enters an order of final approval of this Settlement; however, if any objection to this Settlement or to any of the terms and or conditions of the Settlement is filed by a member of the Settlement class, or any intervenor to this Lawsuit, the Effective Date shall occur upon the expiration of the time for the filing any appeal of the order of final approval of this Settlement. If an appeal is filed or any writ granted, then the Effective Date shall occur after the appeal has been dismissed or the writ dissolved and when there is no further time to appeal the dismissal of the appeal or the dissolution of the writ.



(iv) the Court-approved costs of the Settlement Administrator, and (v) the payment to the LWDA.

The “Net Settlement Amount” (“NSA”) will equal the net amount available for payment of claims to Class Members after deducting the above-referenced costs from the Gross Settlement Amount. Settlement, § III(D).

The NSA will be calculated and distributed as follows:

- **Participating Class Members’ Settlement Shares.** The settlement shares are allocated 33.33% to wages (for which employment taxes will be deducted and W-2s issued) and 66.67% to penalties and interest (for which 1099s will be issued).
- **Class Portion of Settlement Ration Calculation.** The Settlement Administrator shall assign to each Class Member a “Settlement Ratio,” which shall be a fractional number comprised of (a) that Class Member’s Individual Paychecks as the numerator, and (b) the aggregate total of all Class Members’ Individual Paychecks as the denominator. The Settlement Administrator shall assign to each Class Member the “Settlement Share” which shall be calculated by multiplying that Class Member’s Settlement Ratio by amount allocated to Class Members from the Net Settlement Amount.
- **PAGA Portion of Settlement Ratio Calculation.** The Settlement Administrator shall assign to each Class Member a “Settlement Ratio,” which shall be a fractional number comprised of (a) that PAGA Member’s Individual Paychecks during the PAGA Period as the numerator, and (b) the aggregate total of all PAGA Members’ Individual Paychecks during the PAGA Period as the denominator. The Settlement Administrator shall assign to each PAGA Member the “Settlement Share” which shall be calculated by multiplying that PAGA Member’s Settlement Ratio by amount allocated to PAGA Members from the Net Settlement Amount.

Settlement, § III(D).

C. Release of Claims by Class Members

Upon the Effective Date, Plaintiff and Class Members will be deemed to have released Defendants, SPB Hospitality, LLC and Walnut Brewery, Inc., as well as Craft Brewery Group, LLC, and all of their past and present owners, officers, directors, shareholders, employees, agents, assigns, attorneys, insurers, parent companies, subsidiaries, and affiliates, and their respective predecessors, successors, and assigns, without limitation (“the Released Parties”) of and from all of the Released Claims during the Class Period. These claims include all claims



1 alleged or could have been alleged based on the facts, circumstances, and/or primary rights at
2 issue in the operative complaint and any amendments thereto. They include without limitation:
3 (1) all claims for failure to pay wages earned, including minimum wages, and overtime wages;
4 (2) all claims for failure to provide rest periods and claims for rest period premium pay; (3) all
5 claims for failure to provide meal periods and claims for meal period premium pay; (4) all claims
6 for failure to provide accurate wage statements and related penalties; (5) all claims for failure to
7 timely pay wages during employment and at termination; (6) all claims for violation of California
8 Business and Professions Code §§ 17200, *et seq.*, to the extent such claims are predicated on the
9 other claims released herein; and (7) all claims for violation of PAGA and all related claims for
10 penalties, to the extent such claims are predicated on the other claims released herein. Settlement
11 § V. Plaintiff also provided Defendants and Craft Brewery Group LLC with a general release of
12 all claims, whether known or unknown, including unknown claims covered by Civil Code
13 Section 1542. *Id.*

14 **D. Notice and Claim Process and Procedures**

15 Within fourteen (14) calendar days following the Court's entry of its Order Granting
16 Preliminary Approval of Settlement, Defendants shall provide the Settlement Administrator with
17 the following information about each Class Member: (1) name; (2) last known mailing address;
18 (3) Social Security Number; and (4) total number of paychecks for each Class Member during
19 the Class Period ("Individual Paychecks"). Settlement § IV(B)(1).

20 Within fourteen (14) calendar days after receipt of the class data, the Settlement
21 Administrator will mail the Class Notice to all identified Class Members via first-class U.S. mail
22 using the mailing address information provided by Defendants, unless modified by any updated
23 address information that the Settlement Administrator obtains in the course of administration of
24 the Settlement. Settlement § IV(B)(2).

25 If a Class Notice is returned because of an incorrect address, the Settlement Administrator
26 will promptly, and not later than ten (10) days from receipt of the returned Class Notice, search
27 for a more current address for the Class Member and re-mail the Class Notice to the Class
28 Member. The Settlement Administrator will be responsible for taking reasonable steps, consistent



1 with its agreed-upon job parameters, court orders, and fee, to trace the mailing address of any
2 Class Member for whom a Class Notice is returned as undeliverable by the U.S. Postal Service.
3 These reasonable steps shall include the tracking of all undelivered mail; performing address
4 searches for all mail returned without a forwarding address; and promptly re-mailing to Class
5 Members for whom new addresses are found. If the Class Notice is re-mailed, the Settlement
6 Administrator will note for its own records and notify Class Counsel and Defendants' Counsel
7 of the date and address of each such re-mailing as part of a weekly status report provided to the
8 Parties. Settlement § IV(B)(3).

9 A returned Class Notice will be forwarded only once by the Settlement Administrator.
10 Class Members will have sixty (60) calendar days from the date the Class Notice is first mailed
11 to Opt-Out of the Class. Unless a Class-Member opts out of the Class, the Class Member will be
12 bound by all terms of the Joint Stipulation (including the release) and the Court's order and final
13 judgment. Defendants have provided information to Class Counsel that only an English version
14 of the Class Notice is required. Settlement § I(W), Ex. A.

15 **1. Procedures for Class Member Disputes**

16 To dispute the number of Paychecks with which he or she has been credited, a Class
17 Member must timely submit a Paychecks Dispute Form by the Class Member Exclusion
18 Deadline. The Paychecks Dispute Form must be submitted by postal mail or an equivalent
19 service. The delivery date is deemed to be the date the Paychecks Dispute Form is deposited in
20 the U.S. Mail as evidenced by the postmark. Class Members who timely fill out Paychecks
21 Dispute Forms may produce evidence to the Settlement Administrator showing that the
22 Paychecks Workweek information is inaccurate. Absent evidence rebutting Defendants' records,
23 Defendants' records will be presumed determinative. However, if a Class Member produces
24 evidence contrary to Defendants' records by the Response Deadline, the Settlement
25 Administrator shall notify Class Counsel and Defense Counsel to discuss and resolve the dispute,
26 including providing all available relevant information to all counsel. The Parties will resolve all
27 disputes jointly, which shall be final and binding on any Class Member disputes and shall
28 thereafter instruct the Settlement Administrator how to proceed in processing the dispute. If the



Parties cannot reach an agreement, the dispute shall be submitted to the Court for final determination. All such disputes are to be resolved or submitted to the Court not later than fourteen (14) calendar days after the Response Deadline. Settlement, § IV(C), Ex. A, Ex. C.

2. Procedures for Opting Out of the Class

Class Members who wish to exclude themselves from the Class must mail the Settlement Administrator a request for exclusion from the Class in writing within 60 days after the date the Class Notice was mailed (the “Response Deadline”), unless the Court orders otherwise. All requests for exclusion must be made in writing, signed by the Class Member, and must be submitted by postal mail. The delivery date is deemed to be the date the Opt-Out request is deposited in the U.S. Mail as evidenced by the postmark.

A request to be excluded from the Class will be deemed valid only if the Class Member provided his or her name and address by the Response Deadline. The written request to be excluded must indicate the Class Member’s intent to be excluded from the Settlement. Settlement, § IV(D)(1), Ex. B.

3. Procedures for Objecting to the Settlement

Any Class Member who seeks to object to the Settlement may serve a copy of the objection to the Settlement Administrator. All objections should be served within 60 days of mailing of the Class Notice. The Settlement Administrator will forward a copy of the objection to counsel for the parties. Members may appear at the final approval hearing to be heard on their objections, even if they have not previously served a written objection. Settlement, § IV(D)(2).

E. Uncashed Checks

Class Members will not have to submit a claim form in order to receive their Settlement Share. Each Class Member who does not submit a Request for Exclusion will automatically be mailed checks for his/her Settlement Share. Any checks issued to participating Class Members will remain valid and negotiable for one hundred and eighty (180) days from the date of their issuance. If any settlement check(s) remains uncashed after 180 days from issuance, the Settlement Administrator shall transfer the value of the uncashed checks, plus any interest that has accrued thereon, to the State Controller’s Office – Unclaimed Property Fund, under the



unclaimed property laws in the name of the Settlement Class member. The Settlement Administrator shall void any tax documents issued to Settlement Class Members who did not cash their checks within 180 days of issuance. In such event, such Settlement Class Member shall nevertheless remain bound by the Settlement. Settlement § IV(M), Ex. A.

IV. CERTIFICATION OF THE PROPOSED CLASS IS APPROPRIATE.

Under Code of Civil Procedure § 382, a class may be certified if: (1) it is ascertainable and its members are too numerous for joinder to be practical; (2) the representative and absent class members share a community of interest and questions of law and fact common to the class predominate over questions unique to individual class members; (3) the representative's claims are typical of the class' claims; and (4) the representative will fairly and adequately represent the class' interests. *See, e.g., Richmond v. Dart Industries, Inc.* (1981) 29 Cal.3d 462, 470. Moreover, in the settlement context, the Court can use a lesser standard to determine the appropriateness of a settlement class as opposed to a litigated class certification. *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1807. As explained below, all of these requirements are met in this case.

1. The Settlement Class Is Objectively Ascertainable.

A class is ascertainable when it may be readily identified without unreasonable expense or time by reference to official records. *Rose v. City of Hayward* (1981) 126 Cal.App.3d 926, 932 (citing *Hypolite v. Carlson* (1975) 52 Cal.App.3d 566, 579). Plaintiff maintains that the above-defined Class is ascertainable because its members may be identified by reference to Defendants' records and Defendants have agreed to share the relevant information from their records to facilitate the settlement process. Therefore, the Settlement Class is ascertainable. DS, ¶ 14; Settlement, §IV(B)(1).

2. The Membership of the Settlement Class Is Sufficiently Numerous.

The Settlement Class has sufficiently numerous members to render joinder impractical. No set number is required as a matter of law to maintain a class action. *Hebbard v. Colgrove* (1972) 28 Cal.App.3d 1017, 1030. Defendants estimate that there are approximately 130 Class Members. DS, ¶ 15; Settlement § I(B). Plaintiff maintains that it would be impractical and economically inefficient to require each Class Member to separately maintain an individual



1 action or be joined as a named plaintiff in this action. The California Supreme Court has upheld
2 a class of as few as 10 individuals. *See Bowles v. Superior Court* (1955) 44 Cal.2d 574. In light
3 of these considerations, the Settlement Class' membership is sufficiently numerous. *Id. See Daar*
4 *v. Yellow Cab Co.* (1967) 67 Cal.2d 695.

5 **3. Class Members Share a Well-Defined Community of Interest.**

6 The community of interest requirement “embodies three factors: (1) predominant
7 common questions of law or fact; (2) class representatives with claims or defenses typical of the
8 class; and (3) class representatives who can adequately represent the class.” *Sav-On Drug Stores,*
9 *Inc. v. Superior Court* (2004) 34 Cal. 4th 319, 326. It “does not mandate that class members have
10 uniform or identical claims.” *Capitol People First v. Dept. of Developmental Servs.* (2007) 155
11 Cal. App. 4th 676, 692. Rather, courts focus on the defendant’s internal policies and “pattern
12 and practice . . . in order to assess whether that common behavior toward similarly situated
13 plaintiffs renders class certification appropriate.” *Id.* (citing *Sav-On*, 34 Cal. 4th at 333).

14 To justify certification, the class proponent “‘must show ... that questions of law or fact
15 common to the class predominate over the questions affecting the individual members’” *See,*
16 *Arenas v. El Torito Rests., Inc.*, 183 Cal. App. 4th 723, 732 (2010) (citing *Washington Mut.*
17 *Bank, FA v. Superior Court*, 248 Cal. 4th 906, 913 (2001)). In light of the more lenient standard
18 for certification of a settlement class, the Parties agree that for the purposes of the Settlement
19 only, the claims of the Class Members all stem from the same sources. DS, ¶ 16.

20 In this case, Plaintiff asserts all Class Members were subject to the same or similar
21 operations and employment policies, practices, and procedures. The claims arise from
22 Defendants’ alleged uniform policy of failing to properly account for all time worked and failing
23 to, among other things, properly pay minimum and overtime wages, provide off-duty meal and
24 rest periods, indemnify for business expenses, timely pay wages upon termination, and provide
25 compliant wage statements, all of which Plaintiff claims constitute unfair business practices and
26 give rise to PAGA penalties. Plaintiff asserts that common questions include, but are not limited
27 to: (1) Whether Defendants failed to pay all wages earned to Class Members for all hours worked
28 at the correct rates of pay; (2) Whether Defendants failed to provide the class with all meal and



rest periods in compliance with California law; (3) Whether Defendants failed to pay the class one additional hour of pay on workdays that they failed to provide the class with one or more meal or rest period in compliance with California law; (4) Whether Defendants failed to indemnify the class Members for all business expenses; (5) Whether Defendants knowingly and intentionally failed to provide the class with accurate wage statements; (6) Whether Defendants willfully failed to provide the class with timely final wages; and (7) Whether Defendants engaged in unfair competition within the meaning of Business and Professions Code section 17200, *et seq.*, with respect to the class. *Id.* Therefore, common questions predominate.

4. Plaintiff Is Typical of the Settlement Class.

The class representative must be similarly situated to the rest of the purported class. *See Classen v. Weller* (1983) 145 Cal. App. 3d 27, 46 (stating “it has never been the law in California that the class representative must have identical interests with the class members. The only requirements are ... that the class representative be *similarly* situated”) (emphasis in original); *See also* Newberg, § 3:29 (typicality “focuses on whether there exists a relationship between the Plaintiff’s claims and the claims alleged on behalf of the class”). Plaintiff contends that his claims are typical for the purposes of certifying the Settlement Class. Plaintiff asserts that he, like absent Class Members, was subject to the same relevant policies and procedures governing his compensation, hours of work, meal and rest periods, and reimbursement of business expenses. Because Plaintiff contends that he was subject to the same general course of conduct as absent Class Members, resolving the common questions as they apply to Plaintiff will determine Defendants’ *prima facie* liability to all Class Members. Moreover, Plaintiff’s claims could potentially be subject to the same primary affirmative defenses as those of absent Class Members. Accordingly, Plaintiff’s claims are typical of the Class. DS, ¶ 17.

5. Plaintiff Will Adequately Represent the Settlement Class.

The adequacy requirement is met where the plaintiff is represented by counsel qualified to conduct the litigation and the plaintiff’s interest in the litigation is not antagonistic to the class’ interests. *McGhee v. Bank of America* (1976) 60 Cal.App.3d 442, 451. In other words, where the



1 plaintiff has adequate counsel, the plaintiff may represent the entire class absent any disabling
2 conflicts of interest that might hinder the plaintiff's ability to represent the class. DS, ¶ 18.

3 First, Plaintiff's counsel has supplied the Court with declarations to show that they are
4 adequate to represent the Settlement Class and that they have significant experience in
5 employment litigation generally, and wage and hour and employment-related class action
6 litigation specifically. *See* DS, ¶¶ 20-27; Declaration of Walter Haines ("Haines Decl.") ¶ 2.
7 Thus, Plaintiff's counsel is adequate to serve as Class Counsel.

8 Second, Plaintiff contends that he is an adequate class representative. Plaintiff and the
9 Class Members have strong and co-extensive interests in this litigation because they all worked
10 for Defendants during the relevant time period, allegedly suffered the same alleged injuries from
11 the same alleged course of conduct, and there is no evidence of any conflict of interest between
12 Plaintiff and the Class Members. DS, ¶ 19. Moreover, Plaintiff has demonstrated his commitment
13 to the Settlement Class by, among other things, retaining experienced counsel, providing counsel
14 with documents and extensively speaking with them to assist in identifying the claims asserted
15 in this case, assisting them in identifying witnesses, as well as exposing himself to the risk of
16 attorneys' fees and costs awards against him if this lawsuit had been unsuccessful. *Id.* Thus,
17 Plaintiff is adequate to serve as Settlement Class Representative. Accordingly, this Court should
18 find that Plaintiff and his counsel are adequate to represent the Settlement Class as required under
19 Code of Civil Procedure § 382.

20 **6. Class Action Treatment Is the Superior Means For Resolving The Claims Of**
21 **The Class Members.**

22 Plaintiff further contends that a class action is also superior to other means adjudicating
23 the issues in this action. The predominance of common legal and factual questions shows that
24 this Court could fairly adjudicate the claims of Class Members through a single class action. In
25 view of the *theoretical* alternatives that proposed class members could potentially utilize—
26 representative PAGA action (where there is less relief available), individual civil lawsuits or
27 wage claims through the Division of Labor Standards Enforcement (where there would be
28 relatively little money at stake, but the claims would be time-consuming to litigate)—a class



1 action is plainly superior to all of them. Thus, this consideration supports conditional class action
2 treatment for purposes of this Settlement only. DS, ¶ 28.

3 **V. THE COURT SHOULD PRELIMINARILY APPROVE THE SETTLEMENT**
4 **BECAUSE IT IS A FAIR, REASONABLE AND ADEQUATE COMPROMISE**
5 **OF ALL DISPUTED CLAIMS.**

6 California courts favor settlement *See e.g., Stambaugh v. Superior Court* (1976) 62
7 Cal.App.3d 231, 236. Unlike most settlements, class action settlements involve a court approval
8 process that exists to prevent fraud, collusion, and unfairness to class members. *Malibu Outrigger*
9 *Bd. of Governors v. Superior Court* (1980) 103 Cal.App.3d 573, 578-579. This approval process
10 consists of preliminary settlement approval, notice being given to class members, and a final
11 fairness and approval hearing being held at which class members may be heard with respect to
12 the settlement. *See e.g., Id.* For the reasons discussed below, this Court should preliminarily
13 approve the Settlement, allow the Parties to give notice to the Settlement Class, and schedule a
14 final approval hearing.

15 **A. The Settlement Was Reached at Arms' Length Through Experienced Counsel**
16 **and an Experienced Mediator with Sufficient Information to Intelligently**
17 **Negotiate a Fair Settlement in View of the Claims Asserted and Risks of**
18 **Continued Litigation.**

19 A settlement is presumptively fair where it is reached through arms' length bargaining,
20 based on sufficient discovery and investigation to allow counsel and the Court to act intelligently,
21 counsel is experienced in similar litigation, and the percentage of objectors is small.³ *Dunk v.*
22 *Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1802 ("*Dunk*"). In deciding whether to approve a
23 proposed settlement, a trial court has broad powers to determine if the proposed settlement is fair
24 under the circumstances of the case. *Mallick v. Superior Court* (1979) 89 Cal.App.3d 434, 438.
25 In exercising these powers, the overriding concern is to ensure that a proposed settlement is "fair,
26 adequate, and reasonable." *Dunk*, 48 Cal.App.4th at p. 1801 (internal quotations omitted).

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³ Because the fourth prerequisite cannot be addressed until the final approval hearing, only the first three are relevant at this stage of the approval process.





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1 Relevant factors for that determination, include, but are not limited to:

2 [T]he complexity and likely duration of further litigation, the risk of maintaining class

3 action status through trial, the amount offered in settlement, the extent of discovery

4 completed and the state of the proceedings, the experience and views of counsel, the

5 presence of a governmental participant, and the reaction of the class members to the

6 proposed settlement.

7 *Id.* These factors require balancing, are non-exhaustive, and, as such, trial courts should tailor the

8 factors considered to each case and give due regard to “what is otherwise a private consensual

9 agreement between the Parties.” *Id.*

10 “In the context of a settlement agreement, the test is not the Gross amount plaintiffs might

11 have obtained at trial on the complaint, but rather whether the settlement is reasonable under all

12 of the circumstances.” *Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 250

13 (“Wershba”). Because settlements inherently involve compromise, even settlements providing for

14 substantially narrower relief than likely would be obtained if the suit were successfully litigated

15 can be reasonable because “the public interest may indeed be served by a voluntary settlement in

16 which each side gives ground in the interest of avoiding litigation.” *Id.* (quoting *Air Line*

17 *Stewards, etc., Local 550 v. Am. Airlines, Inc.* (7th Cir. 1972) 455 F.2d 101, 109). In addition,

18 courts review the discovery process and information received through it to aid them in assessing

19 whether the Parties sufficiently developed the claims and their supporting factual bases before

20 reaching settlement. See *Kullar v. Foot Locker Retail Inc.* (2008) 168 Cal.App.4th 116, 129-131

21 (“Kullar”). Information is sufficient where it allows the Parties and the court to form “an

22 understanding of the amount that is in controversy and the realistic range of outcomes of the

23 litigation.” *Clark v. Am. Residential Servs. LLC* (2009) 175 Cal.App.4th 785, 801. This

24 requirement exists so that the Parties can provide the court with “a meaningful and substantiated

25 explanation of the manner in which the factual and legal issues have been evaluated.” *Kullar*,

26 168 Cal.App.4th at p. 118.

27 Here, the Settlement resulted from thorough, arms’ length, negotiations between

28 experienced counsel with the assistance of a respected mediator after sufficient discovery was

exchanged to assess the relative strengths and weaknesses of their respective cases and

Defendants’ estimated exposure. DS, ¶ 29. Plaintiff’s counsel prepared spreadsheets to determine Defendants’ maximum exposure in advance of the mediation. DS, ¶ 30, Ex. 9. As a result of Plaintiff’s Counsel’s analysis of potential monetary recoveries for all claims in this case, Plaintiff’s Counsel determined that such monetary remedies could reach \$6,009,505.29 million (of which \$5,006,350 consists of civil penalties) – for defendants with the resources to afford a judgment in this amount. *Id.* The estimates are in essence “home run” projections that omit data points that will undoubtedly reduce the maximum possible damages award and do not factor in any of the risks involved in litigating this Action. The GSA under the Settlement before the Court involves a total payment of about 5% of this amount. A settlement for approximately 5% of the potential recovery is a proportion substantially in excess of recovery proportions sanctioned by existing case law.⁴ *Id.*

Plaintiff is aware of only two significant awards under the PAGA in a contested proceeding, both issued by federal district courts.⁵ DS, ¶ 31. PAGA penalty awards are often

⁴ See, e.g., *In re Newbridge Networks Sec. Litig.*, 1998 WL 765724 at *2 (D.D.C. Oct. 23, 1998) (“[A]n agreement that secures roughly six to twelve percent of a total trial recovery . . . seems to be within the targeted range of reasonableness.”); *Wise v. Ulta Salon, Cosmetics & Fragrance, Inc.* 2019 WL 3943859 at *8 (E.D. Cal. Aug. 21, 2019) (granting preliminary approval where the proposed allocation to settle class claims was at least 9.53 percent); *Bravo v. Gale Triangle, Inc.*, 2017 WL 708766 at *10 (C.D. Cal. Feb 16, 2017) (“a settlement for fourteen percent recovery of Plaintiffs’ maximum recovery is reasonable”); *In re Omnivision Techs., Inc.*, 559 F.Supp.2d 1036, 1042 (N.D. Cal. 2008) (approving settlement amount that “is just over 9% of the maximum potential recovery asserted by either party.”).

⁵ In *Bernstein v. Virgin Am., Inc.*, (N.D. Cal. 2019) U.S. Dist. LEXIS 13253, the court awarded civil penalties under the PAGA of approximately \$25 million, representing a 25% reduction from plaintiff’s claim for approximately \$33 million. *Bernstein* represents a unique set of circumstances that is distinguishable from the case at hand. Notably, the plaintiffs in *Bernstein* suffered a particularly sizeable injury – the court found that the defendant’s policies caused damages to the plaintiffs in excess of \$45 million. *Id.* at 20. Additionally, the defendants in *Bernstein*, who the court noted had received “millions of dollars from the state of California” to train their flight attendants, engaged in glaring violations of the labor code, such as failing to compensate its flight attendants for work performed outside of “block time” (time during which the aircraft is moving), including time spent participating in pre-flight briefings, boarding passengers, and deplaning. *Bernstein v. Virgin Am., Inc.* (N.D. Cal 2017) 227 F. Supp. 3d 1049, 1055-1058. Indeed, the defendant’s liability was so clear in *Bernstein* that the case was resolved on the plaintiffs’ motion for summary judgment. *Bernstein v. Virgin Am., Inc.*, (N.D. Cal. 2019) U.S. Dist. LEXIS 13253.

In *Robert Magadia v. Wal-Mart Assocs.* (N.D. Cal. 2019) 384 F. Supp. 3d. 1058, the court awarded approximately \$102 million in damages, primarily based on the defendants’ failures to comply with the requirements of California Labor Code section 226.



1 small even for egregious, intentional violations of the Labor Code.⁶ *Id.* For instance, on October
2 24, 2017, the Los Angeles Superior Court awarded a prevailing PAGA plaintiff, represented by
3 very experienced counsel, civil penalties totaling only \$50.00. *Shields v. Security Paving*
4 *Company, Inc.*, LA Superior Court case no. BC492828. Further, in *Carrington v. Starbucks*
5 *Corp.*, 30 Cal.App.5th 504, 529 (2018), the Court of Appeal affirmed judgment which provided
6 for a PAGA penalty of only \$5 per pay period for the defendant's meal period violations. A
7 similar result could occur here. *Id.*

8 Plaintiff's initial estimates do not realistically account for the risks outlined below or the
9 risk that a class will not be certified. *Id.* Therefore, Plaintiff believes a Class Settlement for
10 \$275,000.00 is fair and reasonable.

11 **1. Evaluation of Plaintiff's Case**

12 **i. Risks Associated with the Off-the-Clock Work Claim**

13 The difficulty inherent in proving that off-the-clock work occurred poses a significant
14 hurdle to Plaintiff. DS, ¶ 32. Defendants deny all allegations of unpaid off-the-clock work. *Id.*
15 Plaintiff will rely on declarations and witness statements to prove this claim. Generally, a court
16 will not certify a class unless it can determine an appropriate class-wide methodology. *See, e.g.,*
17 *Duran v. U.S. Bank National Assn.*, 59 Cal. 4th 1 (2014). Here, Plaintiff may rely heavily on
18 anecdotal evidence to prove the off-the-clock work claim, especially given the lack of records
19 indicating when such off-the-clock work may have taken place. Individualized inquiries would
20 need to be conducted person-by-person, day-by-day, to determine if an individual in fact worked
21 "minutes" off-the-clock on a "regular" basis. Accordingly, there is a significant risk that the Court
22 would consider this evidentiary showing insufficient as a class-wide methodology. *Id.*

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25 _____
26 ⁶ In 2012, Plaintiff's Counsel tried *Ghrdilyan v. RJ Financial, Inc.*, Los Angeles Superior Court case number
27 BC430633. In *Ghrdilyan*, the employer underpaid commission overtime wages. The plaintiff sought in excess of \$9
28 million in civil penalties under the PAGA. After a bench trial, the Honorable Judge Ronald M. Sohigian awarded
approximately \$325,000 in civil penalties under the PAGA. DS, ¶ 31, Exs. 10-11. Also, on October 24, 2017, the
Los Angeles Superior Court awarded a prevailing PAGA plaintiff civil, represented by very experienced counsel,
penalties totaling only \$50.00. *Shields v. Security Paving Company, Inc.*, LA Superior Court case no. BC492828. A
similar result could occur here.



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1 Additionally, there are other risks to Plaintiff’s rest period claim. DS, ¶ 34. Employers
2 are not required to record rest periods and such periods are paid. *Id.* Defendants contend they
3 provided non-exempt employees the opportunity to take rest periods in accordance with
4 California law. Further, Defendants’ written policies on meal and rest periods are consistent with
5 the Wage Order. *Id.* Thus, unlike meal periods, where there are often records showing whether
6 an employee clocked out or not, there is no such evidence to prove a missed rest period or that
7 the employer refused to authorize and permit one. *Id.* Managing such claims at trial has become
8 exceedingly difficult. *Id.* Plaintiff will depend on sample witness testimony and surveys to prove
9 the claims. *Id.* While a victory with such evidence is certainly possible, relevant caselaw makes
10 such claims risky from a trial management and due process perspective. *Id.*, *See Duran v. U.S.*
11 *Bank National Assn.*, (2014) 59 Cal. 4th 1, 31 (explaining “[I]f sufficient common questions
12 exist to support class certification, it may be possible to manage individual issues through the
13 use of surveys and statistical sampling.”); *Tyson Foods, Inc. v. Bouphakeo* (2015) 136 S.Ct. 382;
14 *Comcast Corporation v. Behrend* (2013) 133 S.Ct. 1426.

15 iii. **Risks Associated with the Failure to Indemnify Claims**

16 There is a risk that the Court may consider Plaintiff’s claims as to Defendants’ alleged
17 failure to indemnify for business expenses to be individual in nature and thus decline to certify
18 the class. Plaintiff alleges that Defendants required Plaintiff and the Class Members to use their
19 personal mobile telephones to perform their job duties but did not reimburse them for such
20 expenses, nor did they provide them with mobile phones as an alternative. There is a risk that the
21 Court may consider Plaintiff’s claims to be individual in nature and unfit for class wide
22 resolution. Defendants also deny this allegation. DS, ¶ 35.

23 iv. **Risks Associated with the Penalty Claims**

24 Plaintiff also asserts claims for wage statement violations, untimely wage violations, and
25 PAGA penalties. Under Labor Code section 226, wage statements must include various
26 information, including the applicable rates of pay, corresponding hours worked, and gross pay.
27 DS, ¶ 36.

28 ///



1 Here, Plaintiff's wage statement claim has the same underlying risks as the above claims,
2 as it is derivative of them. *Id.* On their face, the wage statements issued by Defendants comply
3 with the requirements of Labor Code section 226. Further, to the extent that Plaintiff claims
4 Defendants' wage statements were inaccurate because they did not include wages or premium
5 payments that they contend Defendants should have paid, Plaintiff's claims are subject to
6 additional risk, as case law suggests that such premium payments are not to be considered wages,
7 and therefore do not give rise to claims under section 203. *Id. See Jones v. Spherion Staffing,*
8 *LLC*, 2012 U.S. Dist. LEXIS 112396 at * 26 (C.D. Cal. Aug. 7, 2012) (no claim for Labor Code
9 section 203 penalties based on meal period claims because "the underlying violation that gives
10 rise to a section 226.7 [meal period] claim is not the nonpayment of wages"); *Nguyen v. Baxter*
11 *Healthcare Corp.* 2011 U.S. Dist. LEXIS 141135 at * 24 (C.D. Cal. Nov. 28, 2011) (holding that
12 Section 226(a) does not even cover meal period premium pay). Accordingly, the *Jones* and
13 *Nguyen* decisions will likely foreclose this claim.⁷ *Id.*

14 Plaintiff's claims for untimely wages are predicated on Labor Code section 201 to 203.
15 Defendants can argue based on the *Jones* and *Nguyen* decisions, *supra*, that meal or rest premium
16 pay is not a "wage" for purposes of Labor Code section 203 penalties. Further, in the recent
17 decision *Ferra v. Loews Hollywood Hotel, LLC* (2019) 40 Cal.App. 5th 1239, the Court of Appeal
18 held that unlawful meal and rest periods under section 226.7 cannot serve as a basis for recovery
19 of penalties under section 203. *Id.* at 1252 ("We conclude that the administrative and legislative
20 history of the statute indicates that . . . the Legislature intended section 226.7 first and foremost
21 to *compensate* employeesSection 226.7's additional hour of pay is a premium wage . . .not
22 a penalty.")(internal citations and quotation marks omitted). Under the *Loews* decision, it is
23 highly unlikely that the Court will permit untimely wage penalties for Defendants' alleged failure
24 to provide meal and rest period penalties. DS, ¶ 37.

25 ///

26
27 ⁷ Moreover, the Court of Appeal's decision in *Naranjo v. Spectrum Security Services, Inc.* (2019) 40 Cal.App.5th
28 444, holding that a defendant's failure to pay meal premiums does not give rise to violations of Labor Code sections
2020 Cal. LEXIS 167. Tellingly, the California Supreme Court chose not to depublish the Court of Appeal's decision
in advance of its ruling. *Id.*



1 Regarding PAGA, a court has discretion to award a lesser amount than the maximum
2 penalty. Lab. Code § 2699(e)(2); *Thurman v. Bayshore Transit Management, Inc.* (2012) 203
3 Cal.App.4th 1112, 1135 (reducing PAGA award). As set forth above, Defendants have posed
4 valid defenses to the Labor Code claims underlying Plaintiff's PAGA allegations. Thus, the
5 PAGA claims likewise face significant uncertainty. DS, ¶ 38. There is a risk that the Court would
6 consider the maximum civil penalty available to be confiscatory. Moreover, the current COVID-
7 19 pandemic could motivate the Court to further reduce the penalty award to avoid what it may
8 consider a confiscatory taking. *Id.*

9 This uncertainty increases Plaintiff's risk of pursuing the PAGA claims and requires a
10 significant discount for settlement purposes. DS, ¶ 39. For mediation purposes, Plaintiff's
11 counsel estimated a maximum exposure of approximately \$5 million in civil penalties. This
12 estimate did not take into account any of the risks discussed above and assumed a violation for
13 every single pay period. *Id.* Plaintiff's counsel also assessed multiple penalties for the same pay
14 period for the same alleged violations of different Labor Code provisions and derivative
15 violations. *Id.* Although two federal district court decisions held that "stacking" PAGA penalties
16 in this fashion may be appropriate to determine the amount in controversy for purposes of
17 removal jurisdiction, Plaintiff's counsel is not aware of any California state courts awarding
18 plaintiffs multiple PAGA penalties for the same violation for the same pay period under different
19 Labor Code provisions. *Id.* This may be because the PAGA does not provide for what many
20 employers characterize as claim splitting and not merely stacking. *Id.*

21 The United States Supreme Court announced on December 15, 2021 that, in the near
22 future, it will hear the matter of *Viking River Cruises, Inc. v. Moriana*, No. 20-1573, and decide
23 (likely no later than the end of summer 2022) whether or not to overrule the California Supreme
24 Court's decision in *Iskanian v. CLS Transportation* (2014) 59 Cal.4th 348 that a private
25 arbitration agreement cannot deprive an employee of his right to sue under PAGA in a court of
26 law. If the Supreme Court sides with the Petitioner, Plaintiff's PAGA claim may be subject to an
27 arbitration agreement allowing only bilateral arbitration and, consequently, inhibiting the claim
28 altogether. While such an outcome would conflict squarely with *EEOC v. Waffle House* (2002)



534 US 279 (private settlement agreements do not preclude government prosecutions on behalf of employee signatories to such agreements), this potential outcome is a risk. DS, ¶ 40.

2. Allocation of the PAGA Payment

The settlement of PAGA penalties in the sum of \$4,000, of which 75% (\$3,000) will be paid to the LWDA and 25% (\$1,000) will be distributed to the Class, is reasonable and appropriate under the circumstances. DS, ¶ 41. The Parties negotiated a good faith amount for PAGA penalties to be paid to the LWDA and to the Class. *Id.* The portion to be paid to the LWDA was not the result of self-interest at the expense of other Class Members. *Id.* Where settlements “negotiate[] a good faith amount” for PAGA penalties and “there is no indication that this amount was the result of self-interest at the expense of other Class Members,” such amounts are generally considered reasonable. *Hopson v. Hanesbrands Inc.* (N.D. Cal. Apr. 3, 2009) No. CV-08-0844 EDL, 2009 WL 928133, at *9. Likewise, where the employer did not act willfully, and made good faith attempts to comply with wage and hour laws, a reduction or lesser penalty is warranted because imposing maximum PAGA penalty for each violation would have been unjust, arbitrary, and oppressive. *Id. Carrington v. Starbucks Corp.* (2018) 30 Cal.App.5th 504, 528-529 (affirming trial court’s award of only 10% of maximum PAGA penalty for meal break violations). *Id.* The amount to be paid to the LWDA comports with PAGA settlement amounts approved by other courts. See, e.g., *Chu v. Wells Fargo Investments, LLC* (N.D. Cal., Feb. 16, 2011) 2011 WL 67245, 81 (approving PAGA payment of \$7,500 to LWDA out of \$6.9 million common fund); *Lazarin v. Pro Unlimited, Inc.* (N.D. Cal., July 11, 2013) 2013 WL 3541217 (approving PAGA payment of \$7,500 to LWDA out of \$1.25 million common fund settlement); *Hopson v. Hanesbrands, Inc.* (N.D. Cal. Aug. 8, 2008) 2008 WL 3385452, at *1 (approving PAGA settlement of 0.3% or \$1,500); see *Nordstrom Com. Cases* (2010) 186 Cal.App.4th 576, 589 (approving PAGA settlement and release that allocated \$0 to PAGA claim). Courts have also approved settlements for \$20,000 or less. See, e.g., *Hicks v. Toys ‘R’ Us–Delaware, Inc.*, (C.D. Cal. Sept. 2, 2014) 2014 WL 4703915, at *1 (approving \$5,000 PAGA payment in a case involving \$4 million settlement); *Franco v. Ruiz Food Prods., Inc.* (E.D. Cal. Nov. 27, 2012) 2012 WL 5941801 at *14 (approving PAGA penalties of \$10,000 as part of \$2.5 million



1 settlement); *Garcia v. Gordon Trucking* (E.D. Cal. Oct. 31, 2012) 2012 WL 5364575, at *3
2 (approving PAGA payment of \$10,000 as part of \$3.7 million common-fund settlement). *Id.*

3 While the evidence gathered through Plaintiff's discovery supports the merits of the
4 claims asserted in this lawsuit, Plaintiff and his counsel recognize that continued litigation
5 presents significant risks that support a downward departure from Defendants' estimated liability
6 exposure. DS, ¶ 42. In view of the risks, the Settlement reflects Plaintiff's estimate of the total
7 amount of damages, monetary penalties or other relief that the Class could reasonably expect to
8 be awarded at trial, taking into account the likelihood of prevailing and other attendant risks. *Id.*
9 It also represents a fair, adequate, and reasonable compromise amount for these claims and
10 warrants preliminary approval. *Id.* See *Laguna v. Coverall N. Am., Inc.*, Case No. 12-55479 (9th
11 Cir. June 3, 2014) 2014 WL 2465049, * 3.

12 **B. The Settlement Fairly, Reasonably, and Adequately Compensates Class**
13 **Members Because Each Class Member Will Be Paid Based on the Potential**
14 **Extent of His or Her Injury Compared to Other Class Members.**

15 The Settlement Shares will be paid to each Class Member based on his or her Individual
16 Paychecks compared to the aggregate total of all Class Members' Individual Paychecks. DS, ¶
17 43, Settlement § III(D). Because this method compensates Class Members based on the extent
18 of their potential injuries, in that Class Members who worked for Defendants longer would have
19 been subject to more alleged violations, it is fair, adequate, and reasonable. *Id.*

20 **C. The Proposed Class Counsel Fees Payment for Attorneys' Fees and Class**
21 **Counsel Litigation Expense Payment for Costs Is Fair, Adequate, and**
22 **Reasonable and Should Be Preliminarily Approved.**

23 The settlement states Class Counsel may seek attorneys' fees of \$91,666.66 (one-third of
24 the GSA) and up to \$15,000.00 for actual reasonable litigation costs and expenses incurred in
25 prosecuting the Action. Settlement §III(C)(2). These amounts are reasonable, given the facts and
26 circumstances of the case. DS, ¶ 44.

27 Trial courts have "wide latitude" in assessing the value of attorneys' fees and their
28 decisions will "not be disturbed on appeal absent a manifest abuse of discretion." *Lealao v.*
Beneficial Cal., Inc. (2000) 82 Cal. App. 4th 19, 41. Indeed, it is long settled that the "experienced



trial judge is the best judge of the value of professional services rendered in his court.” *Ketchum v. Moses* (2001) 24 Cal. 4th 1122, 1132. California law provides that attorney fee awards should be equivalent to fees paid in the legal marketplace to compensate for the result achieved and risk incurred. *Laffitte v. Robert Half Intl, Inc.* (2016) 1 Cal. 5th 480, 503 (citing *Lealao, supra*, 82 Cal.App.4th at p. 48-49). The Supreme Court has recently approved fees equal to one-third (1/3) of the common fund. *Laffitte, supra*, 1 Cal. 5th 480. Many courts have similarly approved fee awards equal to or greater than the percentage requested here. *See, e.g., In re Pacific Enterprises* (9th Cir. 1995) 47 F.3d 373, 379 (award of 33% of the common fund); *In re Activision* (N.D. Cal. 1989) 723 F.Supp. 1373, 1375 (32.8% of the common fund); *In re Ampicillin Antitrust Litig.* (D.D.C. 1981) 526 F.Supp. 494, 498 (45% of settlement fund).

The amount of fees and costs requested are commensurate with (1) the risk Class Counsel took in bringing the case, (2) the extensive time, effort and expense dedicated to the case, (3) the skill and determination Class Counsel has shown, (4) the results Class Counsel achieved, (5) the value of the Class Counsel achieved for the class, and (6) the other cases Class Counsel turned down to devote time to this matter. DS, ¶ 45. Class Counsel interviewed and obtained information from putative class members, met and conferred with Defendants’ counsel on numerous occasions, reviewed and analyzed the data and documents provided by Defendants and obtained through other sources, researched applicable law, and provided estimates of “damages” for purposes of settlement discussions, among other tasks. *Id.*

Class Counsel have borne all the risks and costs of litigation and will receive no compensation until recovery is obtained. DS, ¶ 46. Class Counsel are well-experienced in wage-and-hour class action litigation and used that experience to obtain a fair result for the Class. *Id.* Considering the amount of the attorney fees requested, the work performed, and the risks incurred, the requested fees and costs are reasonable and should be awarded. *Id.*

D. The Class Representative Payment to Plaintiff Is Fair, Adequate, and Reasonable and Should be Preliminarily Approved.

Courts routinely approve incentive awards to compensate named plaintiffs for the services they provide and the risks they incur during class action litigation, often in much higher amounts than that sought here. *See, e.g., Bell v. Farmers Ins. Exchange* (2004) 115 Cal.App.4th



1 715, 726 (upholding “service payments” to named plaintiffs for their efforts in bringing the case);
2 *Van Vranken v. Atlantic Richfield Co.* (N.D.Cal. 1995) 901 F.Supp. 294 (approving \$50,000
3 enhancement award). The Settlement provides that Plaintiff may seek a Class Representative
4 Payment of \$15,000.00. This amount is entirely reasonable given Plaintiff’s efforts in this action
5 and the risks he undertook on behalf of Class Members. DS, ¶ 47. Plaintiff has devoted many
6 hours advancing the interests of the Settlement Class. Plaintiff has done this by, among other
7 things, retaining experienced counsel, providing them with information about his work history
8 with Defendants and Defendants’ policies and practices with respect to the wage and hour claims
9 at issue, participating in mediation, and being actively involved in the settlement process to
10 ensure a fair result for the Settlement Class as a whole. In doing this, Plaintiff has been exposed
11 to significant risks, including the risk of an order to pay Defendants’ attorneys’ fees and costs if
12 this action had been unsuccessful (*See* Labor Code §§ 218.5-218.6). The efforts and risks that
13 Plaintiff undertook on behalf of the Settlement Class shows that the proposed Class
14 Representative Payment is fair, adequate, and reasonable, and thus warrants preliminary
15 approval. *Id.*

16 **E. The Proposed Settlement Administration Costs Are Fair and Reasonable and**
17 **Should Be Preliminarily Approved.**

18 With regard to the settlement administration costs provision, it is reasonable. Before
19 agreeing to Phoenix Settlement Administrators, the Parties sought and reviewed bids from other
20 reputable third-party administrators which provided higher bids. DS, ¶ 48, Exs.12-14. Thus, the
21 settlement administration costs provision should be given preliminary approval.

22 **VI. THE PROPOSED NOTICE AND SETTLEMENT ADMINISTRATION PLAN**
23 **SHOULD BE APPROVED BECAUSE IT IS REASONABLY CALCULATED TO**
24 **GIVE ACTUAL NOTICE TO CLASS MEMBERS AND SUFFICIENT TIME TO**
25 **EXERCISE THEIR RIGHTS**

26 This Court should approve the proposed plans for giving notice to the Settlement Class
27 and administering the Settlement. The standard for determining the adequacy of notice is whether
28 the notice has “a reasonable chance of reaching a substantial percentage of the class members.”
Cartt v. Superior Court (1975) 50 Cal.App.3d 960, 974. The notice process includes multiple
measures to ensure that as many Class Members as practicable receive actual notice of the



1 Settlement and have enough time to exercise their rights. The Settlement requires distribution of
2 the Notice by First Class U.S. mail only. Settlement, § IV(B)(2). Although there are current
3 employee Class Members, it is uncertain whether Defendants' records of their contact
4 information include email addresses and Class Members, who perform all of their work away
5 from a desk, are not in a position to check their emails. As such, notice by mail alone is fair,
6 adequate, and reasonable. DS, ¶ 49.

7 With respect to its content, "[The] notice given to the class must fairly apprise the class
8 members of the terms of the proposed compromise and of the options open to dissenting class
9 members." *Trotsky v. Los Angeles Fed. Sav. & Loan Assn.* (1975) 48 Cal.App.3d 134, 151-152.
10 The purpose of the notice in class settlement context is to give class members sufficient
11 information to decide whether they should accept the benefits offered, opt out and pursue their
12 own remedies, or object to the settlement. *Id.* The Notice (Exhibit A to the Settlement) provides
13 Class Members with all pertinent information that they need to fully evaluate their options and
14 exercise their rights under the Settlement. Specifically, it clearly and concisely explains, among
15 other things: (1) what the Settlement is about; (2) who is a Settlement Class Member; (3) how
16 Class Counsel will be paid; (4) how to submit an exclusion request not to be bound by the
17 Settlement; (5) how to object to the Settlement; (6) how the Settlement will be allocated; (7) how
18 payments to Class Members will be calculated; (8) how the disputes will be resolved; and (9) the
19 Individual Settlement Class Member's estimated payment. Additionally, the Class Notice will
20 include the number of Individual Paychecks a Class Member had during the Class Period.
21 Accordingly, the Notice should be approved because it describes the Settlement with sufficient
22 clarity and specificity to explain to Class Members what this action is about, their rights under
23 the Settlement, and how to exercise those rights. DS, ¶ .

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2 **VII. CONCLUSION**

3 For the reasons stated above, this Court should grant Plaintiff's Motion in its entirety and
4 adopt the proposed order submitted concurrently herewith.

5 Respectfully submitted,

6 THE SPIVAK LAW FIRM

7
8 DATED: 05 / 25 / 2022

By: 
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1 **PROOF OF SERVICE**

2
3 State of California,
County of Los Angeles

4 1. I am a citizen of the United States and am employed in the County of Los
5 Angeles, State of California. I am over the age of 18 years, and not a party to the within action.
My business address is 15303 Ventura Bl, Ste 900, Sherman Oaks, CA 91403.

6 2. I am familiar with the practice of The Spivak Law Firm, for collection and
7 processing of correspondence for mailing with the United States Postal Service. It is the practice
8 that correspondence is deposited with the United States Postal Service the same day it is
submitted for mailing.

9 On Tuesday, May 31, 2022, I served the foregoing document described as
10 **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S**
11 **UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION**
12 **SETTLEMENT** on interested parties by placing a true and correct copy thereof enclosed in a
sealed envelope, with postage fully prepaid, addressed as follows:

13 **Flynn M. Dowdy, Esq.**
14 **Aaron Z. Karabel, Esq.**
15 **Waller Lansden Dortch & Davis, LLP**
16 **511 Union Street, Suite 2700**
17 **Nashville, TN 37219**

18 **Cory Miller, Esq.**
19 **Adam Miller, Esq.**
20 **Miller Miller Gerber LLP**
21 **18301 Von Karman Avenue, Suite 950**
22 **Irvine, CA 92612**

23 XXXX (BY MAIL) I caused such an envelope to be mailed by placing it for collection and
24 mailing, in the course of ordinary business practice, with other correspondence of The Spivak
25 Law Firm, 15303 Ventura Bl, Ste 900, Sherman Oaks, CA 91403.

26 (BY EMAIL) I caused the documents to be sent to the persons at the electronic service
27 addresses listed above from my electronic service address stacy@spivaklaw.com.

EXECUTED on Tuesday, May 31, 2022, at Thousand Oaks, California.

24 XXXX (State) I declare under penalty of perjury under the laws of the State of California that the
25 above is true and correct.

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